

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.163/PUN/2013  
निर्धारण वर्ष / Assessment Year : 2008-09

Yazaki India Private Limited  
(Formerly known as Tata Yazaki  
AutoComp Limited),  
Gat No.93, Survey No.166,  
High Cliff Industrial Estate,  
Kesnand, Pune – 412 207  
PAN : AAAC5570F

ACIT,  
Circle-12, Pune

(Appellant)

(Respondent)

Appellant by

Shri Dhanesh Bafna,  
& Shri Pavan Dudhediya

Respondent by

Shri Sanjiv Shankar

Date of hearing

09-07-2019

Date of pronouncement

12-07-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order passed by the Assessing Officer (AO) u/s. 143(3) r.w.s.144C(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the Assessment year 2008-09.

2. The assessee has raised the following additional grounds :

“12. On the facts and in the circumstances of the case and in law, the learned Assessing Officer (Ld. AO) erred in passing the draft assessment order dated 27 December 2011 without following the mandate as laid down under section 144C of the Income-tax Act, 1961 (the Act).

The Appellant prays that the said draft assessment order be held as void-ab-initio, bad in law and illegal and consequently the entire assessment ought to be quashed.

13. On the facts and in the circumstances of the case and in law, the Ld. AO erred in issuing a notice of demand under section 156 and a notice under section 274 read with section 271(1)(c) of the Act along with the said draft assessment order, thereby not following the mandate as laid down under section 144C of the Act.

The Appellant prays that the said draft assessment order be held as void-ab-initio, bad in law and illegal and consequently the entire assessment ought to be quashed.”

3. Having gone through the subject matter of the additional grounds taken by the assessee, it is discernible that the same are legal grounds involving adjudication on questions of law. The Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* has observed that “the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-

taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item". Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee and the Tribunal has jurisdiction to examine the same. We find that the additional grounds raised before the Tribunal involve pure questions of law and no fresh investigation of facts is necessary for their determination. We are, therefore, admitting such additional grounds and espousing them for disposal on merits.

4. Briefly stated the facts of the case are that the assessee is engaged in manufacturing wiring harnesses, high tension cables, connectors, terminals and junctions and fuse boxes to serve passenger cars and commercial vehicles. The assessee filed its return declaring certain international transactions. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions. The Transfer Pricing Officer (TPO)

passed order u/s. 92CA(3) of the Act on 28-10-2011 proposing certain amount of transfer pricing adjustment. The AO passed an 'Assessment order' on 27-12-2011 u/s.143(3) r.w.s.144C(3) of the Act determining total income at Rs.17,81,56,751/- as against the Nil income declared by the assessee. The additions included transfer pricing addition of Rs.13.19 crore; disallowance u/s.40(a)(ia) amounting to Rs.1.04 crore; and disallowance u/s.40A(2)(a) at Rs.3.57 crore. Pursuant to such an order, a demand notice was issued. In addition, the AO also issued show cause notice u/s.274 for imposition of penalty u/s.271(1)(c) of the Act on all the issues on which the additions were made. The assessee raised objections before the DRP with reference to the additions in the said order dated 27.12.2011, which were disposed off. Pursuant to the directions given by the DRP on 05-09-2012, the AO passed 'Assessment order' on 29-11-2012 u/s.143(3) r.w.s. 144C(13) of the Act determining total income at Rs.24.15 crore, against which the instant appeal has been filed before the Tribunal.

5. The contention of the assessee is that the impugned assessment order should be set aside because the statutorily prescribed procedure was not followed in as much as the AO

issued final assessment order in place of draft assessment order followed by issuing notice of demand and also initiating penalty proceedings u/s.271(1)(c) of the Act. This has been countered by the Id. DR who submitted that albeit the AO inadvertently described it as an `Assessment order`, but in essence it was a draft order, which was also treated by the assessee as such - filing objections before the DRP. He further submitted that although the notice of demand was issued pursuant to such a draft order, but the same was never enforced and further though penalty proceedings were initiated through this draft order, but no penalty order was actually passed. He still further submitted that if the assessee was aggrieved by the nomenclature of draft order, then it should not have agitated the matter before the DRP or should have challenged it by means of a writ petition, which it did not. Crux of his argument was that a draft order was simply wrongly described as an `Assessment order`, which did not prejudice the assessee in any manner.

