

आयकर अपीलिय अधिकरण
मुंबई पीठ "जे", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S.RIFAUR RAHMAN , ACCOUNTANT MEMBER

आअसं.1492/मुं/2015 (नि.व. 2010-11)
ITA NO.1492/MUM/2015(A.Y.2010-11)

M/s. Mondelez India Foods Private Limited,
Mondelez House, Unit NO.2001, 20th Floor,
Tower -3 (Wing C), India Bulls Finance Centre,
Parel, Mumbai – 400 013.

PAN: AAACC-0460-H

..... अपीलार्थी /Appellant

बनाम Vs.

Addl. Commissioner of Income Tax, Range – 5 (1),
Aaykar Bhavan, M.K.Road,
Mumbai 400 020.

..... प्रतिवादी/Respondent

आअसं.1576/मुं/2015 (नि.व. 2009-10)
ITA NO.1576/MUM/2015(A.Y.2009-10)

Dy. Commissioner of Income Tax,
(Large Taxpayer Unit)-2,Mumbai,
World Trade Centre -1, Cuffe Parade,
Mumbai – 400 005

..... अपीलार्थी /Appellant

बनाम Vs.

M/s. Shell India Markets Private Ltd.
1018, Maker Chambers –V,
10th Floor, Nariman Point,
Mumbai 400 021

PAN: AAICS-1404-P

..... प्रतिवादी/Respondent

आअसं.2340/मुं/2015 (नि.व. 2009-10)
ITA NO.2340/MUM/2015(A.Y.2009-10)

M/s. Shell India Markets Private Ltd.
1018, Maker Chambers –V,
10th Floor, Nariman Point,
Mumbai 400 021

PAN: AAICS-1404-P

..... अपीलार्थी /Appellant

बनाम Vs.

Dy. Commissioner of Income Tax,
(Large Taxpayer Unit)-2, Mumbai,
World Trade Centre -1, Cuffe Parade,
Mumbai – 400 005

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri J.D. Mistry, Sr. Advocate with
Shri Hiten Chande
Shri Ajit Kumar Jain &
Shri Siddhesh Chougule

प्रतिवादी द्वारा/Respondent by : Ms. Vatsala Jha ,CIT-DR

सुनवाई की तिथि/ Date of hearing : 17/08/2022

घोषणा की तिथि/ Date of pronouncement : 14/11/2022

आदेश/ ORDER

PER VIKAS AWASTHY, J.M:

The appeal by assessee in **ITA No.1492/Mum/2015** is directed against the assessment order dated 29/01/2015 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'] for the assessment year 2010-11.

2. The assessee in appeal has raised several grounds/ additional grounds of appeal assailing additions/adjustments on merits as well as challenging the validity of assessment order.

3. Shri J.D. Mistry, Sr. Advocate appearing on behalf of the assessee submitted that at this stage he would be pressing only additional grounds of

appeal No.48 and 49 challenging validity of order passed by Transfer Pricing Officer (TPO) dated 30/01/2014 and the assessment order dated 29/01/2015. The Ld.Counsel for the assessee submitted that both these orders are time barred.

4. The Id.Counsel for the assessee submitted that since additional grounds of appeal No.48 & 49 are legal grounds and goes to the root of validity of assessment, therefore, these additional grounds of appeal should be admitted for adjudication on merits. The facts required for adjudication of the additional grounds are already on record. No fresh evidence is required for adjudication of these legal grounds. He further asserted that legal/jurisdictional issues can be raised at appellate stage even if such issues were not raised before lower authorities.

5. Ms. Vatsalaa Jha representing the Department vehemently opposed admission of additional grounds of appeal. The Id.Departmental Representative submits that this appeal was filed by the assessee in 2015. The assessee has filed additional grounds of appeal challenging validity of assessment order and the order passed by TPO in 2022 i.e. after inordinate delay of over seven years. Hence, the additional grounds of appeal should not be admitted at this belated stage.

6. The assessee has filed additional grounds of appeal Sl. No.48 and 49, vide application dated 12/07/2022. The said additional grounds are reproduced herein below:

“ 48. Without prejudice to the Appellant's grounds of appeal, the order under section 92CA of the Act is time-barred as it was not passed within the time stipulated under section 92CA(3A) read with section 153 of the Act.

49. Without prejudice to the Appellant's grounds of appeal, the assessment order dated 29 January 2015 is time-barred as assessment order under section 143(3) of the Act was required to be passed by 31 March 2014."

