

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

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

ITA No.39/PUN/2011
Assessment Year : 2003-04

ACIT, Circle- 1,
Aurangabad.

.....अपीलार्थी / Appellant

बनाम / V/s.

Skoda Auto India Pvt. Ltd.,
Plot No.A1/1, Shendra Five
Star Industrial Area,
MIDC, Aurangabad – 431201.

PAN : AAEC3749M

.....प्रत्यर्थी / Respondent

C.O. No.38/PUN/2011
(Arising out of ITA No.39/PUN/2011)
Assessment Year : 2003-04

Skoda Auto India Pvt. Ltd. (SAIPL),
A-1/1, Five Star Industrial Area,
MIDC, Shendra, Aurangabad.

PAN : AAEC3749M

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle- 1,
Aurangabad.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S. B. Prasad, CIT

सुनवाई की तारीख / Date of Hearing : 19.12.2018

घोषणा की तारीख / Date of Pronouncement : 31.12.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are cross-appeals under consideration. The assessee filed a
Cross Objection vide C.O. No.38/PUN/2011 for the assessment year

2003-04. In this regard, ld. Counsel raised additional Cross Objection and the same are extracted as under :-

“1] *The assessee company submits that on the facts and circumstances of the case and in law, the assessment order dated 29th December, 2009 issued by the learned Assessing Officer is bad in law and void ab initio as the same has been passed in violation of section 144C of the Income-tax Act, 1961.*

2] *The assessee company submits that the learned Assessing Officer erred in issuing the notice of demand notice u/s. 156 and penalty notice u/s. 274 r.w.s. 271(1)(c) along with the assessment order dated 29.12.2009 instead of draft assessment order and hence, since the procedure laid down in section 144C was not followed by the learned A.O., the assessment order passed be held invalid in law.*

3] *Without prejudice to the above additional grounds of cross objection, the assessee company submits that the adjustment on account of working capital ought to have been granted while computing the operating margins of the comparables.*

4] *Without prejudice to the above additional grounds of cross objection, the assessee company submits that in case, any addition is required to be made on account of transfer pricing, the same should be restricted international transactions entered into with the Associated Enterprises and not on entity level.*

The assessee company submits that the additional grounds of cross objection raised are legal in nature and as all the facts are on record, the assessee requests for admission of the above grounds.”

2. At the outset, ld. Counsel for the assessee submitted that the assessee raised a legal issue of the validity of the assessment in the Cross Objection. The adjudication of the said legal issue would decide the requirement of adjudication of the other grounds on merits raised in the appeals by both the assessee as well as the Revenue. The ld. DR finds merit in the said submission of the assessee. Accordingly, we proceed to decide the legal issue on merits raised by the assessee in the Cross Objection vide C.O. No.38/PUN/2011.

3. Additional grounds no.1 and 2 of the Cross Objection are relevant in this regard. The same relate to the validity of the assessment order since the procedure laid down u/s 144C of the Act *qua* the requirement of making the draft assessment order, was not followed by the assessing authority.

4. Brief facts on this legal issue include that the assessee filed the return of income declaring income of Rs.9.23 crores (rounded off). The TPO passed an order u/s 92CA(3) of the Act on 30.10.2009 and proposed the adjustments worth of Rs.207.35 crores (rounded off). The Assessing Officer passed the assessment incorporating the said adjustments on 28.03.2008 determined the total income at Rs.33.28 crores (rounded off). The matter reached to the Tribunal and the Tribunal, vide ITA No.202/PUN/2007, order dated 12.03.2009, set-aside the whole issue to the file of the Assessing Officer/TPO, copy of the said order is placed at pages 168 to 208 of the Paper Book. On the receipt of the order of the Tribunal, the matter was referred by the Assessing Officer to the TPO for second round of the TP proceedings/adjustment. In the second round, the TPO recommended the lesser amount of adjustment of Rs.16.89 crores (rounded off). Incorporating the said adjustment of Rs.16.89 crores (rounded off), the Assessing Officer **passed an assessment order dated 29.12.2009 and issued notice of demand u/s 156 of the Act along with the penalty notices.** On 26.02.2010, the First Appellate Authority passed an order of adjudication. Meanwhile, the Assessing Officer informed the assessee that the assessment order dated

29.12.2009 needs to be treated as draft assessment order only. However, the Assessing Officer failed to withdraw the original demand notices or penalty notices which were already issued by him. Eventually, the Assessing Officer passed a final assessment order on the same date i.e. on 26.02.2010 and did not bother to issue a fresh demand notice and penalty notice.

5. On these facts, ld. Counsel for the assessee submitted that the order passed by the Assessing Officer on 29.12.2009 constitutes a final assessment order as the same is accompanied by issue of demand notice and penalty notices. As per the law, issue of final assessment order with the demand notice and penalty notice shall follow the draft assessment order. The Assessing Officer attempted to make correction by issue of communication dated 26.02.2010. The procedure adopted by the Assessing Officer construes the violation of the procedure laid down in section 144C of the Act. According to the ld. Counsel for the assessee, the making of the final assessment order, without complying with the statutory provisions as required for making of a draft assessment order as per the procedure laid down in the said Section is invalid and unsustainable in law. Without going to the merits of the above, ld. Counsel for the assessee filed a written submission. However, ld. Counsel argued that the identical issue was decided by the Jurisdictional High Court in the case of the Pr.CIT vs. **M/s. Lionbridge Technologies Pvt. Ltd.** in Income Tax Appeal No.622 of 2016, order dated 03.12.2018. He also submitted that the Pune Bench of the Tribunal also decided the

same issue in favour of the assessee vide ITA No.2599/PUN/2016 in the case of ACIT vs. **M/s. East West Seeds Ltd.** for the assessment year 2009-10, order dated 14.11.2018.