6. We have heard both the sides and gone through the relevant material on record. Section 144C of the Act has caption "Reference to Dispute Resolution Panel". Sub-section (1) of section 144C provides that: "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.' Sub-section (2) of section 144C states that the assessee shall either file his acceptance to the AO on the variations proposed in the draft order or file his objections, if any, with the DRP. In case, the assessee accepts the variation in the draft order, then sub-section (3) states that: 'The Assessing Officer shall complete the assessment on the basis of the draft order'. In case, the assessee objects to the draft order, it can, *inter alia*, raise concerns with the DRP which shall issue directions under sub-section (5) of section 144C. Upon receipt of the directions from the DRP, the AO shall complete the assessment under sub-section (13) in conformity with the directions given by the DRP.

7. An overview of section 144C of the Act deciphers that a draft order passed under sub-section (1) is only a tentative order which does not fasten any tax liability on the assessee. In case variations to the income in the draft order are accepted by the assessee, the

AO completes assessment under section 144C(3) on the basis of draft order and the matter ends. In case the assessee objects to the variations in the income as proposed in the draft order and approaches the DRP, the final assessment order is passed by the AO u/s.144C(13) after considering the directions given by the DRP under sub-section (5). So, it is only on the finalization of the variation in the income as per the draft order, to the extent specified in the provision, that the AO is obliged to pass an assessment order, either under sub-section (3) or (13) of section 144C of the Act, determining the tax liability, pursuant to which a notice of demand is issued. Thus it follows that if the assessee raises objection before the DRP, it is only on the passing of the order under section 144C(13) that the assessment is treated as finalized on which notice of demand can be issued. It is overt from the above discussion that the statute has prescribed a particular procedure to be followed in case some variation is made in the returned income of an eligible assessee defined u/s 144C(15) of the Act.

8. The Hon'ble Madras High Court in *Vijay Television (P) Ltd. Vs. DRP (2014) 369 ITR 113 (Mad.)* was confronted with a situation in which the AO, pursuant to the order of the TPO, passed

a final assessment order instead of a draft order. A question arose as to whether the order so passed could be treated as a valid order. Accepting the contention of the assessee, the Hon'ble High Court set aside the order passed by the AO by observing that: "where there was omission on the part of the AO to follow the mandatory procedures prescribed in the Act, such omission cannot be termed as a mere procedural irregularity and it cannot be cured". Thus the assessment order was quashed. Almost similar issue came up for consideration before the Hon'ble jurisdictional High Court in *Pr. CIT Vs. Lionbridge Technologies Pvt. Lt. (2019) 260 taxmann 273 (Bom.)* in which the Tribunal in the first round restored the matter to the AO on the ground that the DRP failed to deal with the assessee's objections. During such remand proceedings, reference was made to the TPO. On receipt of the TPO's order, the AO straightaway passed an order u/s.143(3) r.w.s. 144C(13). On realizing the mistake, the AO issued a corrigendum to such an assessment with a view to treat it as a draft assessment order and not a final assessment order. Matter finally travelled to the Hon'ble High Court. Deciding the issue in favour of the assessee, the Hon'ble High Court held that the corrigendum was without jurisdiction. A principle which follows from the above decisions

and several other decisions on the same line is that the statutorily mandated procedure must be followed by the authorities. In case there is a default in following such a procedure, the assessment is vitiated. The same cannot be cured even by remanding matter to the concerned authority.

9. Adverting to the facts of the instant case, it is found as an admitted position that the AO, on receipt of an order from the TPO, did not pass any draft order u/s 144C(1) of the Act. He directly proceeded to pass an 'Assessment order' u/s. 144C(3) of the Act on 27.12.2011 determining the total income at Rs.17.82 crore. Not only that, he also issued demand notice on the same date, namely, 27-12-2011, a copy of which has been placed at page 1 of the paper book determining the amount payable by the assessee at Rs.8,77,37,516/-.

10. We have seen the scheme of section 144C of the Act above and noticed that an order u/s 144C(3) is passed after the draft order is passed u/s 144C(1) and further when the assessee either intimates to the Assessing Officer the acceptance of the variation; or no objections are received within the stipulated period. An order passed u/s 144C(3) is a final assessment order. Reverting to

the facts, we find that the AO passed an `Assessment order' u/s 144C(3) of the Act on 27.12.2011. This could have been only on the assessee accepting the variation. As against that, it is seen that no variations were intimated to the assessee through a draft order. The AO not only passed such "assessment order" but also directed to "issue show cause notice u/s.274 r.w.s. 271(1)(c) of the I.T. Act, on all the issues on which the additions have been made". It, therefore, transpires that on receipt of an order from the TPO, the AO simply proceeded to pass the final assessment order u/s.144C(3) of the Act. The fact that in the covering letter to the assessee, the AO described it as a `draft order' is of no consequence, when, in fact, *ex facie*, the order was passed as a final assessment order u/s 144C(3) followed by a notice of demand as well. It is only when the assessee filed objections against such an `assessment order' before the DRP, that the AO realized his mistake and went on to pass another `Assessment order' on 29.11.2012, this time u/s 144C(13) of the Act. Consequently, it is palpable that the AO kept on passing one final assessment order [u/s 144C(3)] after another final assessment order [u/s 144C(13)]. On going through the entire exercise of assessment, it can be seen that so many statutorily mandated procedural lapses have occurred

at the end of the AO, which have the effect of vitiating the impugned assessment order.

11. The ld. DR tried to distinguish the decision in the case of *Vijay Television (supra)* by arguing that firstly, it was a decision in a writ petition and hence does not have a binding effect in other cases and secondly, no draft order was passed in that case. In our considered opinion these contentions are sans merit. Even if a decision is rendered in a writ petition, it does not cease to be operative in other cases to the extent of *ratio decidendi* laid down therein. The next distinction drawn by the ld. DR was that the decision to quash the final assessment order came in the absence of the AO passing a draft order, which was not a case in the extant appeal. We have noted above that no draft order u/s 144C(1) of the Act was passed in the instant case also. Moreover, in our considered opinion, the real issue is whether the statutorily laid down procedure was followed or not. Any lapse in such a procedure, as is instantly the case, cannot save the final assessment order. The further reliance of the ld. DR on the judgment of the Hon'ble Delhi High Court in the case of *BSC C & C Joint venture vs. JCIT (W.P. (C) 7623/2017 & CM 31533/2017) dated 5.2.2018* is of no avail. That is case based on the concession of the assessee

before the Hon'ble High Court, in which the petitioner agreed that the order dated 3.8.2017 may be treated as a draft assessment order; the demand notice etc. sent along with the assessment order may be accordingly treated as withdrawn; the procedure u/s 144C may be applied and followed inasmuch as the assessee would either file its acceptance to the variation within 30 days or raise objections. What is relevant to note is that the decision in this case, which is based on a concession of the petitioner, cannot be construed as having laid down any *ratio* by the Hon'ble High Court so as to have a binding effect. It is further relevant to note that it was also decision on a writ petition filed by the assessee

12. There is another interesting aspect of the matter. Pursuant to the 'Assessment order' passed by the AO on 29-11-2012 determining total income at Rs.24.15 crore, the assessee took up the matter with the competent authorities under Mutual Agreement Procedure (MAP) in respect of the transfer pricing adjustment flowing from transactions with Yazaki Corporation, Japan (YCJ), its Associated Enterprise (AE), under Article 25 of the DTAA between India and Japan. An application was moved not only for the year under consideration but also the succeeding assessment year. The competent authorities of both the countries have

resolved the issue concerning international transactions of the assessee with YCJ. A copy of such a Resolution dated 10-09-2015 has been placed on record. It states the amount of total transfer pricing adjustment as per the rectification order dated 21-03-2013 at Rs.16.43 crore, having transfer pricing adjustment relating to YCJ at Rs.9,85,89,000/- and the remaining amount of Rs.6,57,81,925/- on account of transactions with non-YCJ AEs. As per the Resolution, the amount of transfer pricing adjustment corresponding to transactions with YCJ has been reduced to Rs.5,78,23,800/-, thereby giving relief of Rs. 4.07 crore and odd. Such a Resolution has been admittedly accepted by the assessee.

