

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

आयकर अपील सं. / ITA No.2344/PUN/2012

निर्धारण वर्ष / Assessment Year : 2008-09

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

PAN : AAEC3749M

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle – 1, Aurangabad

.....प्रत्यर्थी / Respondent

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

सुनवाई की तारीख / Date of Hearing : 12-03-2019
घोषणा की तारीख / Date of Pronouncement : 03-06-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the assessment order dated 31-10-2012 passed u/s. 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2008-09.

2. The assessee in appeal apart from challenging the additions on merits has raised additional grounds assailing validity of Assessment Order (Draft Assessment Order) dated 28-12-2011. Since, the assessee has challenged the validity of Assessment Order itself, therefore, before advertng to the grounds challenging additions on merits it would be imperative to first adjudicate the legal grounds raised by the assessee. The additional grounds of appeal raised by the assessee are as under :

- 1] *The appellant company submits that on the facts and circumstances of the case and in law, the assessment order dated 28th December, 2011 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 appellant 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 28.12.2011 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 appeal, the appellant company submits that the adjustment on account of working capital ought to have been granted while computing the operating margins of the comparables.*

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

3. Shri Nikhil Pathak appearing on behalf of the assessee submitted that the assessee is engaged in the business of manufacturing and selling of Passenger Cars and trading in spare parts and accessories thereof. During the period relevant to assessment year under appeal, the assessee had entered into various international transactions with its Associated Enterprises (AEs). A reference was made to Transfer Pricing Officer (TPO) u/s. 92CA(1) of the Act to benchmark arm's length price (ALP) of international transactions entered into with AEs. The TPO vide order

dated 28-10-2011 made adjustment of Rs.89,09,33,936/- on international transactions with AEs. Thereafter, the Assessing Officer vide order dated 28-12-2011 made additions proposed by the TPO u/s. 92CA and also made additions on following counts :

- i. Supervision charges for construction of temporary parking space Rs.1,24,69,797/-.
- ii. SAP implementation charges Rs.1,56,45,757/-.

Along with the assessment order the Assessing Officer issued notice of demand u/s. 156 of the Act and notice u/s. 271(1)(c) of the Act for initiating penalty proceedings.

3.1 The ld. AR pointed that though in the title of order it is mentioned as 'Draft Assessment Order' but in fact it is final assessment order as the Assessing Officer had issued notice of demand u/s. 156 and notice of penalty u/s. 271(1)(c) along with the order. In effect the Assessing Officer passed the final assessment order without affording opportunity to the assessee to file objections before the DRP. Thus, the assessment order dated 28-12-2011 passed by the Assessing Officer is in violation of provisions of section 92CA of the Act.

3.2 The ld. AR further submitted that the assessee had filed objections before the DRP against the alleged Draft Assessment Order and the same were disposed of by the Dispute Resolution Panel (DRP) and thereafter the alleged final assessment order dated 30-10-2012 was passed but proceedings subsequent to the assessment order dated 28-12-2011 are vitiated after issuance of demand notice u/s. 156 and the notice of penalty u/s. 271(1)(c) of the Act. The ld. AR pointed that at no point of time the

notice u/s. 156 and notice u/s. 271(1)(c) of the Act issued by Assessing Officer were withdrawn. The ld. AR in support of his contentions placed reliance on the following decisions :

- i. Pr. CIT Vs. Lionbridge Technologies Pvt. Ltd. in Income Tax Appeal No. 622 of 2016 decided on 3rd December, 2018 (Bom.);
- ii. International Air Transport Association Vs. DCIT, 68 taxmann.com 246 (Bom.);
- iii. Vijay Television (P.) Ltd. Vs. Dispute Resolution Panel, 46 taxmann.com 100 (Mad.);
- iv. ACIT Vs. Skoda Auto India Pvt. Ltd. in ITA No. 39/PUN/2011 for assessment year 2003-04 decided on 31-12-2018;
- v. DCIT Vs. M/s. Rehau Polymers Pvt. Ltd. in ITA No. 566/PUN/2015 for assessment year 2010-11 decided on 14-06-2017;
- vi. Sektas India Pvt. Ltd. Vs. Asstt. CIT in ITA No. 206/PN/2015 for assessment year 2010-11 decided on 09-12-2016.

