

**IN THE HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD**

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I.T.T.A.No.29 of 2023

Between:

The Principal Commissioner of Income Tax-2,
Hyderabad.

Petitioner

VERSUS

M/s.Hyundai Motor India Engineering Pvt. Ltd.

Respondents

JUDGMENT PRONOUNCED ON: 11.09.2023

**THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND**

THE HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

P.SAM KOSHY, J

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Respondent

! Counsel for Petitioner(s) : Ms. K. Mamata
Choudary

^Counsel for the respondent(s) : Mr K.Raghavendra Rao

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> HEAD NOTE:

? Cases referred

1. [2014] 46 taxmann.com 100 (Madras)
2. [2018] 95 taxmann.com 101 (Madras)
3. [2023] 149 taxmann.com 486 (Karnataka)

**THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

I.T.T.A.No.29 of 2023

JUDGMENT :-*(per Hon'ble Sri Justice P.SAM KOSHY)*

The challenge in the instant appeal is to the order dated 29.07.2022 passed by the Income Tax Appellate Tribunal (for short 'the Tribunal'), Hyderabad Bench 'B', Hyderabad, in I.T.A.No.123/Hyd/2020 for the assessment year 2015-16. Vide the said impugned order, the Tribunal has allowed the appeal preferred by the respondent/assessee by setting aside the order passed by the Commissioner of Income Tax (Appeals) (for short '(CIT (Appeals)') dated 05.12.2019 and also the assessment order passed on 11.12.2018.

2. Heard Ms. K. Mamata Choudary, learned counsel for the appellant and Mr.Raghavendra Rao, learned counsel for the respondent-Department.

3. The issue involved in the present appeal is whether the Tribunal was justified in setting aside the assessment

order dated 11.12.2018, treating the same as final assessment order. Rather than, treating it to be a draft assessment order under Section 144-C of the Income Tax Act, 1961 (for short 'the Act').

4. The brief facts which led to the filing of the instant appeal is that the respondent/assessee is involved in the business of rendering support services in computer aided engineering field. For the assessment year 2015-16, respondent/assessee filed its return on 27.11.2015. The assessment of the respondent/assessee was subsequently subjected to scrutiny under Section 143 (2) of the Act and reference was made to Transfer Pricing Officer (TPO) for determination of the Arm's Length Price (ALP) of the assessee's international transactions entered with its associate enterprises.

5. In terms of the procedure prescribed before an assessment is finalized, the statute requires the Assessing Authority to first forward a draft assessment order to the assessee, calling upon his objections if any. The objections are to be submitted within thirty (30) days from the date of

its receipt. And it is only thereafter that the Assessing Authority shall pass the final assessment order. It is this requirement under law which is in dispute in the present appeal.

6. The dispute in the instant case is that when the draft Assessment Order under Section 144-C was sent to the respondent/assessee, it also was accompanied by a notice of demand and penalty under Section 271(1)(c) of the Act. It is said that the respondent/assessee did not respond to the said notice and as a consequence, the final assessment order was passed on 10.01.2019. The respondent/assessee immediately preferred an appeal before the CIT (Appeals) on the very same day i.e. on 10.01.2019, which was rejected by the CIT (Appeals), leading to filing of an appeal before the Tribunal. The Tribunal after considering the contentions put forth by the parties, allowed the appeal, thereby setting aside the order passed by the CIT (Appeals). It is this order under challenge by the respondent-Department by way of the instant appeal.

7. The contention of the learned counsel for the respondent-Department all along was that in fact the authorities concerned had issued a draft Assessment Order on 11.12.2018 calling for the objections from the respondent/assessee on the draft Assessment Order. And it is only when the respondent/assessee failed to submit any response to the draft Assessment Order, nor any objections before the authorities concerned, the final assessment order was passed on 10.01.2019.

8. According to the learned counsel for the appellant, the statutory requirement as such has been duly complied with. However, it was only because of an inadvertence that the draft assessment order got accompanied with the notice of demand and penalty. But the same was inconsequential for the reason that since the respondent/assessee did not respond to this draft assessment order, they were left with no other option, but to pass the final assessment order, which they did pass on 10.01.2019.