13. Now we need to see the effect of MAP proceedings *vis-à-vis* the quashing of the assessment order on the legal issue as discussed hereinabove. Normally, if an assessment order is quashed, all the additions made in the order stand deleted and the returned income becomes the finally determined total income. However, position is little different, when the assessee has accepted a MAP resolution as per which some amount of addition has been held to be sustainable, which has been accepted by the assessee.

14. Section 295 of the Act empowers the CBDT to make rules for the purposes of the Act. Sub-section (2) lists certain matters in respect of which the Board may provide for rules. Clause (h) of section 295(2) empowers the Board to make rules providing for: 'the procedure for giving effect to the terms of any agreement for the granting of relief in respect of double taxation or for the avoidance of double taxation which may be entered into by the Central Government under this Act.' Pursuant to the prescription of section 295(2)(h), rules have been framed under part IX-C of Income-tax Rules, 1962 covering rules 44G, 44GA and 44H. Instantly, we are concerned with rule 44H. Sub-rule (4) of rule 44H states that the effect of Resolution arrived at under the mutual agreement procedure (MAP) shall be given by the AO within the stipulated period, if the assessee gives his acceptance to the resolution taken under mutual agreement procedure; and withdraws his appeal, if any, pending on the issue which was the subject matter for adjudication under mutual agreement procedure. Crux of rule 44H(4) is that when a Resolution has been made on an issue under the MAP proceedings, which the assessee has accepted, the same attains finality. The assessee, as a pre-condition, has to necessarily withdraw its appeal to the extent of the subject matter for

adjudication under the MAP. On going through the mandate of Rule 44H(4), it becomes patent that where the assessee has accepted the Resolution of dispute under MAP; given acceptance to the Resolution; and has taken action for withdrawing of his appeal pending on the issue which was subject matter of adjudication before the MAP, such a Resolution binds the assessee. In such a situation, the Resolution accepted by the assessee under the MAP has the effect of substituting the originally returned income with the further additional income as accepted under the Resolution. Having accepted the MAP order, the assessee cannot agitate such an issue in the appellate proceedings. In the extant case, the assessee admittedly accepted the Resolution under the MAP. Once the assessee has accepted such a Resolution as per which the amount of transfer pricing adjustment, corresponding to transactions with YCJ, has been restricted to Rs.5,78,23,800/-, the assessee now cannot resile from such Resolution and is bound by the same. The Id. AR fairly admitted that the Resolution has been accepted by the assessee. In that view of the matter, the amount of transfer pricing addition sustained under the MAP proceedings at Rs.5,78,23,800/- will be considered as a part of total income returned by the assessee, which cannot be assailed in any appellate

proceedings. However, all other remaining additions, including the balance of transfer pricing addition in respect of transactions with non-YCJ AEs would stand deleted because of the illegality occurring due to not following the statutorily prescribed procedure u/s 144C of the Act. We, therefore, overturn the impugned order on this legal issue itself but direct to adopt total income at Rs.5,78,23,800/-, being, the amount of Nil income originally returned as added by the amount of transfer pricing adjustment accepted by the assessee under MAP.

15. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 12<sup>th</sup> July, 2019.

Sd/-  
**(PARTHA SARATHI CHAUDHURY)**  
**JUDICIAL MEMBER**

Sd/-  
**(R.S.SYAL)**  
**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 12<sup>th</sup> July, 2019  
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे  
“सी” / DR ‘C’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	09-07-2019	Sr.PS
2.	Draft placed before author	11-07-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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