

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.2599/PUN/2016

निर्धारण वर्ष / Assessment Year : 2009-10

The Assistant Commissioner of Income Tax,
Circle – 1, Aurangabad

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. East West Seeds Ltd.,
Gat No. 66, Village-Narayanpur (BK),
P.O.-Waluj, Tq.-Gangapur
Aurangabad – 431133

PAN : AANCE1237F

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / Date of Hearing : 12-11-2018

घोषणा की तारीख / Date of Pronouncement : 14-11-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-13, Pune dated 03-08-2016 for the assessment year 2009-10.

2. The brief facts of the case as emanating from records are : The assessee company entered into various international transactions during

the period relevant to the assessment year under appeal. Reference u/s. 92CA(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was made to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) in relation to the international transactions. The TPO vide order dated 15-01-2013 proposed adjustment of Rs.2,73,38,231/- in respect of international transactions. The Assessing Officer on 28-03-2013 passed final assessment order u/s. 143(3) r.w.s. 144C of the Act and also issued demand notice u/s. 156 and notice u/s. 271(1)(c) of the Act on the same date. The assessee filed appeal before the Commissioner of Income Tax (Appeals) on 25-04-2013 assailing the action of Assessing Officer in passing final assessment order dated 28-03-2013 without first passing draft assessment order. Thereafter, the Assessing Officer passed another assessment order dated 30-04-2013 u/s. 143(3) r.w.s. 144C of the Act, purported to be draft assessment order. The Commissioner of Income Tax (Appeals) following the decision of Hon'ble Bombay High Court in the case of International Air Transport Association Vs. DCIT reported as 241 Taxman 249 held that the final assessment order passed without passing the draft assessment order is without jurisdiction.

Against the findings of Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal by raising following grounds :

- "1. The Id. CIT (A) has erred both on facts and in law in not applying the mandatory provisions of section 144C(1) of the IT Act 1961 which specifically mandates the AO to pass draft assessment order **"in the first instance"** in which the AO by mistake appended the notice of demand u/s 156 and penalty notice u/s 274 r.w.s. 271(1)(c) which by itself cannot make the above draft assessment order a final order as erroneously held by CIT (A).*
- 2. Without prejudice to the above ground, the AO mentioned clearly in his order dated 07/02/2014, "draft assessment order" and by mistake appended notice of demand u/s 156 and penalty notice u/s 274 r.w.s. 271(1) (c) - which is a curable defect in view of the specific provisions of section 144C (1) and section 292B of the IT Act 1961, which clearly provides for curing of such defects, when in facts and substance the order is in conformity with the requirements of section 144C (1) of the IT Act 1961.*

3. *The Id. CIT(A) erred in not applying the principles of "approbate and reprobate" to the assessee who specifically understood the order of the AO dated 07/02/2014 u/s 144C (1) by specifically stating to his appeal to the DRP that it is as an appeal against the impugned draft assessment order.*
4. *The Id. CIT CA) erred both in facts and in law in not applying the principles of "estoppel by conduct" against the assessee by first treating the order of the AO as draft assessment order and then subsequently altering his decision to the detriment of revenue, in appeal when during the entire assessment proceedings he had attended and understood the same as "draft assessment order proceedings"*

3. Shri Nikhil Pathak appearing on behalf of the assessee submitted at the outset that the Assessing Officer in violation of the provisions of Section 144C(1) has passed the final assessment order dated 28-03-2013 without passing the draft assessment order. The Id. AR submitted that the Pune Bench of the Tribunal in the case of Dy. Commissioner of Income Tax Vs. M/s. Rehau Polymers Pvt. Ltd. in ITA No. 566/PUN/2015 for assessment year 2010-11 decided on 14-06-2017 has held that final assessment order passed by the Assessing Officer without passing the draft assessment order is bad in law. The Id. AR vehemently supported the order of Commissioner of Income Tax (Appeals) and prayed for dismissing the appeal of Revenue.

4. On the other hand Shri Sudhendu Das representing the Department submitted that the Assessing Officer has passed draft assessment order dated 30-04-2013 u/s. 143(3) r.w.s. 144C of the Act, therefore, earlier assessment order i.e. 28-03-2013 is not to be considered.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The solitary issue for adjudication before the Tribunal as emanating from the records is; Whether the Assessing Officer has erred in passing final assessment order

u/s. 143(3) r.w.s. 144C without passing draft assessment order in transfer pricing proceedings.

6. The TPO vide order dated 15-01-2013 passed order u/s. 92CA(3) of the Act and proposed addition of Rs.2,73,38,231/- in respect of international transactions entered into by the assessee. Thereafter, the Assessing Officer vide order dated 28-03-2013 passed the assessment order u/s. 143(3) r.w.s. 144C. Along with the order Assessing Officer also issued demand notice u/s. 156 and notice u/s. 271(1)(c) of the Act on the same date i.e. 28-03-2013. Issuance of notice along with the assessment order clearly suggests that the Assessing Officer had issued the final assessment order.

7. The provisions of section 144C(1) mandates that the Assessing Officer shall pass draft assessment order. The assessee within a period of 30 days of the receipt of the draft assessment order shall file his acceptance of variation or file his objections against the adjustments with the Dispute Resolution Panel (DRP). In the present case, the Assessing Officer has directly passed the final assessment order usurping assessee's valuable right to file objections before the DRP against the draft assessment order. The Hon'ble Bombay High Court in the case of International Air Transport Association Vs. DCIT (supra) has held that the final assessment order passed without draft assessment order is without jurisdiction.

The Hon'ble Bombay High Court in recent decisions Pr. Commissioner of Income Tax Vs. Andrew Telecommunications (P.) Ltd. reported as 96 taxmann.com 613 and Dimension Data Asia Pacific PTE Ltd. Vs. Dy. Commissioner of Income Tax reported as 257 Taxman 442 has

reiterated that final assessment order passed u/s. 144C(13) r.w.s. 143(3) without passing a draft assessment order u/s. 144C(1) deserves to be quashed being violative of Section 144C(1) of the Act.

8. Thus, in view of the settled legal position we do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in quashing the assessment order dated 28-03-2013 passed u/s. 143(3) r.w.s. 144C of the Act. Accordingly, the impugned order is upheld and the appeal of the Revenue is dismissed being devoid of any merit.

9. Before parting with the order we would like to mention that the Revenue in ground Nos. 2 and 3 of the appeal has referred to some 'draft assessment order' dated 07-02-2014. However, copy of the said order has neither been filed along with appeal nor it has been brought on record by the Department till date. There appears to be no such assessment order dated 07-02-2014 for assessment year 2009-10. Therefore, in our considered view ground Nos. 2 and 3 of the appeal are misconceived and are liable to be dismissed on this account as well.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced on Wednesday, the 14th day of November, 2018.

Sd/-	Sd/-
(अनिल चतुर्वेदी / Anil Chaturvedi)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 14th November, 2018

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-13, Pune
4. प्रधान आयकर आयुक्त / The Pr. CIT, Aurangabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune