IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

ITA No. 2298/Kol/2016
Assessment Year: 2011-12

M/s. Pricewaterhouse Coopers Private Limited……………………………………………………Appellant
Block-EP, Plot –Y14
Salt Lake City
Sector-V
Kolkata – 700 091
[PAN : AABCP 9181 H]

Vs.

Deputy Commissioner of Income Tax (IT), Circle-2(1), Kolkata………………………………Appellant

Appearances by:
Shri Kanchun Kaushal, A/R & Shri Bikash Kr. Jain, CA, appeared on behalf of the assessee.
Shri Vijay Shankar, CIT, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : February 25th, 2020
Date of pronouncing the order : May 29th, 2020

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order passed by the Assessing Officer u/s 144C(13) r.w.s. 143(3) of the Income Tax Act, 1961 (the 'Act'), dt. 29/09/2016, for the Assessment Year 2011-12. This order was communicated to the assessee on 7th October, 2016.

2. Facts in brief:-

In the Transfer Pricing (TP) analysis and report issued by the assessee, at page 5, Point Nos. 1.2 to 1.4, read as follows:-

> *"**1.2.1. PricewaterhouseCoopers (P) Ltd.***
>
> *PwC India, an Indian company, was incorporated in 1982. It started operations on a full scale only in the year 2000. PwC India is a member of PwC International Limited, UK, a company incorporated in UK and limited by guarantee. PwC International Limited, UK is akin to association of which the PwC entities across various countries in the world are members. By virtue of being a member of the association, namely, PWC International Limited, UK, PwC India is entitled to use the name of 'PricewaterhouseCoopers' under a royalty free non-exclusive license granted by the said UK company/ association. It is independently involved in the business of management consultancy services and business advisory services. The company has been rendering services to both overseas and domestic clients since April 2000. PwC India owns only routine intangibles as it acts as a management consultant in exchange for a service fee.*
>
> ***1.2.2. PricewaterhouseCoopers Lanka (P) Ltd.***
>
> *PricewaterhouseCoopers Lanka (Pvt) Limited (PWC Lanka) is the Technology Advisory arm of PwC in Sri Lanka and employs over 30 professionals. PwC Lanka provides services to government, large multinational organisations, as well as to small private sector companies. PricewaterhouseCoopers Sri Lanka is an ISO 27001 certified company.*

PricewaterhouseCoopers employs more than 140,000 people in 149 countries across the globe and share their thinking, experience and solutions to develop fresh perspectives and practical advice.

1.2.3. PricewaterhouseCoopers Development Associates Ltd.

PricewaterhouseCoopers Development Associates Ltd., UK (,PwC DA') is an associated enterprise of PwC India and is incorporated under the Companies Act, 1985 in the United Kingdom. The Registered office of PwC DA is situated at 35 St. Thomas Street, London SE 1 9SN. PwC DA is engaged in providing management consultancy services to clients especially engaged in the development projects funded by international agencies like World Bank, DFID, ADB etc.

The development of the arm's length price in this analysis recognises that PwC DA performs the role of a routine management consultant merely acting as a distributor of services, which are performed by PwC India.

Based on the functional analysis, PwC DA has least complex operations and bears lesser share of risks and was accordingly selected as the tested party for the economic analysis.

1.3. Economic analysis

The Indian Regulations require the use of the most appropriate transfer pricing method which can be supported by uncontrolled comparables.

The table below summarises the outcome of the economic analysis:

Nature of international transaction	***Most appropriate method***	***Net profit indicator (NPI)***	***Tested Party***	***Tested Party's NPI***	***Comparables NPI***
Receipt for management consultancy services from PwC DA	*Resale Price Method ("RPM")*	*Gross Profit/Sales ("GP/Sales")*	*PwC DA*	*-06.84%*	*19.70%*
Receipt for management consultancy services from PwC Lanka	*Transaction Net Margin Method (TNMM)*	*Operating Profit/Total Cost ("OP/TC")*	*PwC India*	*23.03%*	*12.29%*
Recovery of Expenses	*Comparable Uncontrolled Price Method (CUP)*				
Reimbursement of Expenses					

1.4. Conclusion

The above analysis indicates that the international transactions of PWC India were in accordance with arm's length standard required under the Indian Regulations.

It is important to note that the results of our transfer pricing analysis are based on facts and financial data as of March 31, 2011 and are pertinent to the financial year ended March 31, 2011. On a going forward basis, the results would need to be altered so as to incorporate latest financial results and any changes in the functions performed, risks assumed and the level of tangible and intangible assets owned and employed by PwC India and its associated enterprise. Also, we recommend that PwC India reviews and updates its transfer pricing arrangements to reflect changes in the market or changes in the nature of its intra-group transaction.

2.1. The issue of determination of Arm's Length Price (ALP) was referred by the Assessing Officer to the Transfer Pricing Officer (TPO). The TPO passed an order u/s 92CA(3) of the Act on 27/01/2015. At para 6 of this order, the ALP of the international transaction has been determined as follows:-

"

5.3. Final List of Comparable :

Sl. No.	Name of comparable company	Operating Revenue	Total Cost	Operating Profit	PLI = OP/TC
1.	8K Miles software services limited	1.12	0.79	0.33	41.77%
2.	Aurum Soft systems limited	1.48	1.24	0.24	19.35%
3.	Lucid Software Limited	3.01	2.12	0.89	41.98%
4.	Sagarsoft (India) Limited	9.56	7.54	2.02	26.79%
5.	Spry Resources India Private Limited	2.74	2.02	0.72	35.64%
6.	Prelude Sys India Ltd	12.99	10.38	2.61	25.14%
7.	Sankhya Infotech Pvt. Ltd	52.12	40.44	11.76	29.08%
8	Zylog Systems (India) Ltd	45.61	34.24	11.37	33.21%
9	E-Infochip Bangalore	45.12	35.61	9.51	26.7%
10	ASM Technologies Ltd	62.73	52.93	9.80	18.52%
11	Axis IT & T Ltd	37.16	29.27	7.89	26.36%
12	Trigyn Technologies Ltd	27.47	21.73	5.74	26.72%
13	Acropetal Technologies Ltd (segmented)- revised on proportionate allocation of expenditure not allocated	81.40	54.31	27.09	31.65%
	Simple Arithmetic Mean				**29.46%**

Now the Arm' length Profit Mean margin is 29.46%.

