

**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT**

(Through Video conferencing from E-Court at Ahmedabad)

[Coram: Pramod Kumar AM and Rajpal Yadav JM]

ITA No. 756/Rjt/2014
Assessment year: 2013-14

LR2 Management K/S

.....**Appellant**

[As foreign commercial manager / agent of
Principal freight beneficiary, Maersk Tankers
Singapore Pte. Ltd ('MTSPL')
Agent: Atlantic Shipping Pvt. Ltd.,
Plot No.12, Panchvati Colony,
Sikka-361 140
[PAN: AADFL 6763 E]

Vs

Income Tax Officer (International Taxation)
Rajkot, Gujarat

.....**Respondent**

ITA No. 276/Rjt/2015
Assessment year: 2013-14

LR2 Management K/S

.....**Appellant**

[As foreign commercial manager / agent of
Principal freight beneficiary, Maersk Tankers
Singapore Pte. Ltd ('MTSPL')
Agent: Interocean Shipping (I) Pvt. Ltd.,
301-Milestone, P.N. Marg,
Pachwati, Opp. Triveni Apartments,
Jamnagar-361 002
[PAN: AADFL 6763 E]

Vs

Income Tax Officer (International Taxation)
Rajkot, Gujarat

.....**Respondent**

ITA No. 91/Rjt/2016
Assessment year: 2014-15

Handytankers K/S

.....**Appellant**

[As foreign commercial manager / agent of
Principal freight beneficiary, Maersk Tankers A/S]
Agent: Atlantic Shipping Pvt. Ltd.,
Plot No.12, Panchvati Colony,
Sikka-361140
[PAN: AAQCS 7210 M]

Vs

Deputy Commissioner of Income-tax (International Taxation).....**Respondent**
Rajkot, Gujarat

Appearances by

Porus Kaka, Sr. Advocate, alongwith Manish Kanth, for the appellant
Jitender Kumar, for the respondent

Date of hearing of the appeal : 10.05.2018
Date of pronouncing this order: 09.08.2018

O R D E R

Per Pramod Kumar, AM:

1. One of the common grievances raised in all these appeals is that “the Income Tax Officer (International Taxation), Rajkot has erred in passing a final order under section 172(4) of the Income-tax Act, 1961 without first issuing a draft of the assessment order as is required under section 144C of the Income-tax Act, and, therefore, the assessment made is bad in law and merits to be quashed”.

2. Learned representatives fairly accept that this issue is covered in favour of the assessee, in the case of LR2 Management K/S Vs. Income Tax Officer [(2015) 63 taxmann.com 42 (Rajkot Trib.)], wherein we have observed as follows:-

“5. The fundamental question that we have to first consider is whether an order under section 172(4) can be said to be an 'assessment order' because the requirement of serving a draft order on the assessee is only in respect of an 'assessment order'. Section 144C(1) categorically states that the Assessing Officer is required to "forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee" and thus give an eligible assessee option of approaching the Dispute Resolution Panel before the final assessment order is passed. Unless, therefore, the impugned order passed under section 172(4) can be treated as an 'assessment order', the requirements of Section 144C cannot come into play.

6. This issue is no longer res integra. In the case of Emirates Shipping Line FZE v. Asstt.DIT [2012] 349 ITR 493/211 Taxman 82/23 taxmann.com 400 (Delhi), Hon'ble Delhi High Court had an occasion to adjudicate on the question whether an order passed under section 172(4) can be treated as an assessment order for the purposes of subjecting a completed assessment to reopening under section 147 of the Act. It was in this context that Their Lordships observed held that an order passed under section 172(4) is a summary assessment of income, though the assessee has an option to seek regular assessment of income under section 143(3), and that "it is difficult to accept the contention of the petitioner that the provisions of Section 147/148 cannot be invoked in the present case or in cases in where summary assessment is made under section 172(4) of the Act". It was also noted that "Section 147 does not refer to an assessment order under Section 143(1) or (3)" which is the same position so far as Section 144C is concerned. It was thus held that what is material is that section 172(4) assesses the income, even though it is a provisional assessment of income which can be followed by a, what is termed as "regular" assessment of income under section 143(3). As the Privy Council pointed out in the case of Seth Badridas Daga v. CIT [1949] 17 ITR 209, the word assess and assessment refer primarily to the computation of income. Therefore an order