A perusal of the grounds and the application for admission of said additional grounds clearly indicates that these are legal grounds assailing the validity of the assessment order and the order of TPO. The Hon'ble Supreme Court of India in the case of National Thermal Power Company vs. CIT, 229 ITR 383 has held that the Tribunal has jurisdiction to examine a question of law which arises from the facts on record and have a bearing on the tax liability of the assessee. In the instant case, the additional grounds of appeal raised by the assessee challenges the validity of assessment order and the order of TPO on the ground of limitation. No further documentary evidence is required to be adduced for adjudicating these grounds. The said additional grounds of appeal are admitted and are taken up for adjudication.

7. The Id.Counsel for the assessee submits that at this stage he will be confining his submissions only with respect to the additional grounds of appeal No.48 & 49, without prejudice to the original grounds / other additional grounds of appeal. If ground No.48 & 49 are allowed, the original grounds/ other additional grounds would become academic and, hence, adjudication of original grounds/other additional grounds may not be required.

7.1 The Id.Counsel for the assessee submits that the order passed by TPO dated 30/01/2014 is time barred by one day. Narrating the sequence of dates he pointed that the TPO passed the order under section 92CA(3) of the Act on 30/01/2014. The period of limitation for passing the assessment order expires on 31/03/2014. The draft assessment order was passed on 28/03/2014. The

DRP issued directions on 19/12/2014 and the final assessment order was passed on 29/01/2015.

7.2 The Id.Counsel for the assessee submits that as per provisions of section 92CA(3A) of the Act, where reference is made to the TPO, the TPO is required to pass order under section 92CA(3) of the Act at any time before sixty days prior to the date on which the period of limitation referred to in section 153 for making the assessment order expires. The Id.Counsel for the assessee further refers to the provisions of section 153 of the Act as they were applicable to the assessment year 2010-11. The Id.Counsel for the assessee pointed that where reference is made to TPO under section 92CA(1) of the Act, the limitation for passing assessment order shall be three years from the end of assessment year in which the income was first assessable. In the present case, the due date for completion of assessment in accordance with third proviso to section 153(1) of the Act was 31/03/2014. The time limit for passing the order under section 92CA(3A) of the Act is **before sixty days prior to the date on which limitation for passing assessment order expires**. In calculating 60 days – the day on which limitation to pass assessment order expires i.e. 31/03/2014 has to be excluded. Calculating 60 days backwards – 30 days of March, 28 days of February and 2 days of January. Thus, the last date for passing the order under section 92CA(3) of the Act was 29/01/2014. The TPO passed the order under section 92CA(3) of the Act on 30/01/2014. Thus, the order passed under section 92CA(3) of the Act is time barred by one day. The Id.Counsel for the assessee in support of his submissions placed reliance on the following decisions:

- (i) Pfizer Healthcare India (P) Ltd. vs. JCIT, 433 ITR 028 (Mad)

(ii) DCIT vs. Saint Gobain India (P) Ltd., 137 taxmann.com 215 (Mad)

7.3 The Id.Counsel for the assessee submits that the Single Judge of the Hon'ble Madras High Court in the case of bunch of appeals, lead case being Pfizer Healthcare India (P) Ltd. (supra) had decided exactly the similar issue. The Hon'ble Madras High Court observed that limitation has been prescribed for each stage/process in an assessment right from filing of return of income, reference to the TPO, passing of the order by TPO, filing of objections before DRP and thereafter passing of final assessment order. The Hon'ble High Court in para- 30 of the judgment has explained as to how the period of sixty days as mentioned in section 92CA(3A) is to be calculated. The Hon'ble High Court has further held that any order passed by the TPO beyond a period of limitation as prescribed under the provisions of section 92CA(3A) read with proviso to section 153 of the Act, lacks jurisdiction.

7.4 The order of the Single Judge was challenged by the Department in writ appeal before the Division Bench of Hon'ble Madras High Court. The Division Bench in the case titled DCIT vs. Saint Gobain India (P) Ltd.,(supra) confirmed the findings of Single Judge Bench. Thereafter, Bangalore Bench of the Tribunal in the case of Unisys India Pvt. Ltd. vs. DCIT in ITA No.2096/Bang/2017 following the law laid down by Hon'ble Madras High Court held the order passed by TPO, time barred in similar set of facts.