9. According to the learned counsel for the appellant only because there was a notice of demand and penalty

which inadvertently got enclosed along with the draft assessment order by itself will not vitiate the entire proceedings. As the respondent/assessee had the occasion of submitting his objections to the draft assessment order, the authorities concerned would have still considered the same and thereafter, passed the final assessment order.

10. The learned counsel for the appellant referred to an earlier decision rendered by the Tribunal in this regard and which was relied upon by the CIT (Appeals) i.e. in the case of ***M/s. BS Hyderabad vs. ACIT 2(3)*** in ITA No.2186/Hyd/2017. Therefore, the order of the CIT (Appeals) was self-contradictory in itself.

11. According to the learned counsel for the appellant the Tribunal erred in not considering the fact that the respondent/assessee waited till the final assessment order was passed on 10.01.2019 and thereafter challenged the same by way of an appeal before the CIT (Appeals).

12. According to the learned counsel for the appellant there is no dispute to the fact that he did not receive the draft Assessment Order, yet, he chose not to submit any

objections. And it is only when the final assessment order was passed on 10.01.2019 that the respondent/assessee filed an appeal before the CIT (Appeals). It is further contended that the reliance by the Tribunal to the judgement of the Hon'ble Supreme Court also was not proper, as the said judgement was rendered under an entirely different contextual background and the same was distinguishable on facts itself.

13. Having heard the contentions put forth on either side and on perusal of records, what is necessary to be taken note of at this juncture, is the requirement of law. The reference to dispute resolution panel is what is envisaged under Section 144-C of the Act. The relevant provision of Section 144-C is reproduced hereunder:

"144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,—

- (i) the Dispute Resolution Panel; and
- (ii) the Assessing Officer.

(3) 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).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) *The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.*

(9) *If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.*

(10) *Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.*

(11) *No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.*

(12) *No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.*

(13) *Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.*

(14) *The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.*

(15) *For the purposes of this section,—*

(a) *"Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;*

(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) *any foreign company.'*

A plain reading of sub-Sections 1, 2, 6, 8 and 13 of Section 144-C would clearly spell out the requirement of law. Admittedly in the instant case, in addition to the draft assessment order, there was also a notice of demand and penalty which was enclosed. A plain reading of sub-Section 8 of Section 144-C would further make it amply clear that the demand has to be raised only after the final assessment order is passed, more particularly, for the reason that the dispute resolution panel has got the power to confirm, reduce or enhance the variations proposed in the draft.

14. In the given context, if the draft assessment order is accompanied by a notice of demand and penalty that itself would force one to reach to the conclusion that though it is termed as draft assessment order, in fact, it is the final assessment order and the notice of demand and penalty was accompanying the same. To further weaken the case of the appellant, the operative part of the draft assessment order reads as under:

“The assessment is completed under section 143(3) r.w.s. 92CA of the Income-tax Act, 1961. Credit for prepaid taxes is given. Penalty proceedings u/s 271AA & 271BA are being initiated separately. A copy of the assessment order along with demand notice is issued to the assessee”.

A perusal of the aforesaid operative part of the so called draft assessment order would further establish that it was not a draft assessment order, but was a final assessment order after the assessment was concluded. The operative part also clearly mentioned about the raising notice of demand under Section 271-AA and Section 271-BA of the Act.

15. The High Court of Judicature at Andhra Pradesh in the case of ***M/s.Zuari Cement Ltd. vs. The Assistant Commissioner of Income Tax*** has held as under:

“As this has occurred after 01.10.2009, the cut off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly this has not been done and the respondent has passed a final assessment order dt.23.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void”.

The said judgement has also been affirmed by the Hon’ble Supreme Court of India vide its order dated 27.09.2013 in Special Leave to Appeal (Civil) C.C.No.16694 of 2013. Similarly, the Single Bench of the Madras High Court in the case of ***Vijay Television (P.) Ltd. v. Dispute Resolution***

Panel, Chennai¹ at paragraph Nos.20 and 21 held as

under:

“Under Section 144 (C) of the Act, it is evident that the assessing officer is required to pass only a draft assessment order on the basis of the recommendations made by the TPO after giving an opportunity to the assessee to file their objections and then the assessing officer shall pass a final order. According to the learned senior counsel for the petitioners, this procedure has not been followed by the second respondent inasmuch as a final order has been straightaway passed without passing a draft assessment order.

