

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “C”, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.1810/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

TDK Electronics AG (Formerly known as EPCOS AG) C/o. EPCOS India Pvt. Ltd., E-22-25, MIDC Satpur, Nashik 422 007 PAN : AAACE9787H	Vs.	ACIT (IT), Circle-1, Pune
Appellant		Respondent

Assessee by	Shri Naresh Kumar
Revenue by	Shri T. Vijaya Bhaskar Reddy

Date of hearing	24-02-2020
Date of pronouncement	26-02-2020

आदेश / ORDER

PER R.S.SYAL, VP :

A short but interesting point has been raised in this appeal, which emanates from the final assessment order dated 24.10.2019 passed by the Assessing Officer (AO) u/s. 144C(13) r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter also called ‘the Act’) in relation to the assessment year 2015-16.

2. Succinctly, the factual panorama of the case is that the assessee is a non-resident company having its head office at

Germany and as such a tax resident of Germany. The assessee has a global presence in terms of having manufacturing plants, research and design centres and sales offices etc. throughout the world. The assessee established two subsidiaries in India, viz., EPCOS India Private Limited, Nashik and EPCOS Ferrites Limited, Kolkata. A return of income was filed declaring total income of Rs.33,09,92,550/-. The assessee reported certain international transactions. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. Pursuant to the order passed by the TPO, the AO passed a draft order dated 21.12.2018 determining total income at Rs.33.48 crore by making an addition of Rs.38,77,566/- on account of 'Income from fees for technical services'. The draft order was admittedly served on the assessee on 24.12.2018. The assessee filed objections in Form No. 35A before the Dispute Resolution Panel (DRP) on 24.01.2019. The DRP, considering the provisions of section 144C(2), opined that the objections in Form No.35A ought to have been filed within 30 days of receipt of the draft order, which was actually delayed by one day. The DRP called upon the assessee to submit as to why the

objections be not dismissed at the threshold as not maintainable. The assessee raised certain issues urging the DRP to proceed with the matter after condoning the delay, which bore no fruit. Eventually, the DRP dismissed the assessee's objection *in limine* as time barred vide its direction dated 27.09.2019. The AO passed the final assessment order on 24.10.2019 u/s.144C(13) r.w.s.143(3) of the Act determining the total income at Rs.33.48 crore, being, the same amount as was determined in the draft order. Aggrieved thereby, the assessee is in appeal before the Tribunal.

3. We have heard the rival submissions and gone through the relevant material on record. Section 144C of the Act with the marginal note 'Reference to dispute resolution panel' provides through sub-section (1) that the AO, in the first instance, shall forward a draft of the proposed order of the assessment to the eligible assessee if he proposes to make any variation in the income returned. Sub-section (2) of section 144C states that: 'On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order, - (a) (b) file his objections, if any, to such variation with, -(i) the Dispute Resolution Panel; and (ii) the Assessing Officer'. The Income-tax

(Dispute Resolution Panel) Rules, 2009 lay down the procedure for filing objections through Rule 4. Sub-rule (1) provides that 'the objections, if any, of the eligible assessee to the draft order may be filed in person or through his agent within the *specified period* in Form 35A'. These rules do not spell out any meaning of the term 'specified period' for filing of Form 35A and as such, the term takes its genesis from section 144C(2) of the Act. Ergo, it becomes overt that an assessee, on receipt of the draft order, is obliged to file objections, if any, to the variation in the income before the DRP/AO within 30 days of the receipt of the draft order.

4. Before proceeding further, let us have a quick look at the following relevant dates of the case under consideration, which are material for our decision:-

Date of the Draft order	21.12.2018
Date on which Draft order was received by assessee	24.12.2018
Date on which objections filed before DRP	24.01.2019
Date of the DRP direction	27.09.2019
Date of the final assessment order u/s 144C(13)	24.10.2019

5. As the draft order in this case was admittedly received by the assessee on 24.12.2018, the period of 30 days for filing Form No. 35A, in terms of sub-section (2) of section 144C, expired on 23.01.2019. As against this, the assessee actually filed Form No.35A on 24.01.2019, thereby causing a delay of one day in raising objections against the draft order. The DRP has canvassed a view that it has no power to condone the delay in as much as such power is absent in section 144C or Income-tax (DRP) Rules, 2009. The DRP fortified its view in dismissing the objections filed by the assessee *in limine* by mainly relying on the judgment of Hon'ble Bombay High court in *CIT Vs. Grasim Industries Ltd. (2009) 319 ITR 154 (Bom)* in which the Hon'ble High Court has held that it has no power to condone the delay in filing appeal u/s. 260A of the Income-tax Act. Under these circumstances, the moot question is whether the DRP was justified in not condoning the delay of one day and consequently dismissing the objections raised by the assessee at the entry level without delving into their merits.