7.5 The Id.Counsel for the assessee further submits that the provisions of section 144C of the Act are applicable only to the "eligible assessee" as defined in sub-section (15), clause(b) to section 144C of the Act. The Id.Counsel for the assessee again draws support from the decision of Hon'ble Madras High Court in the case of Saint Gobain India (P) Ltd.,(supra) to buttress

his arguments, that the assessee in the present case is not “eligible assessee” as there is no valid order under section 92CA(3) of the Act in the case of assessee. Therefore, the assessment framed on the basis of non-est order of TPO is unsustainable. The Id.Counsel for the assessee further asserted that the assessment order dated 21/05/2015 is time barred as the limitation of passing the assessment order got over on 31/03/2014.

8. Per contra, Ms. Vatsala Jha representing the Department vehemently submitted that the order passed by TPO u/s.92CA(3)of the Act is a valid order passed within the period of limitation. The Id. Departmental Representative submits that CBDT vide Circular No.3/2008 dated 12/03/2008 in the Explanatory Notes on the provisions of the Finance Act, 2007 has explained that with a view that TPO gets sufficient time to make the audit of Transfer Pricing and also to provide the Assessing Officer sufficient time to make assessment in the case involving international transactions, the time limit specified in section 153 of the Act has been extended by 12 months, where reference is made to the TPO. Further, it has also been provided that the TPO shall determine the ALP at least two months before the expiry of statutory time limit for making the assessment. In appeal under consideration, due date for completion of assessment under third proviso of section 153(1) of the Act was 31/03/2014 and the time limit for passing an order u/s. 92CA(3A) of the Act is two months prior to the date of limitation. The TPO passed the order on 30/01/2014 which is two months prior to 31/03/2014, therefore, the order passed by TPO is within the period of limitation. The Id. Departmental Representative further referred to the Central Action Plan for Financial Year 2014-15 and 2015-16, wherein the period prescribed to frame transfer pricing

audit is 31/01/2015 and 31/01/2016, respectively, and the limitation for order u/s.143(3) r.w.s. 153 of the Act is 31/03/2015 and 31/03/2016, respectively. The same principle would apply to A.Y. 2010-11. The Id. Departmental Representative submits that in line with the Boards Central Action Plan the TPO has passed the order within the period of limitation. The Id. Departmental Representative placed reliance on the decision of Delhi Bench of Tribunal in the case of M/s. Louis Dreyfus Commodities India Ltd. vs. DCIT in ITA No.2381/Del/2014 for Assessment Year 2009-10 decided on 11/03/2021.

9. Shri Mistry, Sr. Advocate rebutting the submissions made on behalf of the Revenue asserted that Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. vs. JCIT (supra) has considered Central Action Plan issued by CBDT. The Id. Counsel for the assessee further asserts that in the case of Louis Dreyfus Commodities India Ltd.(supra) the Bench has not considered the provisions of section 144C of the Act, hence, the aforesaid decision is distinguishable.

10. We have heard the submissions made by rival sides on the limited issue of validity of order passed by TPO u/s. 92CA(3) of the Act and the subsequent proceedings arising there from. The Id.Counsel for the assessee has restricted his submissions to the legal grounds raised in additional grounds of appeal No.48 & 49.

11. The assessee has questioned the validity of order passed u/s.92CA(3) of the Act alleging the same to be barred by limitation. Before proceeding further to adjudicate this issue it would be imperative to have a glance on the relevant dates.

Date	Events
30/01/2014	TPO passed order u/s. 92CA of the Act
28/03/2014	A.O Passed draft assessment order
19/12/2014	Directions of the DRP u/s.144C(15) of the Act
29/01/2015	Final assessment order.

The contention of the assessee is that the order passed u/s.92CA(3) of the Act is time barred by one day. The period of limitation for passing the order u/s. 92CA(3) of the Act is computed by the assessee as under:-

<u>Events</u>	<u>Relevant Dates</u>
Assessment Year ('AY')	2010-11
End of Assessment Year	31-03-2011
Due date for completion of assessment under Third Proviso to section 153(1) of the Act (i.e. 3 years from the end of AY)	31-03-2014
Time limit for passing the order under section 92CA(3A) of the Act	60 days
Less: Date on which limitation expires under section 153 of the Act i.e. 31-03-2014	1 day
Less: Remaining days of March 2014	30 days
Less: Number of days February 2014	28 days
Less: Number of days January 2014	2 days
Last date for passing the order under section 92CA(3) of the Act	29-01-2014
Date of passing the transfer-pricing order ('TP order') under section 92CA(3) of the Act	30-01-2014

12. The relevant extract of the provisions of section 92CA(3A) and section 153(1) of the Act and the third proviso as was applicable to the impugned assessment year are reproduced herein below:

Section 92CA (3A)

“(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to

in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires.”