“As rightly pointed out by the learned senior counsel for the petitioners, in the order passed on 26.03.2013, the second respondent even raised a demand as also imposed penalty. Such demand has to be raised only after a final order has been passed determining the tax liability. The very fact that the taxable amount has been determined itself would show that it was passed as a final order. In fact, a notice for demand under Section 156 of the Act was issued pursuant to such order dated 26.03.2013 of the second respondent. Both the order dated 26.03.2013 and the notice for demand thereof have been served simultaneously on the petitioner. Therefore, not only the assessment is complete, but also a notice dated 28.03.2013 was issued thereon calling upon the petitioner to pay the tax amount as also penalty under Section 271 of the Act. Thereafter, the petitioner was given an opportunity of hearing on 12.04.2013. Subsequently, the second respondent realised the mistake in passing a final order instead of a draft assessment order which resulted in issuing a corrigendum on 15.04.2013. In the corrigendum it was only stated that the order passed on 26.03.2013 under Section 143C of the Act has to be read and treated as a draft assessment order as per Section 143C read with Section 93CA (4) read with Section 143 (3) of the Act. In an by the order dated 15.04.2013, the second respondent granted thirty days time to enable the assessee to file their objections. On receipt of the corrigendum dated 15.04.2013, the petitioner company approached the first respondent, but the first respondent declined to issue any direction to the assessment officer on the ground that the first respondent has got jurisdiction only to entertain such an appeal if the order passed by the second respondent is a pre-assessment order. Therefore, it is evident that the first respondent declined to entertain the objections raised by the petitioner company on the ground that the order passed by the

¹ [2014] 46 taxmann.com 100 (Madras)

second respondent is not a draft assessment order, rather it is a final order. Thus, the first respondent had treated the order dated 26.03.2013 of the second respondent as a final order and therefore refused to entertain the objections filed on behalf of the petitioner company”.

The said decision has been further affirmed by the Division Bench of the Madras High Court in the case of the **Assistant Commissioner of Income-tax, Media Circle-11, Chennai v. Vijay Television (P.) Ltd.**² wherein, the Division Bench at paragraph Nos.31 to 34 and 39 held as under:

“A perusal of the materials available in the typed set of documents reveal that the order dated 26.3.13 not only has finalised the assessment, but goes one step ahead by making a demand for tax, thereby implying that the assessment is final and not provisions. Adding insult to injury, penalty has also been imposed in the very same order. A notice of demand has also been made under Section 156 of the Act. Therefore, it is a conclusive order completing the assessment and making a consequential demand and by no stretch of imagination it can be construed as pre-assessment order.

It is further evident from the materials available on record that when the assessee approached the DRP against the above assessment order u/s 144-C (2), the DRP has categorically refused to entertain the appeal pointing out that no draft assessment order has been placed before it for taking up the matter. In essence, the DRP itself has confirmed that the order passed by the AO is a final order and not a draft assessment order.

Therefore, it is very clear that what has been issued is not a Draft Assessment Order, as contemplated u/s 144-C of the Income Tax Act, but a final order, as mandated u/s 143(3) of the Act. However, the contention now raised is that the mistake stood corrected by

² [2018] 95 taxmann.com 101 (Madras)

issuance of the corrigendum dated 15.4.2013 and, therefore, for all purposes the assessment order should be treated as final assessment order.

Will the corrigendum, which has been issued on 15.4.2013 cure the defect that has crept into the order and, thereby, rectify the mistake committed by the Revenue and enable treatment of the assessment order as a draft assessment order is the point, which requires the determination of this Court.

From the above it is unambiguously clear that the Assessing Officer is duty bound to adhere to the mandatory requirement mandated under Section 144-C of the Act by first passing a draft assessment order, the failure of which would invalidate the final assessment order and the consequent demand notices and penalty proceedings”.