6.0. Determination of Arm's length Price :

Operating Cost for the assessee as a whole		Rs. 1053,70,14,000/-
Arm's Length Margin		29.46 % on operating cost
Arm's Length Price (ALP) @129.46% of operating cost		Rs 1364,12,18,324/-
A	Arm's Length Price @ 129.46 % of operating cost	Rs 1364,12,18,324/-
B	Operating revenue	Rs. 1013,17,31,000/-
C	Value of international transaction (service charges received)	Rs. 16,66,84,102/-
D	Percentage of international transaction to operating revenue	1.64%
E	Arm's length Price of international transactions at ratio of 1.64% of Rs. 1364,12,18,324/-	Rs. 22,37,15,980/-
F	**Shortfall being adjusted u/s 92CA (E-C)**	**Rs. 570,31,878/-**

The above shortfall of Rs. 570,31,878/- is treated as transfer pricing adjustment u/s 92CA(3).

7.0. Since the adjustment is more than +/-5% limit, in view of the facts of the case, an adjustment of Rs. 570,31,878/- -is to be made to the total income of the assessee in order that the international transactions undertaken by the company are at arm's length.

Consequence to this adjustment, the total income of the assessee is revised upwards by Rs. 570,31,878/-."

2.1.1. Subsequently, the Assessing Officer passed an order dt. 27/11/2015 u/s 144C of the Act, which was titled "DRAFT ASSESSMENT ORDER". The Assessing Officer issued a notice of demand u/s 156 of the Act, 27/11/2015, wherein the notice states as follows:-

"…….., has been determined to be payable by you u/s 144C of the I.T. Act 1961."

He also issued a notice u/s 274 r.w.s. 271 of the Act, dt. 27/11/2015.

2.1.2. The assessee replied on 23/12/2015, stating that the said notice issued u/s 274/271 of the Act, received along with the order passed u/s 144C of the Act, is bad in law, as the order passed u/s 144C of the Act, is barred by limitation. The assessee filed a letter before the Assessing Officer i.e., DCIT Circle-2(2), Kolkata on 21/12/2015, wherein, the following contention were raised:-

a) Issuance of notice u/s 156 of the Act, is not in conformity of the provisions of Section 144C of the Act and hence no demand can be created on the proposed variation of income.
b) That the Assessing Officer has passed an assessment order u/s 144C of the Act and that in accordance to Section 144C(2) of the Act, the assessee has the option to accept the variation to income or to file objections before the DRP.
c) That the passing of such order u/s 144C of the Act is beyond jurisdiction and barred by limitation.
d) As there was exchange of information under the DTAA between India and Netherlands, in terms of Explanation 1 (vii) to Section 153 of the Act, the order of assessment should have been passed on or before 9th October, 2015 and as the same was passed on 27th November, 2015, it is beyond the period of limitation.

2.2. Thereafter, the assessee filed objections in Form 35A before the DRP on 21/12/2015 i.e., the same day on which the objections were raised before the Assessing Officer. In Form 35A, the assessee states under column 5 *"Draft assessment*

<u>order under section 144C of the Income-tax Act, 1961 ('the Act') Date of order: November 27, 2015</u>". In the grounds of objections, the assessee objected to the proposals of the Assessing Officer to assess income of the assessee at Rs.235,07,36,930/-. Before the DRP, the assessee contended that the order is barred by limitation. Objections were raised on the proposed additions made in draft assessment order. The DRP called for a remand report from the ACIT and thereafter issued directions on 11/08/2016. Before the DRP, the following additional submissions were made:-

> *"The Ld. AR raised the issue of the order being void ab initio due to alleged violation of limitation per section 153. The Ld. AR did not make any detailed submissions as the scope of section 144C does not empower the DRP to go at the very root of such issues nor is it empowered to hold an assessment as nullity. The section is enabling section and DRP is cannot issue directions of such objections. The panel, hence, declines to interfere on the count of limitation issue in this case."*

3. Aggrieved the assessee has filed this appeal before the Tribunal on the following grounds:-

> *"1. On the facts and in law and in the circumstances of the case, the Ld. AO erred in passing an impugned draft assessment order dated 27 November 2015 under section 143(3) r.w.s 144C of the Income Tax Act, 1961 ('the Act') beyond the period of limitation provided under section 153 of the Act read with Explanation 1(viii) and proviso appended below to Explanation 1 of that section.*
>
> *2.1. On the facts and in law and in the circumstances of the case, the Ld. AO erred in making the disallowance of foreign exchange loss on maturity of marked to market (MTM) contracts amounting to Rs. 3,45,06,888 alleging it to be notional and contingent in nature without appreciating that the said loss got matured/ reversed during the AY under consideration.*
>
> *2.2. On the facts and in law and in the circumstances of the case, the Ld. AO erred in making the disallowance of foreign exchange loss on maturity of MTM contracts amounting to Rs. 3,45,06,888 without appreciating that the claim of such loss on provision basis was disallowed in AY 2008-09 and confirmed by the Ld. Commissioner of Income Tax (Appeals)['Ld. CIT (Appeals)'].*
>
> *2.3. On the facts and in law and in the circumstances of the case, the Ld. AO erred in making disallowance of foreign exchange loss on maturity of MTM contracts amounting to Rs. 3,45,06,888 without appreciating that the Ld. CIT (Appeals) in his order passed for AY 2008-09 has directed the Ld. AO to allow the claim of such loss on maturity of MTM contracts.*
>
> *2.4. On the facts and in law and in the circumstances of the case, the Ld. AO erred in making disallowance of foreign exchange loss on maturity of MTM contracts amounting to Rs.3,45,06,888 without appreciating that the Hon'ble DRP has directed to allow the claim of such loss on maturity of MTM contracts and that all the necessary documents relating to verification of the figures of such foreign exchange loss were duly submitted.*

3. *On the facts and in law and in the circumstances of the case, the Ld. AO erred in not granting relief under section 90 in respect of credit for tax withheld in foreign country amounting to Rs.3,33,66,706.*

4. *On the facts and in law and in the circumstances of the case, the Ld. AO erred in granting credit of tax deducted at source of Rs.58,65,90,555 instead of Rs.59,29,15,190 as reflected under form 26AS statement, thereby resulting in short grant of credit of Rs.63,24,635/-"*

3.1. The assessee filed the following additional grounds on 30/07/2018:-

*"**Corporate tax grounds***

1.1. On the facts and in law and in the circumstances of the case, the learned Assessing Officer ('the Ld. AO') erred in law in issuing demand notice under section 156 of the Act and penalty notice under section 274 read with section 271(1)(C) of the Act along with the draft assessment order dated 27 November 2015, which renders the proceedings before the Ld. AO and subsequent final assessment order dated 29 September 2016 bad in law and non-est in view of the express provision of section 144C of the Act.