Section 153(1)

“ Time limit for completion of assessment and reassessments- (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of -

(a) Two years from the end of the assessment year in which the income was first assessable, or

(b) One year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section(4) or sub-section (5) of section 139, whichever is later:

Provided xxxxxxxxxxxx

Provided further xxxxxxxxxxxx

Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section(1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words “two years” the words “three years” had been substituted”

A conjoint reading of the relevant provisions of section 92CA(3A) and 153(1) of the Act would show that the TPO is required to pass order u/s. 92CA(3) of the Act at any time before sixty days prior to the date on which the period of limitation referred to in section 153 of the Act for making assessment order expires.

13. The Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. vs. JCIT (supra) has explained as to how period of limitation for making the order u/s. 92CA(3) of the Act has to be worked out. The relevant extract of the same is reproduced herein below:

“30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 am of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 am on 1-1-2020, whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31-12-2019. The period of 21 months therefore, expires on 31-12-2019 that must stand excluded since section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to section 153 expires'. Excluding 31-12-2019, the period of 60 days would expire on 1-11-2019 and the transfer pricing orders thus ought to have been passed on 31-10-2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31-10-2019. The impugned orders are thus, held to be barred by limitation”.

14. The aforesaid decision of Single Judge was assailed by the Department in writ appeal before the Division Bench. The Division Bench of the Hon'ble Madras High Court in the case of DCIT vs. Saint Gobain India (P) Ltd. (supra) upheld the decision of Single Judge and observed as under:-

“28. The word "date" in section 92CA(3A) would indicate 31-12-2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31-12-2019 must be excluded. The usage of the word "prior" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be calculated. It is settled law that while interpreting a statute, it is not for the courts to treat any word(s) as redundant or superfluous and ignore the same. In this connection, it is pertinent to note the judgment of the Apex Court in Grasim Industries Ltd. v. Collector of Customs 2002 taxmann.com 1803, wherein, it was held as follows :

“10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are

clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in Crawford v. Spooner [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests [1990 Supp SCC 785 : AIR 1990 SC 1747] , Union of India v. Deoki Nandan Aggarwal [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] , Institute of Chartered Accountants of India v. Price Waterhouse [(1997) 6 SCC 312] and Harbhajan Singh v. Press Council of India [(2002) 3 SCC 722 : JT (2002) 3 SC 21].)"

29. *The language employed is simple. 31-12-2019 is the last date for the assessing officer to pass his order under section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. In the present case, the word "before" used before "60 days" would indicate that an order has to be passed before 1-11-2019 i.e on or before 31-10-2019 as rightly held by the Learned Judge.*

30. *Even considering for the purpose of alternate interpretation, the scope of section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31-12-2019 must be excluded. After excluding 31-12-2019, if the period of 60 days is calculated, the 60th day would fall on 1-11-2019 and the TPO must have passed the order on or before 31-10-2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.*

Mandatory or Directory

31. *The next contention that has been raised by the learned senior standing counsel for the appellants is that the usage of the word "may" in section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings.*

32. *Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-section (1) of section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under section 92CA (3) of the Act. As per section 92CA(3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-section (5) of section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. Sub-section (13) of section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of section 144C of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.*

33. *It would only be apropos to note that as per proviso to section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only is the time frame mandatory, but also that the TPO has to pass an order within 60 days.*

34. *Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to section 153.*

35. *Also, but for the reference to the TPO, the time limit for completing the assessment would only be 21 months from the end of the assessment year. It is only if a reference is pending, the department gets another 12 months. Once reference is made and after availing the benefit of the extended period to pass orders, the department cannot claim that the time limits are not mandatory. Hence, the contention raised in this regard is rejected.*

36. *As rightly pointed out by Mr. Ajay Vohra, learned senior counsel for the respondents in WA. Nos.1148 and 1149/2021, the word "may" has to be sometimes read as "shall" and vice versa depending upon the context in which it is used, the*

consequences of the performance or failure on the overall scheme and object of the provisions would have to be considered while determining whether it is mandatory or directory.