6. It is trite that filing of an appeal or an application under any Act is a right provided by the concerned statute. This right carries certain obligations including adhering to the time limit prescribed

in the statute for filing of such an appeal or application. In the context of the Income-tax Act, 1961, an appeal can be filed before the CIT(A) within 30 days as prescribed u/s. 249(2) of the Act. In the same manner, an appeal can be filed before the Tribunal within 60 days as prescribed u/s. 253(3) of the Act and before the Hon'ble High Court within 120 days as per section 260A(2) of the Act. Apart from the appeals, an application u/s. 264 for revision can be filed by the assessee within one year as per section 264(3) of the Act. In the same manner, certain other time limits have also been outlined in the Act for moving applications etc. One of such instances is section 144C(2), which obligates an assessee to file objections against the draft order before the DRP within 30 days.

7. Sometimes the relevant statute carves out exceptions by granting the competent authority/forum a power to entertain an appeal or application beyond the prescribed period on sufficient cause. It is in the hue of such an express authorization that the concerned authority/forum can exercise its discretion and condone the delay, if satisfied with the reasonableness of the cause in late presentation. Although section 249(2) of the Act requires the filing of an appeal before the CIT(A) within 30 days, sub-section

(3) empowers the CIT(A) to admit an appeal after the expiry of the said period if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the period.

8. Similarly albeit section 253(3) requires the filing of an appeal before the Tribunal within sixty days, sub-section (5) empowers the Tribunal to admit an appeal after the expiry of the period of sixty days. As against the power of the Tribunal to admit an appeal belatedly after the expiry of relevant period in terms of sub-section (5) of section 253A, no specific provision has been enshrined empowering the Tribunal to entertain a Miscellaneous Application u/s. 254(2) of the Act beyond the period of six months from the end of the month in which the order was passed.

9. Prior to the insertion of sub-section (2A) of section 260A by the Finance Act, 2010 with retrospective effect from 01-10.1998, no specific provision was there in the Act empowering a High Court to admit an appeal after the expiry of period of 120 days as referred to in sub-section (2) of section 260A. In the period pre-insertion of sub-section (2A), there was a cleavage of opinion as to whether a High Court can condone the delay beyond the period prescribed in sub-section (2) of section 260A. The full Bench of

Hon'ble Bombay High Court in *CIT Vs. Velingkar Brothers* (2007) 289 ITR 382 (Bom.) (FB) observed that sub-section (2) of section 260A does not make section 29(2) of the Limitation Act, 1963 inapplicable and accordingly held that the power to condone delay in filing appeal must be read to be existent. Thereafter, the Hon'ble Supreme Court had an occasion to consider this issue in the context of Excise Act in *Commissioner of Central Excise and Customs Vs. Hongo India (P) Ltd. and Another* (2009) 223 CTR 225 (SC) in which it held that a High Court has no power to condone the delay in filing reference applications beyond the prescribed period. Similar issue once again came up for consideration before the Hon'ble Bombay High Court in *CIT Vs. Grasim Industries Ltd.* (2009) 319 ITR 154 (Bom.) in which the Revenue sought condonation of delay by relying on the earlier Full Bench judgment of the Hon'ble Bombay High Court in *Velangkar Brothers (supra)*. Considering the later judgment of the Hon'ble Supreme Court in *Hongo India (P) Ltd. and Another (supra)*, the Hon'ble Bombay High court held that the earlier view of the Full Bench in *Velingkar Brothers (supra)* was not a good law in view of the later judgment of the Hon'ble Supreme Court. It is this

judgment of the Hon'ble Bombay High Court in *Grasim Industries Ltd. (supra)* which has been chiefly relied by the DRP in not condoning the delay. It is the Finance Act, 2010 which has retrospectively inserted sub-section (2A) to section 260A permitting the filing of appeal belatedly on showing sufficient cause. Now with the aid of sub-section (2A) of section 260A, a High Court has also been empowered to entertain an appeal filed beyond the period prescribed in section 260A(2) of the Act in case sufficient cause for the delay is established.

10. In the same manner, although sub-section (3) of section 264 empowers an assessee to file revision petition within one year, proviso to sub-section (3) enables the Pr. CIT to accept a revision application u/s. 264 beyond the prescribed period if he is satisfied that the assessee was prevented by sufficient cause from making an application within that period.

11. It follows from the above discussion that whenever the parliament intended to empower the competent authority/forum to condone the delay and accept an appeal or an application beyond the stipulated time, it expressly stated so by inserting a specific provision in the Act. In the absence of such an enabling provision,

no competent authority/forum can usurp the statutory power and bestow upon itself the power to condone the delay. The fortiori is that any application moved after the prescribed period, in the absence of an express provision in this regard, is liable to be dismissed as time barred.

12. Section 144C(2) of the Act provides a period of 30 days for filing of objections before the DRP. Unlike certain other provisions empowering the respective competent authorities/forums to condone the delay, no empowerment has been endowed upon the DRP to condone the delay and accept Form No. 35A beyond the prescribed period of 30 days. Sub-section (2) of section 144C not only uses the word 'shall' requiring the assessee to file objections before the DRP within 30 days but also does not contain any provision authorizing the DRP to condone the delay. In the absence of such an express power to condone the delay, in our considered opinion the DRP rightly held itself to be incompetent to condone the delay.