computing the taxable income is essentially an assessment order. Whether it is a regular assessment or an ad hoc or summary assessment, it is an assessment nevertheless, and, therefore, any order passed under section 172(4) is also an assessment order. Once we hold so, it is not really necessary to adjudicate on learned counsel's argument that since the impugned order is passed qua an agent and qua an assessment year, rather than qua a vessel, it is de facto an assessment order under section 143(3). As we hold the impugned order to be an assessment order, it is also useful to take note of, as was taken by Hon'ble Delhi High Court in the case of Emirates Shipping Line FZE (supra), the decision of Hon'ble Supreme Court in the case of AS Glittre v. CIT [1997] 225 ITR 739/91 Taxman 286 wherein the following observations were made by Their Lordships of Hon'ble Supreme Court:

"6. The scheme of s. 172 of the Act appears to be this : s. 172(1) of the Act gives a right to the ITO to levy and recover tax in the case of any ship belonging to a non-resident, in a summary manner (ad hoc assessment) notwithstanding anything contained in the other provisions of the Act. It is an absolute right conferred on the assessing authority. The assessee has no right to object to the same. Normally, this will be assessment of the assessee for the year. But, under s. 172(7) of the Act a right is given to the assessee to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment according to the provisions of the Act, in a regular manner be made. Thus a right is given to the assessee to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made under s. 172(4) of the Act. It is a valuable right. If the assessee exercises the right conferred on him under s. 172(7) of the Act, the ITO is bound to make an assessment of the total income of the previous year of the assessee and the tax payable on the basis thereof "should be determined in accordance with the other provisions of the Act" and any payment made under the section (earlier) "shall be treated as a payment in advance of the tax" leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment, shall be paid by the assessee or refunded to him. The "ad hoc" assessment made under s. 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case, it is only proper and appropriate to hold that all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted."

7. In view of the above discussions, while it would indeed seem that an order passed under section 172(4) is required to be treated as an assessment order, there are issues with regard to the implementation of the corollaries to this conclusion. To appreciate these difficulties, we will have to take a look at the scheme of reference to Dispute Resolution Panel (DRP, in short) as set out in Section 144(1). For ready reference, this section is reproduced below:

'Reference to dispute resolution panel.

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 or section 153B, 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.*

Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

(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 or section 153B, 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 [Principal Commissioners or] 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.'*

8. *If the above provisions of reference to the DRP are to be applied in the context of orders passed under section 172(4), in terms of the provisions of Section 144(1), it is*