Transfer pricing grounds

5. On the facts and in law and in the circumstances of the case, the Learned Transfer Pricing Officer ('Ld. TPO') and consequently, the Ld. AO/ Hon'ble DRP grossly erred in making a transfer pricing adjustment of Rs. 5,70,31,878 to the international transaction of the Appellant with its Associated Enterprise ('AE') without considering the facts of the present case and thereby making an arbitrary assessment.

Specific Grounds in relation to international transaction with PricewaterhouseCoopers Development Associates Ltd., UK ("PwC DA")

6. The Ld. TPO and the Ld. AO/ Hon'ble DRP erred in selecting the Appellant as the tested party as against the AE (i.e., PwC DA) in respect of the 'Receipt for consultancy services' international transaction.

7. The Ld. TPO and the Ld. AO/ Hon'ble DRP erred in rejecting Resale Price Method ("RPM") selected by the Appellant as the most appropriate method ('MAM') for determining the arm's length price of 'Receipt for consultancy services' international transaction.

8. The Ld. TPO and the Ld. AO/ Hon'ble DRP have erred in application of entity level Transactional Net Margin Method ("TNMM") considering Appellant as the tested party (Appellant having a turnover of Rs. 1,013.1 Crs. vis-a-vis Rs. 16.53 Crs. of related party sales transaction being tested).

9. Without prejudice to above grounds, even if TNMM is selected as the MAM, profit of the Appellant from the transaction with PwC DA, i.e., segment profitability, should be tested and not the entity level margin of the Appellant.

10. Without prejudice to the above grounds, the comparable companies selected by the Ld. TPO and Ld. AO are not comparable to the Appellant.

Specific Grounds in relation to international transaction with PricewaterhouseCoopers Lanka Private Limited ('PwC Lanka')

11. The Ld. TPO and the Ld. AO/ Hon'ble DRP have erred in clubbing two different transaction, i.e., transactions with PwC Lanka and with PwC DA, of the Appellant for the purpose of bench marking.

12. The Ld. TPO and the Ld. AO/ Hon'ble DRP have erred in taking the entity level margin of the Appellant instead of segment level margin of the Appellant with respect to transactions with PwC Lanka.

3.1.1. On 30th July, 2018, the assessee filed the following letter:-

30th July 2018

To
The Assistant Registrar
Income tax Appellate Tribunal
"C" Bench
225/C, A. J. C. Bose Road
Kolkata - 700 020

Appellant	:	**PricewaterhouseCoopers Private Limited ('the Appellant' or 'the Company')**
PAN	:	**AABCP9181H**
Ref.	:	**ITA No: 2298/Kol/2016 for Assessment Year ('AY') 2011-12**
Reg.	:	**Application for Modification of grounds of appeal taken in captioned appeal filed on 5 December 2016and Additional/Modified Grounds before the Income Tax Appellate Tribunal ('ITAT') under Rule 11 of Income-tax (Appellate Tribunal) Rules, 1963 ('ITAT Rules')**

Dear Sir,

By way of this application, the appellant seeks leave of the Hon'ble Tribunal to raise additional/modified grounds of appeal in addition to the grounds of appeal taken in appeal memo filed on 5 December 2016 in the captioned appeal. The Appellant wishes to submit additional grounds of appeal for kind consideration of the Hon'ble Bench and the same is attached as **Annexure – 1** to this application.

1. <u>Corporate tax</u>

1.1 The appellant in the present case has raised the Ground No. 1 in connection with validity of assessment order in view of the provisions of section 153 of the Act. However, the appellant inadvertently and by omission not challenged the assessment proceedings on the ground that the same is also not in accordance with provisions of section 144C of the Act, though specific objection has been raised before the Hon'ble DRP. Therefore, by way of this application, the Appellant raises **Ground No. 1.1** in the **Annexure – 1** to this application which may kindly be adjudicated in the present appeal along with other grounds of appeal.

pwc

1.2 In the present case, an order dated 27 November 2015 was served on the assesse which is accompanied with notice of demand under section 156 and notice initiating penalty proceedings under section 274 read with section 271(1)(c) of the Income-tax Act, 1961 ('the Act'), though such order being titled as Draft assessment order passed under section 143(3) read with section 144C of the Act which is contrary to the provisions of section 144C of the Act and is bad in law and void-ab-initio. It is further submitted even Assessing Officer had not directed the assesse to make objection to Hon'ble DRP in the said order.

1.3 The Appellant respectfully submits that the provisions of section 144C (1) being non-obstante clause directs that at first instance the assessing officer could only propose variation in the income or loss of the eligible assesse which is prejudicial to the interest of such assesse. The provisions of section 144C(1) does not direct the assessing officer to create the tax demand on proposed variation and further demand the same within 30 days as provided under section 156 of the Act.

1.4 Therefore, the issuance of notice under section 156 of the Act signed with the aforesaid order is not in conformity with the provisions of section 144C of the Act.

1.5 Further, not only the notice under section 156 was issued calling upon the Appellant to pay the tax amount but a notice initiating penalty proceedings under section 271 of the Act was also issued along with the said order giving an opportunity of hearing to the Appellant on 28 December 2015, which clearly brings out the intention of the assessing officer that he intended the assessment order dated 27 November 2015 to be the final order.

1.6 The above facts makes abundantly clear that the assessment was completed in defiance of section 144C of the Act wherein it has been clearly stated that in case of an eligible assesse, a draft assessment order has to be issued to the assesse before the issuance of the final assessment order.

1.7 Further, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') has wrongly dismissed the above plea raised by the Appellant by stating that '*the action of the AO can at best be termed as a clerical error and nothing more.*'

In view of the above, it is submitted that the above ground of appeal goes to the very root of the validity of assessment and being legal issue same may kindly be admitted, as material facts are already on record in respect of the above grounds as explained.

2. **Transfer Pricing**

2.1 The appellant further submits that while finalizing the Grounds of appeal due to inadvertent mistake and omission, the issue related to adjustments made by the Learned Transfer Pricing Officer ('Ld. TPO')/Learned Assessing officer ("Ld. AO") and subsequently, confirmed by the Hon'ble DRP was not considered. The Ld. TPO has made adjustments in relation to the international transactions of the Appellant with its Associated Enterprises ("AE") amounting to Rs. 5, 70,31,878 .