37. *At this juncture, it is noteworthy to mention the commentary of Justice G.P.Singh on the interpretation of statutes, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015), which is quoted below for ready reference:*

'The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of "meaning" i.e. what the words mean and in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. This formulation later received the approval of the Supreme Court and was called the "cardinal principle of construction".'

38. *In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 7-9-2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.*

39. *Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the subsection clarifies the mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31-10-2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory."*

The period of limitation for passing the assessment order in the instant case expires on 31/03/2014. The time limit for passing the order u/s. 92CA(3A) is sixty days prior to the date on which the limitation referred in section 153 of the Act expires. Thus, the limitation in the present case for passing the order u/s. 92CA(3) of the Act expires on 29/01/2014. The TPO passed the order u/s. 92CA(3) of the Act on 30/01/2014. Ergo, the order u/s. 92CA(3) of the Act is surely time barred by one day.

15. The Ld. Departmental Representative has referred to Finance Act 2007 – Explanatory Notes on provisions relating to Direct Taxes issued vide Circular No.3/2008 dated 12/03/2008. A perusal of clause 43 of said circular would show that the expression used to depict time limit is “months”. Whereas in the Act, the Legislature has specified the period of limitation in “days”. The expression two months used in clause 43(2) in the aforesaid circular to specify the period of limitation may not necessarily be equal to sixty days as specified in the Act. The words/expressions used in statute cannot be substituted in Explanatory notes or Board Circulars. If the limitation period is mentioned in days in the Act, the same expression has to be used in Circulars. Otherwise it will lead to confusion and ambiguity. “Two months” as mentioned in Circular can be more or even less than sixty days. Therefore, expression issued to evaluate limitation period as specified in the Act has to be strictly followed.

16. The Id.Counsel for the assessee has further pointed that reference to DRP can only be made by “eligible assessee”. The expression “eligible assessee” has been defined in sub-section (15) to section 144C of the Act . The definition of eligible assessee is reproduced herein below:

“(b) “eligible assessee” means –

- (i) Any person in whose case the variation referred to in sub-section(1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and*
- (ii) (ii) any non-resident not being a company, or any foreign company”*

A perusal of the above definition would show that eligible assessee mean any person in whose case variation arises as a consequence of the order of the TPO passed u/s. 92CA(3) of the Act. The order has to be a valid order. In the instant case since, the order of TPO was beyond the period of limitation it is not a valid order. Therefore, there is no “eligible assessee” in terms of the definition provided in sub-section (15) to section 144C of the Act . If there is no eligible assessee, no reference to DRP could have been made. Once the substratum for making the assessment under transfer pricing mechanism erodes the subsequent proceedings emanating from flawed foundation is without jurisdiction.

17. In the light of facts of the case and decisions referred above, we find merit in the additional grounds of appeal No.48 & 49. The assessee succeeds on the aforesaid legal grounds.

18. No arguments were made by Id. Counsel for the assessee in respect of original grounds of appeal / other additional grounds of appeal at this stage. Hence, they are left open for adjudication, if the need arises.

19. In the result, appeal by the assessee is allowed.

**ITA NO.1576/MUM/2015 A.Y. 2009-19(REVENUE’S APPEAL
& ITA NO.2340/MUM/2015 (A.Y.2009-10) (ASSEESSEE’S APPEAL)**

20. Shri Ajit Kumar Jain appearing on behalf of the assessee submitted at the outset that the assessee has filed additional grounds of appeal vide application

dated 28/06/2021, inter-alia, assailing validity of the assessment order passed under section 143(3) r.w.s. 144C(13) of the Act and the validity of order passed under section 92CA(3) of the Act by the TPO on the ground that the aforesaid orders were passed beyond the period of limitation. The Id. Authorized Representative of the assessee submits that at this stage the assessee is only assailing validity of the order passed by TPO under section 92CA(3) and the assessment order passed under section 143(3) r.w.s. 144C(13) of the Act. The Id. Authorized Representative of the assessee further contended that the facts and the reasons for assailing the aforesaid orders in the present appeal are identical (except for the dates) to the facts in the case of Mondelez India Foods Private Limited (supra). Therefore, the Ld.Counsel for the assessee of the assessee relies on the submissions advanced by the Sr.Advocate in the case of Mondelez India Foods Private Limited (supra). The Id. Authorized Representative of the assessee further submits that the arguments raised by Id Sr. Counsel in respect of admission of the legal grounds by way of additional grounds of appeal would equally hold good in the present case. The Id. Authorized Representative of the assessee submits that in so far as the relevant dates for passing the order under section 92CA(3) of the Act and the working of period of limitation, the same is tabulated at page 218 of the legal paper book filed by the assessee.