incumbent upon the Assessing Officer to first forward a draft assessment order under section 172(4) to the assessee, and it is only when the assessee does not raise any objection under section 144C(2)(b) or when the time limit for raising such objections expires, the Assessing Officer can go ahead to pass the final assessment order as proposed. While, in terms of the provisions of Section 144C(4) and 144C(15), the limitation period for passing the assessment orders gets suitably extended for this exercise so far as the assessment orders under sections 143, 144, 147, 148 and 153A etc. are concerned, there is no such enabling provision for extension of limitation period. This aspect of the matter becomes even more significant in case the assessee indeed opts for making a reference to the DRP because in such a case, in order to make the provisions workable, the limitation period for passing the assessment order has to suitably get extended for taking care of the period of time taken by the DRP in adjudicating upon the objections of the assessee and for the period of time taken by the Assessing Officer to give effect to such directions but then there is no provision in the statute for so extending the limitation period so far as the orders under section 172(4) are concerned. The time limit for passing order under section 172(4) is set out in section 172(4A) which provides that, "No order assessing the income and determining the sum of tax payable thereon shall be made under sub-section (4) after the expiry of nine months from the end of the financial year in which the return under sub-section (3) is furnished". While under section 144C(15), notwithstanding time limit set out in sections 153 and 153B, the order giving effect to the directions of the DRP can be passed within one month from the end of the month in which such directions are received, there is no statutory provision under which such time limit under section 172(4A) can be relaxed. When the DRP itself is allowed a period of nine months from the date on which the draft assessment order is served on the assessee, the entire time allowed to the Assessing Officer to pass order under section 172(4A) is nine months from the end of the financial year in which the vessel voyage return, i.e. return under section 172(3), is received by the Assessing Officer. When all these provisions of the statute are given literal interpretation, such a time limit, in the case of DRP reference being actually made by the assessee, is wholly unworkable. To give an example, if a vessel voyage return is received on 30th March of an year, the Assessing Officer will have just one day to furnish the draft assessment order under section 172(4) to the assessee, and not even a day to implement the directions of the DRP as issued under section 144C(8). The reason is this. In respect of voyage vessel returns received in the month of March of an year, under section 172(4A), the Assessing Officer has to necessarily pass the order within December of that year and unless he forwards the draft assessment order to the assessee within March itself, the DRP cannot be under a statutory obligation to issue directions on or before the end of December that year. Similarly, when a VVR is received at the closing of the working hours of the last working day of March of an year, no assessment can at all be done in the case of an eligible assessee. These results are clearly incongruous and patently absurd.

9. That takes us to the question as to what should the judicial authorities like this Tribunal to do when faced with such a situation. We find guidance from Hon'ble Supreme Court's judgment in the case of *CIT v. Hindustan Bulk Carriers* [2003] 259 ITR 449/126 Taxman 321, wherein it is observed that, "a construction which reduces the statute to a futility has to be avoided" and that "a statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in *maxim ut res magis valeat quam pereat* i.e., a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See *Broom's Legal Maxims* (10th Edition), p. 361, *Craies on Statutes* (7th Edition) p. 95 and *Maxwell on Statutes* (11th Edition) p.

221.J" Unless the relaxation on the period of limitation for passing the assessment orders is read as including the relaxation on the period of limitation for all the assessment orders, and the references to Section 153 and 153B as illustrative rather than exhaustive, the provisions of Section 144C cannot be treated as including all the cases of assessment orders, and not merely for assessment orders under sections 143(3) and 153A. The interpretation that relaxation in time limit for passing the assessment orders is only under sections 143(3) and 153A as the intention of Section 144C was only to cover the assessments under sections 143 and 153A will also be contrary to the scheme of the Act as evident from the Notes on Clauses to the Finance Bill 2009 which clearly indicated that the provisions of Section 144C were intended for the foreign companies in respect of matters relating to international taxation and transfer pricing, and not merely for the assessments under section 143(3) or 153A- which appears to be wholly irrelevant in this context. These notes on clauses, at page 63 of the document (<http://www.indiabudget.nic.in/ub2009-10/fb/bill10.pdf>), state as follows:

Clause 55 of the Bill seeks to insert a new section 144C in the Income-tax Act relating to Dispute Resolution Panel.

The subjects of transfer pricing audit and the taxation of foreign company are at nascent stage in India. Often the Assessing Officers and Transfer Pricing Officers tend to take a conservative view. The correction of such views takes very long time with the existing appellate structure. With a view to provide speedy disposal, it is proposed to amend the Income-tax Act so as to create an alternative dispute resolution mechanism within the income-tax department and accordingly, section 144C has been proposed to be inserted so as to provide inter alia the Dispute Resolution Panel as an alternative dispute resolution mechanism.