6. On the other hand, ld. DR for the Revenue strongly defended the order of the Assessing Officer and the CIT(A).

7. We have heard both the parties on this legal issue and find there is no dispute about the facts of making the assessment order dated 29.12.2009 accompanied by the demand notices and the penalty notices. When the demand notice u/s 156 of the Act is issued and served on the assessee, the same constitutes an assessment order final in all respects. After the appeals were filed before the CIT(A), Aurangabad, the Assessing Officer made a mistake of undoing the same by making good of said mistake i.e. not making a draft assessment order in accordance with the provisions of section 144C of the Act. The attempts of making correction by issue of letters/notices, the Assessing Officer made a mistake of not withdrawing original demand notices and penalty notices. We also perused the written note along with discussed case laws furnished by the assessee in the Court. On finding the relevant of the same, we proceed to extract the said case laws as follows :-

- a. *International Air Transport Association vs. DCIT* [68 taxmann.com 246 (Bombay)].
- b. *Nokia India Pvt. Ltd. vs. Addl.CIT* [98 taxmann.com 373 (Delhi)].
- c. *ACIT vs. Vijay Television Pvt. Ltd.* [46 taxmann.com 100 (Madras)].
- d. *DCIT vs. Rehau Polymers Pvt. Ltd.* [85 taxmann.com 23(Pune)].
- e. *Sandvik Asia P. Ltd. vs. DCIT* [ITA No.465 & 607/PN/14].

- f. Walter Tools India Pvt. Ltd. vs. ACIT [ITA No.416/PN/14].*
- g. Suktas India Pvt. Ltd. vs. ACIT [77 taxmann.com 19].*
- h. JCB India Ltd. vs. DCIT [85 taxmann.com 155 (Delhi)].*

8. Thus, Assessing Officer made the assessment order and issued demand notice and penalty notices as if the same is the final assessment order. Normally, the draft assessment order is never issued along with demand notice and penalty notice. Assessing Officer wanted the assessee to treat the said order as draft assessment order. Demand notice and penalty notices are issued only at the time of issue of the assessment order. Thus, Assessing Officer violated the provision of section 144C of the Act. Further, in the process of making/correcting the lapses, Assessing Officer made another mistake of not withdrawing the said demand notice and penalty notices. Thus, the Assessing Officer made a mess of the statutory procedures and the same renders to the illegality of the order made by the Assessing Officer.

9. Considering the above, we are of the opinion the legal issue raised by the assessee in ground nos.1 and 2 of the Cross Objection are required to be allowed in favour of the assessee and adjudication of the other grounds i.e. without prejudice and other objection originally raised by the assessee in the Cross Objection become an academic exercise. Accordingly, the same are dismissed as academic.

10. In the result, the Cross Objection of the assessee is partly allowed.

ITA No.39/PUN/2011 - By the Revenue - A.Y. 2003-04

11. This appeal is filed by the Revenue against the order of CIT(A), Aurangabad dated 27.10.2010 for the Assessment Year 2003-04.

12. The grounds raised by the Revenue are as under :-

“1. The Hon’ble CIT(A) erred in considering General Motors as a comparable company for the purpose of determining companies comparable to that of the Assessee without taking into consideration that it is a consistent loss making company.

2. The Hon’ble CIT(A) erred in directing the A.O. to allow economic adjustment towards additional non-cenvatable duties paid by the Assessee vis-a-vis the comparable companies without considering that the business model followed by the assessee is consistently same over a period of time.

3. Without prejudice to the above, the Hon’ble CIT(A) erred in neither specifying the quantum of adjustment on account of additional non-cenvatable duties paid by the Assessee, which is to be allowed to the Assessee nor suggesting any methodology for determining such quantum of adjustment.

4. The Hon’ble CIT(A) erred in directing the A.O. to allow the adjustment on account of under utilization of capacity which is not in accordance with the provisions of the Rule 10B(1)(e)(iii) of the Income-tax Rules, 1962 as well as the decision of Hon’ble ITAT in case of Global Vantage Pvt. Ltd. (2010-TIOL-24-ITAT-DEL).

5. Without prejudice to the above, the Hon’ble CIT(A) erred in neither specifying the quantum of adjustment on account of under utilization of capacity, which is to be allowed to the Assessee nor suggesting any methodology for determining such quantum of adjustment.

6. The CIT(A) erred in not giving a decision and holding that no interference was called for since no conclusive findings were given by ITAT with respect to use of multiple year data even though the assessee was not able to show the product and business lifecycles in view of various decisions of the ITAT.”

13. In this case, the Revenue filed an appeal agitating against the relief granted by the CIT(A) on various issues.

14. After hearing both the sides on these grounds raised by the Revenue, we are of the opinion that adjudication of these issues become merely academic exercise in view of quashing of assessment made by the Assessing Officer vide the legal grounds raised by the assessee in C.O. No.38/PUN/2011. Accordingly, the grounds raised by the Revenue are dismissed as academic.

15. In the result, the Cross Objection filed by the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced on 31st day of December, 2018.

Sd/-	Sd/-
(विकास अवस्थी / VIKAS AWASTHY)	(डी. करुणाकरा राव/ D. KARUNAKARA RAO)
न्यायिक सदस्य/ JUDICIAL MEMBER	लेखा सदस्य/ ACCOUNTANT MEMBER
पुणे / Pune; दिनांक / Dated : 31 st December, 2018.	
Sujeet	

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), Aurangabad.
4. The CIT, Aurangabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

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