13. One needs to appreciate that either the power to condone the delay exists or does not exist. It cannot be a hybrid situation in the sense of conferring a bridled power of condoning the delay in

favour of the competent authority/forum so that the delay may be condoned if it is up to a specific length of time. We have noted above that sub-section (2) obligates an assessee to file objections against the draft order in Form No. 35A within a period of thirty days. Sub-section (12) of section 144C places an embargo of limitation on the DRP not to issue any direction u/s. 144C(5) after nine months from the end of the month in which the draft order is forwarded to the eligible assessee. If we accept the contention of the assessee that the DRP was empowered to condone the delay of one day in filing objections and countenance the same, there may be a case in which such a delay is for one year instead of one day and such a delay may also be on a sufficient cause. The logic is that if delay of one day can be condoned on sufficient cause then there can be no reason for not condoning the delay of one year equally on sufficient cause. If such a hypothetical delay of one year is allowed to be condoned, the DRP will run out of time to issue direction under sub-section (5) within a period of nine months from the end of the month in which the draft order is forwarded to the eligible assessee in terms of section 144C(12) of the Act. It is in view of such inter-weaving of the time limits that the legislature

did not confer any power on the DRP to condone the delay in accepting the objections from the assessee beyond the prescribed period. The sequitur is that in the absence of any express provision, non-condonation of delay by the DRP in the facts of the extant case has to be held as perfectly justified. We, ergo, approve the action of the DRP in this regard.

14. There is another facet of the case. Once it is held that filing of objections by the assessee beyond the period of thirty days is barred by limitation and hence inconsequential, it must also meet the resultant effects as well.

15. The scheme of the relevant provisions in this regard is that when the AO makes a reference to the TPO, the latter passes an order u/s. 92CA(3) of the Act. On receipt of the order from the TPO, the AO passes a draft order u/s. 144C(1). If dissatisfied with the draft order, the assessee has an option to either approach the DRP route by filing objections before the DRP or choose the appellate recourse by filing an appeal before the CIT(A). If an assessee opts to be governed by the procedure enshrined for the DRP reference, then the DRP is supposed to issue directions within nine months from the end of the month in which the draft order is

forwarded to the eligible assessee as per sub-section (12) of section 144C. Sub-section (13) provides that upon a receipt of the direction in sub-section (5), the AO shall complete assessment within one month from the end of the month in which such a direction is received. At this juncture, it is significant to have a glance at the mandate of sub-section (3) of section 144C, which runs as under :-

‘The Assessing Officer shall complete the assessment on the basis of the draft order, if—

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).’

16. The crux of section 144C(3) in so far as clause (a) is concerned is that if an assessee accepts the variation as per the draft order, then there is no need to sail through the DRP or the appellate route. In that scenario, the AO, in terms of section 144C(4)(a), will be required to complete the assessment on the basis of the draft order within a period of one month from the end of the month in which the acceptance is received. Clause (b) of section 144C(3) deals with a situation of completing the

assessment on the basis of the draft order in a case in which no objections are received within the period specified in sub-section (2). In the latter situation, clause (b) of section 144C(4) provides that the AO will pass the assessment order within one month from the end of the month in which the period of filing the objections under sub-section (2), expires. It means that if an assessee does not file objections against the draft order before the DRP within a period of thirty days as per sub-section (2), the AO, without waiting for anything else, will have to complete the assessment within one month from the end of the month in which the period of filing of objections under sub-section (2) expires. The DRP dismissed the objections of the assessee *in limine* by opining that the assessee could not have filed objections outside the time limit provided under sub-section (2) of section 144C. The net effect of the order of the DRP is that the objections filed by the assessee were time barred and hence no cognizance could have been taken of them. Once the objections filed by the assessee are time barred, the natural corollary is that no valid objections were filed by the assessee. One cannot contemplate a situation that the objections are invalid for the DRP so as not to issue any direction u/s 144C(5)

and valid for the AO so as to pass order u/s 144C(13) of the Act. If the objections are invalid as time barred having not been filed within the time prescribed under sub-section (2) of section 144C, the AO will have to act in terms of Section 144C(3)(b) and complete the assessment within the time prescribed u/s 144C(4)(b) of the Act, namely, within one month from the end of the month in which the period of filing of objections under sub-section (2) expires.

17. Adverting to the facts of the instant case, it is found that, the period of 30 days for filing objections within sub-section (2) of section 144C expired on 23.01.2019. Going by the mandate of sub-section (3) of section 144C(3)/144C(4), the AO was supposed to complete the assessment on the basis of the draft order by February, 2019. As against this, the AO actually completed the assessment u/s. 144C(13) on 24.10.2019. Such a completion of assessment not only under the wrong provision but also beyond the limitation period is *ultra vires* and hence cannot stand. We declare the assessment order to be time barred and *ex consequenti* null and void, with the effect that the returned income will automatically get accepted as finally assessed income.

18. In the result, the appeal is allowed.

Order pronounced in the Open Court on 26th February,
2020.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 26th February, 2020
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr. CIT -5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	24-02-2020	Sr.PS
2.	Draft placed before author	25-02-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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