21. The Id.Departmental Representative vehemently opposed the admission of additional grounds of appeal at belated stage. The Id.Departmental Representative submits that the assessee had filed the appeal in 2015 and now the assessee has raised additional grounds of appeal challenging the validity of assessment order and the order passed by TPO after six years of filing of appeal. On merits the Id.Departmental Representative reiterated the submissions as were made in the case of Mondelez India Foods Private Limited (supra).

22. The assessee vide application dated 28/06/2021 has inter-alia, raised following two grounds of appeal :

“40.1 On the facts and in the circumstances of the case and in law, the assessment order dated 27 February 2015 passed by the learned AO under section 143(3) r.w.s. 144C of the Act is void and bad in law since it was barred by limitation as per provisions of Section 153 of the Act as the provisions of section 144C of the Act are not applicable for the relevant assessment year.

40.2 In view of the above, it is prayed that the assessment order passed by the learned AO be held to be void ab-initio.

41. Validity of Order passed under Section 92CA(3) of the Act:

On the facts and in the circumstances of the case and in law, the order dated 30 January 2013 passed by the learned Transfer Pricing Officer is bad in law being barred by limitation as the same is passed beyond the lime limit prescribed under section 92CA(3A) read with section 153(4) of the Act.

In view of the above, it is prayed that the Transfer Pricing order dated 30th January 2013 passed by the learned Transfer Pricing Officer be held to be void ab-initio.”

23. A perusal of the above additional grounds of appeal reveal that the assessee has challenged validity of the assessment order passed u/s 143(3) r.w.s. 144(13) of the Act and the validity of the order passed by TPO u/s.92CA(3) of the Act. The issue raised by the assessee in the aforesaid additional grounds goes to the root of validity of assessment. It is no more res-integra that the assessee can raise legal ground at any stage, even during the appellate proceedings, if the facts are already on record. No fresh documentary evidence is required to be adduced for adjudicating aforementioned additional grounds. Hence, the additional ground No.40 & 41 are admitted for adjudication on merits.

24. The assessee has furnished a table giving relevant dates for calculating limitation for passing order u/s. 92CA(3) of the Act. The same is reproduced herein below:

Particulars		
Ground No.41 : Validity of Order passed under section 92CA(3) of the Act Calculation of due date for passing transfer pricing order under section 92CA(3)		
Asst. Order due date as per section 153 of the Act for A.Y 2009-10	31 March 2013	
Transfer Pricing Order due date: (At least sixty days before the period of limitation referred to in section 153 of the Act)	Number of Days in March 2013	30
	Number of Days in February 2013	28
	Number of days in January 2013	2
	Total Number of days	60
Deadline for passing TP Order for A.Y.2009-10	29 January 2013	
Date of TP order passed for A.Y 2009-10	30 January 2013	
Delay	1 Day Delay in passing TP Order	

25. The assessee has determined the period of limitation for passing the order by TPO in accordance with method elucidated by the Hon'ble'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. vs. JCIT (supra). Since, the issue raised in the present appeal is similar to the one adjudicated by us in the case of M/s. Mondelez India Foods Private Limited in ITA No.1492/Mum/2015, A.Y.2010-11, the findings given therein would *mutatis mutandis* apply to the present appeal by the assessee. Consequently, ground No.40 and 41 raised in the appeal are allowed for parity of reasons.

26. The grounds/other additional grounds raised in the appeal have become academic, hence, they are left upon for adjudication if the need arises.

27. In the result, appeal by assessee is allowed.

28. The appeal by the Revenue has become infructuous as the order passed under section 92CA(3) of the Act is held bad in law. Once bedrock for passing the

assessment order is eroded the entire proceedings, arising therefrom are vitiated. Consequently, appeal of the Revenue is dismissed.

29. In the result, appeal of the assessee is allowed and that of Revenue is dismissed.

Order pronounced in the open court on Monday the 14th day of November, 2022.

Sd/-

(S.RIFAUR RAHMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 14/11/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)/Sr. Private Secretary
ITAT, Mumbai