16. Similar view has also been taken by the Division Bench of the High Court of Karnataka in the case of ***Commissioner of Income-tax (International Taxation) v. Cisco Systems Services B.V.***³ wherein at paragraph Nos.13 to 16 it was held as under:

“Undisputed facts of the case are, in the draft assessment order, the ACIT has ordered issuance of demand notice and to initiate penalty proceeding under Section 271(1)(c) of the Act. Both the draft assessment order and the demand notice are dated December 28, 2018.

Argument canvassed by the Revenue is, though demand notice has been issued, assessee had understood the order dated December 28, 2018 as a draft assessment order and filed its objections before the DRP. The defect if any is a curable one. On the other hand, Shri. Nageshwar Rao’s argument is that the ACIT had completed the assessment at the stage of passing the draft assessment order and issued the demand notice. Thus, the re-

³ [2023] 149 taxmann.com 486 (Karnataka)

assessment proceeding was complete. This procedure followed by ACIT is contrary to law laid down in Vijay Television (P.) Ltd. case (supra) and other authorities.

Section 144C lays down a detailed procedure. Under Section 144C(1), the AO is required to forward a draft of the proposed order of assessment to the assessee. Assessee may file its acceptance or objection before the DRP and the AO. If assessee intimates its acceptance or no objections are received within 30 days, the AO shall complete the assessment. Where the DRP receives any objection from the assessee, it shall issue necessary directions to the AO to enable him to complete the assessment after considering the documents/material mentioned in Section 144C (6)(a) to (g) which includes the draft order. Before issuing the directions, the DRP may also make such further enquiry by any Income-tax Authority.

Upon receipt of the directions from DRP under subsection 5, the AO shall, in conformity with the directions, complete the assessment within one month from the end of the month in which such direction is received. A notice of demand under section 156 may be issued after completion of the assessment under section 144C(13)”.

17. The Bombay High Court also in somewhat similar circumstances in the case of **SHL (India) Private Limited Vs. Deputy Commissioner of Income Tax** at paragraph Nos.25 and 26 held as under:

“In our view, the following principles emerge from the above discussion :-

- (i) that the procedure prescribed under Section 144C of the IT Act is a mandatory procedure and not directory*
- (ii) failure to follow the procedure under Section 144C(1) would be a jurisdictional error and not merely procedural error or irregularity.*
- (iii) Therefore, Section 292B of the IT Act cannot save an order passed in breach of the provisions of Section 144C(1), the same being an incurable illegality.*

It is important to note that Section 144C(1) is a non-obstante provision, which requires its compliance irrespective

of the other provisions that may be contained in the IT Act. There is no dispute that Petitioner is an eligible assessee and also there is no dispute as to the applicability of Section 144C. It is also not in dispute that the final Assessment Order has been passed without the draft Assessment Order as contemplated under Section 144C(1) of the IT Act. The Assessing Officer ought to have in the first instance forwarded a draft of the proposed order of assessment to Petitioner, as there was a proposed variation prejudicial to the interest of the assessee. This important step has been completely omitted by the Respondent taking away a very necessary right of Petitioner to file objections to the proposed variation with the DRP and the Assessing Officer, which in our view, strikes to the root of the procedure contemplated by Section 144C”.

18. Given the aforesaid legal position as it stands, as is required under Section 144-C of the Act and also taking note of the contents of the operative part of the so called assessment order, in the considered opinion of this Bench leads to the only conclusion of the order being a final assessment order, more particularly, when the authority concerned has also ordered and directed for initiation of penalty proceedings simultaneously along with the draft assessment order. Hence, this Bench has no hesitation in reaching to the conclusion that the findings arrived at by the Tribunal while allowing the appeal of the respondent/assessee was proper, legal and justified. That the present appeal thus being devoid of merits, deserves to

be and is accordingly, rejected. There shall be no order as to costs.

As a sequel, miscellaneous petitions, if any pending, shall stand closed.

P. SAM KOSHY, J

LAXMI NARAYANA ALISHETTY, J

Date : 11.09.2023

Note :

LR copy to be marked : YES

B/o.

GSD