2.2 Accordingly, the Appellant prays that Ground Nos. 5 to 12 related to Transfer Pricing Adjustment may kindly be considered for adjudication along with other grounds of appeal raised in the appeal memo.

It is therefore prayed that since the facts in relation to the aforesaid Grounds of Appeal now being raised, are already on record in view of the settled principles of law on this point as enunciated by the Hon'ble Apex Court in ***National Thermal Power Co. Ltd. v. CIT, 229 ITR 353(SC),*** the grounds raised by the Appellant be admitted and adjudicated by the Hon'ble Bench.

Thanking You.

Yours faithfully,
For PricewaterhouseCoopers Private Limited

S. Berera 21/7/2018
(Satyavati Berera)
(Director)
Encl: Annexure - 1

3.1.2. The assessee filed an application for admission of additional grounds of appeal on 22/10/2018, under Rule 11 of the ITAT Rules, 1963, which is extracted for ready reference:-

22 October 2018

To
The Assistant Registrar
Income tax Appellate Tribunal
"C" Bench
225/C, A. J. C. Bose Road
Kolkata - 700 020

Appellant	**:**	**PricewaterhouseCoopers Private Limited ('the Company')**
PAN	**:**	**AABCP9181H**
Ref.	**:**	**ITA No: 2298/Kol/2016 for Assessment Year ('AY') 2011-12**
Reg.	**:**	**Application for Additional grounds of appeal taken in captioned appeal filed on 5 December 2016, under Rule 11 of Income Tax (Appellate Tribunal) Rules, 1963 ('ITAT Rules')**

Date of hearing: 18 December, 2018

Dear Sir,

By way of this application, the appellant seeks leave of the Hon'ble Tribunal to raise additional/modified grounds of appeal in addition to the grounds of appeal taken in appeal memo filed on 5 December 2016 and vide letter dated 27 August 2018 in the captioned appeal. The Appellant wishes to submit an additional ground of appeal for kind consideration of the Hon'ble Bench and the same is attached as **Annexure – 1** to this application.

1. **Corporate tax**

1.1 The appellant in the present case has raised the Ground No. 3 in connection with the granting of relief of credit for tax withheld in foreign countries amounting to Rs. 3,33,66,706. In addition to the said claim, the Appellant wishes to raise an additional claim of foreign tax credit amounting to Rs. 5,23,81,415[1] (USD 746,174) pertaining to taxes paid in United States of America (USA) for the captioned AY.

The facts and circumstances under which the additional ground is sought to be filed is explained as under:

1.2 The Appellant filed its Original Return of Income on 30 November 2011 determining total income of Rs. 9,23,25,163. The return was subsequently revised on 22 March 2012 and again on 31 March 2013 determining total income of Rs. 110,71,58,763 and Rs. 91,67,43,467 respectively. The return of income was taken up for scrutiny assessment under section 143(3) of the Income tax Act, 1961 ('the Act') and the Learned Assessing Officer ('Ld. AO') passed an order dated 27 November 2015 determining assessed income of Rs. 235,07,36,930. Thereafter, pursuant to the Directions of the Hon'ble Dispute Resolution Panel dated 11 August 2016, final assessment order under section 144C(13) r.w.s 143(3) of the Act dated 29 September 2016 was passed determining the total assessed income at Rs. 120,62,26,650.

1.3 The Appellant has been deriving income from rendering of services in USA. However, the Appellant was under a bona fide belief that it was not required to file a tax return or pay taxes in USA in respect of income earned from rendering the services in FY 2010-11 as it being a non-resident in USA. Accordingly, the Appellant had not filed any tax return in USA for FY 2010-11. For the AY 2011-12 pertaining to previous year 2010-11, the Appellant, being a resident company of India, filed its tax return in India inclusive of the incomes earned from the transactions carried out of USA. Accordingly, the assessee submits that the Company is entitled for taxes paid in USA in accordance with provisions of Article 25 of Agreement for avoidance of double taxation of income with USA ('Treaty').

1.4 The US – Internal Revenue Service (IRS) has determined the tax liability of the Appellant for income earned from business operations in USA for various years (including the year under consideration). The Appellant filed its tax return in USA for FY 2010-11 in May 2018, computing a total income of USD 21,31,926 and determining a tax liability of USD 7,46,174. The above tax liability has also been confirmed by the IRS vide Form 4549 dated 7 June 2018. Accordingly, the Appellant, adhering to statutory compliances in all segments wherein it operates, did not exercise its appeal rights or contest the tax liability in the US Tax Court and discharged the above liability vide Demand Draft dated 11 September 2018.

1.5 As mentioned above, income determined and offered to corporate tax in USA is also included in the total income in the return of income filed in India and tax on the same is paid in India under the provisions of the Act. Hence, income is doubly taxed, once in USA as a source country and again in India as a resident country. Hence, the Appellant is eligible to claim foreign tax credit of taxes paid in USA against the tax liability determined in India.

1.6 It is further submitted that at the time of filing of income-tax return in India for AY 2011-12, Appellant had not claimed foreign tax credit on account of taxes paid in USA as no tax was paid in USA at that time and also the tax return was not filed in USA. Hence, the Appellant, now after payment of taxes in USA is seeking to raise an **Additional ground No. 3.1** in the **Annexure – 1** to this application for the aforesaid claim of foreign tax credit.

1.7 With respect to the above, it is submitted that Rule 128 of the Rules in connection with claim of foreign tax credit provides as under:

"128. (1) An assessee, being a resident shall be allowed a credit for the amount of any foreign tax paid by him in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India, in the manner and to the extent as specified in this rule :

....

(4) No credit under sub-rule (1) shall be available in respect of any amount of foreign tax or part thereof which is disputed in any manner by the assessee:

Provided that the credit of such disputed tax shall be allowed for the year in which such income is offered to tax or assessed to tax in India if the assessee within six months from the end of the month in which the dispute is finally settled, furnishes evidence of settlement of dispute and an evidence to the effect that the liability for payment of such foreign tax has been discharged by him and furnishes an undertaking that no refund in respect of such amount has directly or indirectly been claimed or shall be claimed."

The claim of credit for taxes paid in USA with respect to tax liability finalized in June 2018 is in accordance with the law.

In view of the above, it is submitted that the above ground of appeal may kindly be admitted and considered for adjudication along with other grounds of appeal raised in the appeal memo.

Thanking You.