4. On the other hand Shri S.B. Prasad representing the Department vehemently defended the assessment order and prayed for dismissing the additional grounds raised by the assessee. The ld. DR submitted that due procedure has been followed by the authorities below in passing the final assessment order. The Assessing Officer after receiving the order from TPO u/s. 92CA(3) passed the Draft Assessment Order on 28-12-2011 u/s. 143(3) r.w.s. 144C of the Act. The assessee thereafter, filed objections before DRP. The objections of assessee were disposed of by DRP vide directions dated 30-07-2012. Thereafter, the final assessment order was passed by the Assessing Officer on 31-10-2012. Nowhere, in the proceedings before DRP or the Assessing Officer the assessee raised objections challenging the validity of Draft Assessment Order dated 28-12-

2011. The assessee throughout the proceedings before DRP and the Assessing Officer cooperated and participated till the final assessment order was made. The objection raised by the assessee by filing additional grounds is an afterthought.

5. We have heard the submissions made by rival sides and have perused the orders of authorities below. We have also considered various decisions on which the Id. AR of assessee has placed reliance to support his arguments. The contention of the assessee is that since the Assessing Officer has issued demand notice u/s. 156 and the notice for initiating penalty proceedings u/s. 271(1)(c) along with the Draft Assessment Order dated 28-12-2011, the Draft Assessment Order become the final assessment order. The failure of Assessing Officer to pass Draft Assessment order is in violation of provisions of section 144C(1) of the Act.

6. It is no more res integra that final assessment order passed without passing Draft Assessment order is unsustainable and the subsequent proceedings if any arising there from are vitiated. In the instant case, the facts are peculiar where the Draft Assessment Order has been passed and thereafter the assessee has filed objection before DRP. After the directions of DRP, final assessment order has also been passed. However, the Assessing Officer committed an error in issuing demand notice u/s. 156 and notice of penalty proceedings u/s. 271(1)(c) along with the Draft Assessment Order. The demand notice u/s. 156 and notice initiating penalty proceedings u/s. 271(1)(c) are issued only after passing of final assessment order. Since, the said notices were issued by the Assessing Officer along with the Draft Assessment Order, the said assessment order partake the character of final assessment order. The Assessing Officer at

no point of time after issuing notice u/s. 156 and u/s. 271(1)(c) has withdrawn the said notices. The failure of Assessing Officer to adhere mandatory requirement of section 144C in not first passing the Draft Assessment Order invalidates the final assessment order and subsequent the proceedings arising there from. In catena of judgments by Hon'ble High Courts it has been held that passing of final assessment order u/s. 144C(13) r.w.s. 143(3) without passing Draft Assessment Order u/s. 144C(1) is in violating of provisions of section 144C and hence, such final assessment order is unsustainable.

7. The Hon'ble Bombay High Court in the case of Pr. Commissioner of Income Tax Vs. Lionbridge Technologies Pvt. Ltd. (supra) has held :