10. There is thus no meeting ground between implementing the law laid down by Hon'ble Courts above, which is also in harmony with the intent of the legislature as evident from the above extracts from 'Notes on Clauses', and the literal interpretation to the provision regarding relaxation to the time limits set out in Sections 153 and 153B. The choice that we now have is between interpreting the connotations of an assessment order as per the law laid down by Hon'ble Courts above, in furthering the scheme of the legislative amendment, in introducing section 144C, and thus reading the references to Section 153 and 153B, as appearing in Section 144C(4) and 144C(15), as illustrative rather than exhaustive, and between interpreting the connotations of an assessment order contrary to the law laid down by Hon'ble Courts above, in construing the scheme of Section 144C contrary to the scheme of the legislative amendment, in inserting section 144C, and, and in thus reading the references to Sections 153 and Section 153B, as appearing in Section 144C(4) and 144C(15), as exhaustive. In view of the above discussions, in our humble and limited understanding, the way forward is that while upholding the plea of the assessee in principle that the Assessing Officer ought to have first forwarded him a draft assessment order under section 172(4) before passing the impugned final assessment order under section 172(4), we also hold that the references to Sections 153 and 153B, appearing in Section 144C(4) and 144 C(15), as illustrative rather than exhaustive and in effect, thus, a reference to section 172(4A) is to be read into these provisions as well. We do feel that this kind of a litigation before judicial bodies, i.e. whether or not an assessee is eligible for approaching the DRP in respect of order under section 172(4), could be easily prevented by more thoughtfully drafting the relevant provision. Either it could be made clear, in the statute itself, that the option of DRP is only with reference to a specific type of assessment orders such as

under section 143(3) or 153A or the relaxation on time limit for passing the orders, which could be carried before the DRP, could be more general rather than confined to time limit for specific type of orders as in Section 153 or 153B. Of course, time limit under section 172(4A) being set out in Section 153 itself could also achieve that objective. It can never be too late for the tax administration to take a call in this respect and take a clear cut stand on the matter. Be that as it may, once we hold that an order under section 172(4) is also covered by the scheme of Section 144C, the next question which needs to be adjudicated by us is whether in a situation in which an eligible assessee has not been forwarded a draft assessment order, the assessment order will stand quashed or whether the matter will have to be remitted to the file of the Assessing Officer for taking the matter further in accordance with the scheme of Section 144C. Learned counsel's submission is that this aspect of the matter is also no longer *res integra* inasmuch as Hon'ble Madras High Court, following Hon'ble AP High Court's judgment in the case of *Zurai Cement Ltd. v. ACIT* (unreported judgment dated 21st February 2013 in WP No. 5557 of 2012) and in the case of *Vijay Television (P.) Ltd. v. DRP [2014] 369 ITR 113/225 Taxman 35/46 taxmann.com 100 (Mad.)* has held that such an order will be "null and void". It is also pointed out that a Delhi bench of this Tribunal, in the case of *Capsugel Healthcare Ltd. v. Asstt. CIT [2014] 50 taxmann.com 324/152 ITD 142 (Delhi-Trib.)* and vice versa also holds so. Learned Departmental Representative, on the other hand, submits that if, in the wisdom of the Tribunal, this matter is to be held to be covered by the scheme of Section 144C, the matter can best be remitted to the file of the Assessing Officer for following that path.