Yours faithfully,
For PricewaterhouseCoopers Private Limited

S. Berera

(Satyavati Berera)
(Director)
Encl: Annexure - 1

3.2. Multiple applications have been filed on the very same matter for admission of additional grounds/additional evidence etc., which we would be dealing with in due course.

4. The ld. Counsel for the assessee, Shri Kanchan Kaushal, made detailed submissions both oral and in writing. For the sake of brevity, we summarise the same.

a) The additional grounds of appeal raised before the Tribunal are all legal grounds, not requiring enquiry into any facts and hence may be admitted. He relied on the judgment of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. Commissioner Of Income Tax, [1998] 229 ITR 383 (SC).*

b) That the order passed by the Assessing Officer on 27/11/2015, is a final assessment order, as a notice of demand u/s 156 of the Act, dt. 27/11/2015, was issued to the assessee and a penalty notice u/s 271(1)(c) of the Act, was also issued to the assessee. He argued, that this order violates the provision of Section 144C of the Act as the Assessing Officer cannot create a tax demand on any proposed variations/additions to the returned income of the year by issuing a demand notice and penalty notice along with the draft assessment order dt. 27/11/2015 and that the mandatory provisions of Section 144C(1) of the Act, were not followed and hence that order is without jurisdiction and, therefore, null and void.

c) That the initiation of penalty proceedings u/s 271(1)(c) of the Act and the notice requiring the assessee to respond/appear before the Assessing Officer on 27/11/2015, clearly brings out the intention of the Assessing Officer that he intended to pass a final assessment order on 27/11/2015.

For this proposition reliance was placed on the following case law:-

- *Shri Chandanmal Nagaraj vs. ACIT [I.T. (TP)A. No. 80/CHNY/2018) dt. 13th March, 2019*

Reliance was also placed on other case-law, which we would deal as and when necessary.

4.1. Without prejudice to the above arguments, if it is concluded that the assessment order passed on 27/11/2015, is a draft assessment order and not the final assessment order, then, the assessment order dt. 29/09/2016 is barred by limitation as the CBDT made a reference to FT & TR.

He submitted that vide letter dt. 21/12/2015, the DCIT, Central-2(2), Kolkata, stated that :-

i. Date of reference made to Netherland Tax Authority by FT&TR-I, Exchange of Information Cell, India, was on 18/03/2015.
ii. Date on which the reply was received by the Ld. Pr. CIT, Kolkata-1, Kolkata, was 10/08/2015

4.1.1. He relies on Explanation 1(viii) to Section 153 read with proviso to Explanation 1 of the Act, as it then existed and argued that the order in question should have been passed on or before 9th October, 2015, after excluding the above period of 145 days i.e., from 18/03/2015 to 10/08/2015 and whereas the order was passed on 27/11/2015. Thus, he submits that both the orders passed on 27/11/2015 is barred by limitation and consequently the order passed on 29/09/2016 is null and void, and hence has to be quashed.

5. On merits, he submitted that Ground No. 2.1. to 2.4. is not pressed.

6. On Ground No. 3, foreign tax credited, the ld. Counsel for the assessee requested that the issue be set aside to the file of the Assessing Officer, to enable the assessee to produce evidence as called for and prove its claim.

7. On Ground No. 4, he submitted that the directions may be issued to the Assessing Officer to give an opportunity to the assessee to reconcile the tax deducted at source figures so that the correct credit may be given.

8. On additional ground no. 3.1., he submitted that income earned by the assessee from United States was included in income earned in India as no return of income was filed in U.S.A. at that point of time. He submitted that later a return of income was filed in Unites States and taxes paid thereon and hence he requested that directions be given to the Assessing Officer to grant tax credit as claimed.

8.1. The ld. Counsel for the assessee has not argued any other matter and has in fact submitted that he will not be pressing all the other issues, excluding those specifically argued before the Bench, which was raised by way of grounds and additional grounds of appeal. Hence all these grounds, not specifically argued are dismissed. He lead no arguments for the admission of additional evidence. Hence, we dismiss the application for admission of additional evidence.

9. The ld. D/R, Shri Vijay Shankar, on the other hand, controverted the submissions of the assessee and submitted that the order passed on 27/11/2015 was only a draft assessment order. His submissions are summarised as follows:-

a) The order was passed u/s 144C of the Act, and the heading of the order is "Draft Assessment Order" and in the order it was concluded as "draft assessment order u/s 144C of the Act". Thus, no order whatsoever, was passed u/s 143(3) of the Act which could be said to be an assessment order much less a final assessment order. That no demand was created on the assessee in pursuance of Section 144C of the Act and in fact under the statute no such demand can be created hence, the notice of demand u/s 156 of the Act in Form 7 was also a draft notice and this is clear from para 1 of the notice, which states that "<u>has been determined to be payable by you u/s 144C of the I.T. Act, 1961</u>." Hence, the demand notice was illegal and hence was never enforced upon the assessee. He refuted the contentions of the ld. Counsel for the assessee that the intention of the Assessing Officer is to pass a final assessment order on 27/11/2015.

b) The notice issued u/s 271(1)(c) of the Act, is non-est in law for the reason that, the penalty notice did not mention the specific charge i.e., whether it was issued for furnishing of inaccurate particulars or concealment of income or whether it was issued for levying penalty non-filing of return of income. Hence, in view of the decision of the Kolkata Bench of the Tribunal after applying the judgment of the Hon'ble Jurisdictional High Court and Hon'ble Supreme Court, such notices are invalid and non-est in law. Hence such invalid notice cannot lead to a conclusion that the order passed on 27/11/2015 is in fact a final assessment order, for the reason that the notice for levy of penalty u/s 271(1)(c) of the Act is non-est in law.

c) That from the fact that the assessee has filed objections before the Hon'ble DRP, leads to a conclusions that the assessee believed that the order dt. 27/11/2015 was a draft assessment order and not a final assessment order. When the assessee has understood that this is a draft assessment order and has instead of filing an appeal before the ld. CIT(A), chosen to challenge the same before the DRP, it cannot contend otherwise and it cannot approbate and repobrate. If the contentions of the ld. Counsel of the assessee that this order dt. 27/11/2015, is the final assessment order is to be upheld, then neither the DRP nor the ITAT have jurisdiction to entertain the appeal of the assessee as the assessee should have approached the ld. CIT(A) with an appeal. He distinguished the decisions relied upon by the ld. Counsel for the assessee that issuance of notice u/s 156 of the Act and initiation of penalty u/s 271(1)(c) of the Act along with the draft assessment leads to a conclusion that the draft assessment order passed u/s 144C of the Act, is in fact a final assessment order passed u/s 143(3) of the Act. He submits that at best it is a mistake.