“11 It must be noted that in respect of the procedure and determination of the ALP of International Transaction between related person, the law provides a special dispensation. In terms of Section 144C(I) of the Act, the Assessing Officer is to first pass a draft Assessment Order which is subject to challenge, by way of representation to the DRP. It is only after the DRP disposes of the representation, that the Assessing Officer passes a final order in terms of the directions of the DRP and such final order is appellable to the Tribunal. In this case, it is undisputed that on 12th March, 2014, the Assessing Officer passed a final Assessment Order in terms of the directions made by the DRP in the earlier round. The time to pass any such order, would expire in the present facts on 31 st March, 2014, however, in case a Draft Assessment Order is issued, then the time to pass a final Assessment Order gets extended to one month after the passing of the directions by the DRP in terms of Section 144C(13)of the Act. Nevertheless, the Draft Assessment Order should have in the present facts been passed before 31st March, 2014 in terms of Section 153A(2A) of the Act. In this case, undisputedly, a final order was passed on 12th March, 2014 and is being sought to be corrected by issue of corrigendum on 16th April, 2014 i.e. after the time to pass the Draft Assessment Order has expired. In fact, the Tribunal placed reliance upon the decision of a single judge of the Madras High Court in Vijay Television (P) Ltd., (supra). This, decision has now been upheld by the Division Bench of the Madras High Court in Assistant Commissioner of Income Tax v/s. Vijay Television (P) Ltd., 407 ITR 642. In the above case, non issue of Draft Assessment Order could not be corrected by issuing a corrigendum to a final Assessment Order. Just as in the facts before the Madras High Court, here also the demand notice and institution of pending proceedings were not withdrawn by the corrigendum. Besides, in International Air Transport Association v/s. Deputy Commissioner of Income Tax 68 taxmann.com 246 - this Court has held that the Draft Assessment

Order is necessary in terms of Section 144 C(1) of the Act before the Assessing Officer can proceed to pass a final Assessment Order. In the absence thereof, the order is without jurisdiction. So far the contention on behalf of the Revenue that the Respondent was estopped from challenging the corrigendum dated 16th April, 2004, as it was accepted by it and a representation also filed to the DRP. This submission overlooks the fact that there can be no estoppel on issue of law pertaining to jurisdiction. Therefore, if the corrigendum dated 16 th April, 2014 and the order dated 12th March, 2014 of the Assessing Officer is without jurisdiction, the same can be raised at any time and the principle of estoppel will not apply. Mere consent of parties does not bestow jurisdiction, if the order is beyond jurisdiction. Therefore, we do not find any substance in this objection of the Revenue. Besides, the finding of the Tribunal in the impugned order that the order of the Assessing Officer was beyond the scope of the remand by order dated 25 th January, 2012 of the Tribunal. This more particularly so as the remand by the Tribunal was occasioned on account of failure of the DRP to deal with the objections of the Respondent to the Draft Assessment Order. Therefore, making a reference again to the TPO for fixing the ALP, was not called for. Nothing has been pointed out to us which would even remotely suggest that the same is not correct.”

The Hon'ble High Court in an unambiguous term has held that where the assessment order has been passed without jurisdiction, the objection can be raised at any time and the principle of estoppels will not apply if the assessee has participated in the subsequent proceedings. Thus, the contentions of the Id. DR that the assessee has not raised the issue of validity of assessment order before DRP and Assessing Officer is without any merit.

8. We find that in assessee's own case for assessment year 2003-04 the Assessing Officer in similar set of facts had passed the assessment order and had issued notice of demand u/s. 156 of the Act along with the penalty notice. Thereafter, the Assessing Officer issued a letter that the assessment order needs to be treated as Draft Assessment Order. However, the Assessing Officer failed to withdraw the original demand notice and the penalty notice already issued. The assessee challenged the aforesaid final assessment order before Tribunal. The Tribunal held that

the final assessment order issued along with the notice of demand and penalty is illegal. For the sake of completeness the relevant extract of the decision of Co-ordinate Bench is reproduced here-in-below :

“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. Thus, in view of the facts and case laws discussed above, we do not find merit in the contention of ld. DR. The assessment order dated 28-11-2012 issued along with notice of demand u/s. 156 and notice of penalty u/s. 271(1)(c) is passed in violation of mandatory provisions of section 144C of the Act. Hence, the same is set aside. Since, the assessment

order dated 28-12-2011 is illegal and invalid, the proceedings arising there from are vitiated. The assessee succeeds on additional grounds of appeal. Since, the appeal of assessee has been allowed on the issue of jurisdiction, the grounds raised by the assessee on merits of additions have become academic and hence, not dealt upon. Accordingly, the impugned order is set aside and the appeal of assessee is allowed.

10. In the result, the appeal of assessee is allowed.

Order pronounced on Monday, the 03rd day of June, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 03rd June, 2019

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Dispute Resolution Panel-II, Mumbai
4. The DIT(IT)/CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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