11. We have noted that in all the precedents cited by the learned counsel, the assessment orders in which arm's length price determination under section 92CA(3) was done, were subject matter of dispute. These are the cases in which there was no dispute with regard to the application to Section 144C and the only issue was as to what should be done in the cases in which the scheme of Section 144C, though admittedly applicable to the facts of the case, was not adhered to. The case before us, however, is qualitatively different inasmuch the very application of the scheme of Section 144C has been disputed on the facts of the case. Learned Departmental Representative's contention is that the provisions of Section 144C does not apply because an order under section 172(4) is not an assessment order at all. While we have not approved this line of reasoning, we cannot be oblivious to the fact that the Assessing Officer may have had a bona fide belief that the provisions of Section 144C will not apply to the orders under section 172(4). As a matter of fact, as we have noted earlier in this order, while the scheme of the Act does indicate that an order under section 172(4) is covered by the scheme of Section 144C, the provisions of Section 144C(4) and 144C(15) do not indicate corresponding references. There is, thus, clearly an element of wholly avoidable ambiguity in the phraseology employed in Section 144C, which is in sharp contrast with the fact situation being dealt with in the judicial precedents cited before us. The subject matter of dispute before us is not as to what is the consequence of not issuing a draft assessment order, when it was admittedly required to be issued on the facts of a case, but whether such a draft order was required to be issued in the first place. In such a situation and the relevant material facts being qualitatively different, in our considered view, it would meet the ends of justice that we hold that draft order was required to be issued in this case, and, for enabling the Assessing Officer for following the path envisaged in Section 144C rather than proceeding to pass the final order straightaway under section 172(4), remit the matter back to the file of the Assessing Officer. Any other view of the matter will also result in a situation that almost all the orders passed by the Assessing Officers under section 172(4) will end up being reduced to a nullity in the

eyes of law. As we hold so, we may add that, as a lower judicial forum, expressing a view contrary to the views of Hon'ble Courts above, is simply unthinkable in judicial conduct for us, and, going a step further, we are extremely reluctant even in taking any view which may even remotely be perceived to be at variance with the esteemed views of Hon'ble Courts above. However, in our limited but sincere understanding, the variations in material facts is on such fundamental aspects that a different approach was warranted on these facts inasmuch as the two category of situations, i.e. the situations in which provisions of Section 144C are admittedly applicable but the AO has not forwarded the draft order and the situations in which there is bona fide dispute about applicability of the provisions of Section 144 and, therefore, the AO has not forwarded the draft order, cannot be equated. We may add, at the cost of repetition, that the point of dispute being whether or not the course of action 144C was permissible, a decision in favour of the assessee is to be essentially followed with an opportunity being given to the assessee to be allowed to traverse that path."

3. Learned senior counsel for the assessee has, however, argued at length on merits of these cases as separate grounds of appeal on merits are also raised and submitted that the matter be decided on merits. Learned counsel for the assessee has raised certain fundamental legal and factual issues, particularly with respect to double non taxation and the scheme of the India Singapore DTAA, which have neither been examined at the stage of the authorities below nor learned Departmental Representative is in a position to offer much assistance on the same in the absence of discussions thereon by the authorities below.

4. In the light of the above discussions, bearing in mind entirety of the case and following the above observations of this Tribunal in the case of the LR2 Management K/S (supra), we deem it fit and proper to remit these matters to the file of the Assessing Officer for framing fresh assessment under section 172(4). The above observations made in LR2 Management K/S (supra) will apply mutatis mutandis in these cases as well, and while deciding the matter in remanded proceedings, the Assessing Officer will also take into account LR2 Management K/S (supra) decision, to the extent relevant, on merits. While we appreciate erudite arguments of the learned counsel, particularly with respect to double non taxation, we are of the considered view that our dealing with such foundational aspects directly at this stage will deprive this adjudication of the proper departmental perspective on the same. The assessee will, however, be at liberty to raise all these issues in the remanded proceedings. With these observations, the matter stands restored to the file of the Assessing Officer.

5. In the result, the appeals are allowed for statistical purposes. Pronounced in the open court today on the 9th day of August, 2018.

Sd/-

Sd/-

Rajpal Yadav
(Judicial Member)

Pramod Kumar
(Accountant Member)

Dated the 9th day of August, 2018

**Bt

Copies to:

<i>(1)</i>	<i>The appellant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>CIT</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>DR</i>	<i>(6)</i>	<i>Guard File</i>

By order

True Copy

*Assistant Registrar
Income Tax Appellate Tribunal
Rajkot bench, Rajkot*