d) On the issue of limitation, the ld. D/R submitted that Section 144C of the Act is complete code in itself. He relied on the following case-law:-

   i. *Religare Capital Markets Limited vs. DCIT [ITA No. 1881/Del/2014, Assessment Year 2009-10; ITA No. 1583/Del/2015, Assessment Year 2010-11; ITA No. 753/Del/2016, Assessment Year 2011-12; ITA No. 1763/Del/2017, Assessment Year 2012-13], order dt. 10/10/2019*

10. He submitted that the Benches have held that the limitation provided u/s 156 of the Act, does not apply to the draft assessment orders. He relied on the decision of the Delhi Bench of the Tribunal in the case of *Honda Trading Corporation, Japan vs. DCIT in ITA No. 1132/Kol/2015, order dt. 15/09/2015* and submitted that the Bench held that there is no time limit prescribed for passing of the draft assessment order and that, such order is required to be passed within reasonable time. Six months

period was considered as reasonable time. In the case on hand, the draft assessment order was passed within six months from the date of receipt of information by the ld. Pr. CIT i.e., 18/03/2015. Thus, he submits that this order is not barred by limitation.

11. On merits, the ld. D/R submitted Ground No. 2.1. to 2.4. have to be dismissed as the ld. Counsel for the assessee is not pressing the same.

12. On Ground No. 3 for non grant of relief u/s 90 of the Act, he submitted that no evidence has been produced by the assessee and hence his claim for credit of tax was rightly rejected by the lower authorities. On the request of the ld. Counsel for the assessee to remand the matter for fresh adjudication, he submitted that no evidence has been filed till date, even before the ITAT and hence such a claim of setting aside to Assessing Officer should not be entertained. On claim of credit of taxes paid to United States, he submitted that the facts are admittedly not on record and under such circumstances, no additional ground can be admitted on this issue. He relied on judgment of the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. (supra)* and submitted that only question of law can be entertained in the Bench, when facts are on record and when no fresh investigation into facts is required.

13. On the issue of short credit of TDS, he submitted that the matter may be restored to the file of the Assessing Officer to grant appropriate tax credit after due verification of the Form No. 26AS of the assessee.

14. In reply, the ld. Counsel for the assessee rebutted the contentions of the ld. D/R and made lengthy submissions both oral and written. For the sake of brevity, they are not extracted. We have carefully considered all these submissions as well as the case law cited by both the parties. These will be discussed if required.

15. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

16. The first issue that has to be adjudicated is whether the order passed on 27/11/2015 is a draft assessment order or a final assessment order.

17. Apparently, the order passed on 27/11/2015 is a "Draft Assessment Order" u/s 144C of the Act. It is said so on page 1 of the order. When the Assessing Officer specifically states that the Section and sub-Section under which the order is made is

Section 144C of the Act and gives the heading of the order as "Draft Assessment Order", in our view, it would be legally incorrect to hold that the order is not passed u/s 144C of the Act, but was actually an order passed u/s 143(3) of the Act. None has the power to change the section under which an order is passed. The attachment of a Notice of Demand in Form No. 7 cannot be taken as the deciding circumstances, which leads us to a conclusion that the order in question is a Final Assessment Order passed u/s 143(3) of the Act. In fact at para 1 of the Notice of Demand u/s 156 of the Act, the Assessing Officer has clearly stated "*…….., has been determined to be payable by you u/s 144C of the I.T. Act 1961"*. Non-striking of para 6 or para 7 in Form No. 7, does not take us to conclusive proof that the order is not a draft assessment order. In fact it is a Draft Notice of Demand attached to the Draft Assessment Order. This notice of demand is non-est in law as no demand can be created by an order passed u/s 144C of the Act. Hence such notice has not bearing on the order.

18. Coming to the notice issued for levy of penalty u/s 274 of the Act, we find that none of the columns in the notice have been struck off by the Assessing Officer. Under such circumstances such a notice is illegal and bad in law. This notice is also non-est in law. This Bench of the Tribunal in the case of *Arun Kumar Bose vs. ITO in ITA No. 2044/Kol/2018, Assessment Year: 2008-09, order dt. February 19th, 2020*, has followed the judgment of the Hon'ble Jurisdictional High Court in the case of *Pr. CIT vs. Dr. Murari Mohan Koley in ITAT No. 306 of 2017, G.A. No. 2968 of 2017*, judgment dt. 18th July, 2018, and held as follows:-

> *"10. The ld. Counsel for the assessee drew our attention to the decision of the Hon'ble Karnataka High Court in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble Karnataka High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 took a view that imposing of penalty u/s. 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. The ld. Counsel further brought to our notice that as against the decision of the Hon'ble Karnataka High Court the revenue preferred an appeal in SLP in CC No.11485 of 2016 and the Hon'ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department. The ld. Counsel also brought to our notice the decision of the Hon'ble Bombay High Court in the case of CIT vs Shri Samson Perinchery in ITA No.1154 of 2014 dated 05.01.2017 wherein the Hon'ble Bombay High Court following the decision of the the Hon'ble Karnataka High Court in the case of of CIT vs Manjunatha Cotton and Ginning factory (supra) came to the conclusion that imposition of penalty on defective show cause notice without specifying the charge against the assessee cannot be sustained. Our attention was also drawn to the decision of ITAT in the case of Suvaprasanna*

Bhattacharya vs ACIT in ITA NO 1303/Kol/2010 dated 06.11.2015 wherein identical proposition has been followed by the Tribunal. The learned DR relied on the order of the CIT(A).

11. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words.

In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the ld. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present case cannot be sustained and the same is directed to be cancelled. "

Mr. Chowdhury in course of argument has urged us to remand the matter before the assessing officer. According to him, this was a technical flaw, which the Revenue must be given a chance to cure. The reason why the penalty order was not sustained by the Tribunal appears from the passages of the decision of the Tribunal quoted earlier in this judgement.

We find that there was no specific charge against the assessee in the notice. Revenue has missed out their opportunity to subject the assessee to the penalty proceeding by not issuing a proper notice. No specific case has been made out by the Revenue as to why the matter should be remanded except that the assessee had not participated properly in the assessment proceedings but for that reason best judgment assessment has been made and the income, which had escaped assessment has been added to the income of the assessee. It was incumbent upon the Revenue to make out a specific case for imposition of penalty, on which count the Revenue has failed.

Under such circumstances, we do not find any reason to interfere with the Tribunal's order. The Tribunal's order does not suffer from any error of law. No substantial question of law is involved in this appeal. Hence, the same is dismissed. Hence, stay petition is also dismissed.

There shall be no order as to costs.

19. In this case, the Assessing Officer has not even mentioned whether he proposed to levy penalty for non-filing of a return of income u/s 139(1) of the Act by the assessee, or for failing to comply with the notice issued u/s 142(1)/143(2) of the Act etc. Thus, such non-est notice cannot be a basis for coming to a conclusion that the assessment order is a final assessment order and not a draft assessment order.

The ld. Counsel for the assessee relied on a number of decisions in support of his contentions. For the sake of brevity, we do not deal with all of them separately. In our view, these case-law are distinguishable on facts as in this case both the Notice of Demand u/s 156 of the Act and the notice for levy of penalty u/s 271(1)(c) of the Act are illegal notices and are *void-ab-initio*. In the case-law relied upon by the ld. Counsel, these notices u/s 156 and 274 of the Act, might have been held to be valid notices in law. The substantial nature and character of the main order does not change just because it was annexed with illegal, void and defective notices proposing certain action which were never taken or implemented. The pith and substance of the main order cannot be changed. The 'tail' cannot wag the 'dog'. The order passed u/s 144C of the Act, cannot be held as passed u/s 143(3) of the Act because some defective and illegal notices are issued along with its.

19.1. In some of the case-law relied upon by the ld. A/R, the Assessing Officer had stated that the order was passed u/s 143(3)/144C(1) of the Act, though he termed it as a draft assessment order. In this case, Section 143(3) of the Act, has not been mentioned at any place in the order dt. 27/11/2015 and only Section 144C of the Act has been mentioned. Even in the notice of demand it is stated that the order was passed/s 144C of the Act. We also do not know whether the penalty notice issued in that case, was a valid show-cause notice for levy of penalty or not. We do not deal with each of the case law cited by the ld. Counsel for the assessee, as in our view, it is not necessary as the facts of this case on hand are clear and cannot lead to any other conclusion.

20. We, however, find force in the arguments of the ld. CIT D/R that the, assessee understood this order dt. 27/11/2015 as a draft assessment order and filed objections with the Hon'ble DRP. If it was the belief of the assessee that this is a final assessment order, then he would have filed an appeal before the ld. CIT(A) and not before the Hon'ble DRP. If the contentions of the assessee is accepted then the appeal is not maintainable before us for the reason that no objection is maintainable before the DRP on a final assessment order. If the contentions of the assessee is that the order is passed other than u/s 143(3)/144C of the Act, then the appeal lies with the ld. CIT(A) and not with the ITAT. In such a case this appeal has to be dismissed as not maintainable. Thus, we dismiss these grounds of the assessee and hold that the order passed on 27/11/2015 is a draft assessment order passed u/s 144C of the Act.

21. We now consider the issue of limitation. This issue is covered against the assessee and in favour of the revenue by the decision of the Delhi Bench of the Tribunal in the case of *Religare Capital Markets Limited (supra)*, wherein it was held as follows:-

"10. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as the time lines which are under challenge before us. We do not have any hesitation in holding that the issues argued by the ld. AR are squarely covered against the assessee by the decision of coordinate bench in ITA No. 1132/Del/2015. The above order of the coordinate bench has clearly covers from para No. 5.22 onwards that in such cases the passing of the final assessment order pursuant to the order of the ld. TPO as contained in section 144C(4) and (13), the time limit given u/s 153 has no relation whatsoever with the passing of the draft order, which should be passed within a reasonable time and the time limit given u/s 153 of the Act is relevant for the determination of time available with the TPO for passing order u/s 92CA(3). The facts before the coordinate bench was that the assessment order u/s 143(3) was passed on 29.01.2015 which is well within the period of one month in which the direction was received from the ld. DRP on 24.12.2014, thus, the final order passed by the ld. AO is within the time prescribed u/s 144C(13). As the draft order was also passed within a reasonable time same is also not barred by limitation. Against this decision no further appeal is filed by the Assessee. However, the ld. AR has given a detail rebuttal to the submission of the revenue.

11. The first argument of the ld. AR was that argument of the ld. CIT DR that DRP proceedings are substitution of the appellant proceedings, thus, direction of the ld. DRP like an appeal order therefore, provision of section 153 of the Act does not apply. The ld. Authorized Representative referred to the decision of the Hon'ble Bombay High Court in 361 ITR 531 where it is held that DRP proceedings are not appellate proceedings. The Hon'ble Bombay High Court has held that the process before the ld. DRP Panel is continuation of assessment proceedings as only thereafter would a final appealable assessment order be passed. However, the Hon'ble High Court further held that process before the ld. DRP is a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the Assessee.

12. The ld. Authorized Representative further stated that as the coordinate bench has held that the draft order is actually different in ambit from the assessment order and thus it is not appreciated that the draft assessment order is a proposed order of assessment and does not have any independent existence in law. It is not accompanied by notice of demand, not appealable and cannot be the basis of initiation of penalty. He therefore, submitted that draft order of assessment cannot be equated with the assessment completed in pursuance of direction of DRP u/s 143(3) read with section 144C(13) of the Act. The argument of the ld. AR though looks attractive but on careful examination of the same we are not impressed. The provisions of the income tax act 1961 sets out a special scheme for the assessment of an entity engaged in international transaction under Chapter X of the income tax act in terms of section 144C (1) to section 144C (14) of the income tax act. Therefore it is apparent that it is not an assessment scheme as applicable to other assesses. It is a scheme of assessment in respect of matters that included the transfer pricing adjustment. According to the provisions of section 144C (1) and order of the draft assessment proposing a variation to the income or loss as returned by the assessee is to be forwarded to the assessee by the assessing officer. On receipt of that order assessee is given 2 options to be exercised within 30 days of the receipt of the draft order either to accept the draft order and intimate the assessing officer accordingly or to file objections to the proposed variations with the dispute resolution panel and the assessing officer. If *the assessee exercised an option to accept the draft order nothing else is required to be done except to complete the assessment on the basis of the draft order. Such order i.e. the draft order becomes the final order when acceptances received or the period for filing of the objection expires. If the objections are filed by the assessee the dispute resolution panel issue directions as it thinks fit and enabling the assessing officer to complete and issue the order of final assessment. Provisions of subsection 6, 7, 8 and 9 of section 144C sets out the procedure to be followed by the dispute resolution panel in issue of the direction. The section further provides that every direction issued by the dispute resolution panel shall be binding on the assessing officer. Thus it seen that AO cannot tinker or apply anything further than what was mentioned in the draft assessment order except what is directed by the learned dispute resolution panel. The provisions of principles of natural justice are ingrained in the provisions of section 144C of the act. It further says a time limit of 9 months from the end of the month when the draft order is forwarded to the assessee for passing of issue of any directions. Upon receipt of the direction the AO shall pass an order of final assessment which is in conformity with the direction of the dispute resolution panel within one month from the end of the month in which the directions are received. There is no further provision of granting any opportunity to the assessee of further hearing. Thus the above provisions are a self-contained code. In this code, the role of the assessing officer ends the movement, the objections are filed by the assessee or draft order is accepted by the assessee. Therefore, the learned assessing officer cannot make any upward adjustment to the income of the assessee after passing of the draft assessment order. He also cannot initiate any further penalties which are attached to the assessment order if same are not initiated in the draft order. The rights of the variation to the income of the assessee are solely rest with the dispute resolution panel. Therefore the dispute resolution panel has a correcting power to the draft assessment order. AO does not have any power to do so. Therefore it is apparent that on the plain reading of the above provisions for all practical purposes the role of the assessing officer comes to an and the movement he passes the draft order. He is only authorized to pass the final assessment order which is according to the directions of the learned dispute resolution panel. The above provisions also contained the separate time limits and it has its own timelines which binds the revenue as well as the assessee. The honourable Madras High Court in 398 ITR 645 (2017) CIT vs Sanmina SCI India private limited in para number 7 has held that it is a self-contained code in itself. Thus, the provisions contained therein only determine the timelines of the passing of such order and not as provided u/s 153 of the act. Thus this argument of the assessee deserves to be rejected.*

13. Further according to the provisions of section 253 of The act pertaining to appeals to the tribunal, clause (d) of subsection 1 also separately carves out the appealable order as order passed by the assessing officer under subsection 3 of section 143 of section 147 of section 153A or section 153C in pursuance of the directions of the dispute resolution panel. Further, it may also be possible that in certain circumstances the provisions of section 263 of the income tax act also do not apply to orders passed under directions of the dispute resolution panel. Thus law has seen the assessment passed in pursuance of direction u/s 144C of the act different from the regular assessment as envisaged u/s 153 of the act.

14. The further argument of the learned authorized representative is that there is no time limit for passing of the draft assessment order under the scheme *of section 144C and then same can be passed within a reasonable time is flawed. The argument advanced is that legislative intent is to progressively reduce the limitations for passing the assessment order to expedite the dispute resolution process and impart certainty & finality to assessment proceedings. As we have already held that it is a complete code in itself therefore it in fact it supports the intention of the legislature in providing expeditious resolution of the dispute between the taxpayer and tax gatherer. Thus this argument deserves to be rejected.*

15. No doubt, the final order of assessment is passed pursuant to the direction of the learned dispute resolution panel but it cannot be said that that limitations provided under section 153 applies to it. As we have already held that it is a complete code in itself as held by the honourable Madras High Court, which also provides for specific limitations, if a particular procedure adopted by the assessee, then timelines provided therein will only apply.

16. Further, over and above the above decision of the Honda Trading Corp, Japan vs DCIT in ITA number 1132/del/2015 dated 15/9/2015 we also draw support from decision of the coordinate bench in case of Volvo India private limited vs ACIT IT (TP) A no. 1537/bang/2012 dated 8/5/2019 and Acer India Pvt Ltd V DCIT 502/bang/ 2017 dated 10/5/2019 which has also taken similar view against the assessee holding that if the assessment orders are passed within the timelines provided under section 144C of the income tax act, irrespective of the timelines prescribed under section 153 of the income tax act, they are passed within the timelines provided under the law and are not time barred.

17. In view of the above reasons we dismiss the additional ground raised by the assessee. We direct the registry to post the hearing of the appeal on other grounds before the regular bench in due course.

22. Respectfully following the same, we dismiss this ground of the assessee.

23. We now take up the grounds on merits.

24. Ground Nos. 2.1. to 2.4., are dismissed as not pressed.

25. Regarding Ground No. 3 on the issue of grant of relief u/s 19 of the Act, in respect of credit of tax withheld in foreign countries, we agree with the submissions of the ld. D/R that the matter cannot be remanded to the file of the Assessing Officer. The assessee has not furnished any details in support of his claim either before the Assessing Officer or the DRP or before us. When no details are furnished till date, we are not in a position to accept the request of the assessee. Thus, this ground of the assessee is dismissed.

26. On the issue of short credit of TDS no reconciliation statement has been filed by the assessee before us nor has it demonstrated as to how the Assessing Officer has

erred in granting the tax deducted at source. If there is a mistake in granting of tax, the Assessing Officer may be approached with a suitable application for rectifications. In the result, this ground of the assessee is dismissed.

27. On the additional ground of granting of tax credit of taxes paid in USA, we find that the facts are not on record either before the Assessing Officer or before the DRP or before us. We cannot admit the additional ground of appeal when the facts are on record. As the facts supporting the claim of the assessee are not on record, we do not admit this ground of the assessee.

28. The ld. Counsel for the assessee after considerable arguments, has not pressed his claim that the foreign AE to be made the tested party. Hence, we dismiss this ground of the assessee. No arguments were made on the question of adjustment, Most Appropriate Method (MAM), Comparables etc. The Transfer Pricing adjustments made by the TPO on facts is not disputed by the assessee. As already stated, no arguments were advanced on the same. Hence, we uphold the same.

29. All the other grounds raised by the assessee are dismissed as not argued.

30. Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded for the purpose of computation of the limitation. For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of *DCIT vs. JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018, Assessment Year 2013-14, order dt. 14th May, 2020.*

31. In the result, appeal of the assessee is allowed in part.

Kolkata, the 29th day of May, 2020.

Sd/-	***Sd/-***
[S. S. Godara]	[**J. Sudhakar Reddy**]
Judicial Member	Accountant Member

Dated : 29.05.2020
{SC SPS}

Copy of the order forwarded to:

1. ***M/s. Pricewaterhouse Coopers Private Limited***
Block-EP, Plot –Y14
Salt Lake City
Sector-V
Kolkata – 700 091

2. ***Asstt. Commissioner of Income Tax , Circle-2(2), Kolkata***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches