

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

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.518/Coch/2019 : Asst.Year 2014-2015

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| The Asst.Commissioner of Income-tax, Circle-1 Kollam. | Vs. | M/s.Olam Agro India Private Limited Bishop Jerome Nagar Kollam – 691 001. PAN : AABCH6830P. |
| (Appellant) | | (Respondent) |

Appellant by : Sri.Mritunjaya Sharma, Sr.DR

Respondent by : Smt.Surabhi Agarwal &
Sri.Uday Agarwal, CAs

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| Date of Hearing : 13.01.2020 | Date of Pronouncement : 14.01.2020 |
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ORDER

Per George George K, JM :

This appeal at the instance of the Revenue is directed against CIT(A)'s order dated 11.07.2019. The relevant assessment year is 2014-2015.

2. The ground raised reads as follow:-

“The learned CIT(A), has erred in partly allowing the appeal filed by the assessee stating that there has been procedural violation in terms of provisions of Section 144C by the AO and therefore Transfer Pricing adjustment made by the TPO cannot be acted upon. Even though a draft assessment order was not served on the assessee by the assessing officer, assessee was given enough opportunities to represent its case and was well informed about the upward adjustments proposed by the TPO. The TPO before finalizing order u/s 92CA(3) of the Income tax Act has issued the assessee a show cause notice dated 14.09.2017 proposing to make adjustment and the assessee has filed its objections vide submission dated 04.10.2017. This fact is mentioned in the order of the TPO dated 30.10.2017. The assessing officer has also given opportunity to the assessee and the assessee was also informed about the Transfer Pricing adjustments proposed to be made in the assessment. The matter regarding objection filed by the assessee vide its letter dated 29.11.2017, has also found a mention in the assessment order. As opportunity has been given by the TPO by putting across the assessee the adjustments to be

made by the AO, for which the assessee also replied and after considering the assessee's reply only, the TPO has finalized the order. Hence there is no procedural lapse. For this and other grounds that may be advanced at the time of hearing the order of the Commissioner of Income tax (Appeals)-II, Kochi may be set aside and the order of the Assessing Officer may be restored."

3. The brief facts of the case are as follow:

The assessee is a company engaged in trading and processing of agricultural commodities. For the assessment year 2014-2015, the return of income was filed on 28.11.2014 declaring total income of Rs.`Nil'. The assessment was taken up for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of scrutiny assessment since the assessee had entered into an international transaction as defined in section 92B of the I.T.Act with its Associated Enterprises, the matter was referred to the Transfer Pricing Officer (TPO). The TPO vide its order dated 30.10.2017 u/s 92CA(3) of the I.T.Act, proposed transfer pricing adjustment of Rs.7,32,83,827. The Assessing Officer passed the order u/s 143(3) of the I.T.Act (order dated 30.12.2017) incorporating the proposed transfer pricing adjustment made by the TPO.

4. Aggrieved by the assessment order, the assessee filed an appeal to the first appellate authority. Before the first appellate authority it was contended that the assessee was not issued draft assessment order. Therefore, it was submitted that the assessee was denied an opportunity to approach the Dispute Resolution Panel (DRP). It was stated that this procedural irregularity would render the assessment order dated 30.12.2017, null and void. The CIT(A) placing reliance on his predecessor's order for assessment year 2013-

2014 in assessee's own case held that the procedural infirmity in not issuing the draft assessment order would render the assessment as null and void. The relevant finding of the CIT(A) reads as follow:-

“5.3. I have gone through the assessment order and the order passed by the TPO u/s. 92CA(3) of the I. T. Act. Either in the assessment order or in the TPO's order, it is not mentioned that the draft order has been prepared and given to the appellant. The appellant has contended that he was not served with a draft assessment order and, therefore, he has been denied the opportunity of approaching the DRP. The appellant contended that in the case of an order u/s.92CA by a TPO, it is a statutory requirement and mandatory to serve upon the assessee a Draft Assessment Order. Any failure in doing so, shall render the assessment so made as null and void. Decision by various High Courts also endorse this view and many such decisions have been relied upon by the appellant in its submission, reproduced earlier.”

5. The Revenue being aggrieved by the above order of the CIT(A), has filed this appeal before the Tribunal. The learned Departmental Representative relied on the ground raised. The learned AR, on the other hand, had filed a brief written submission reiterating the submissions made before the Income-tax authorities.

6. We have heard the rival submissions and perused the material on record. Section 144C of the I.T.Act provides that notwithstanding anything to the contrary contained in the Act, the A.O. is required to forward a draft of the proposed order of assessment to the “eligible assessee” if the A.O. proposes any variation in the returned income which is prejudicial to the interest of such assessee. The term “eligible assessee” has been defined to mean a person in whose case addition in the assessment order is made as a result of adjustment proposed by the TPO in the order passed u/s 92CA(3) of the I.T.Act. In the instant case, the Assessing

Officer in the assessment order has made additions on account of adjustment proposed by the TPO in the order passed u/s 92CA(3) of the I.T.Act. Thus, the assessee clearly fall within the meaning of "eligible assessee" as per section 144C of the I.T.Act. Therefore, going by the provisions of section 144C of the I.T.Act, the Assessing Officer is required to issue draft assessment order. Whereas, the Assessing Officer in this case has passed the assessment order and issued notice of demand u/s 156 without sending a draft assessment order to the assessee with regard to the adjustment proposed. Therefore, the Assessing Officer has not followed the mandatory provisions of section 144 of the I.T.Act. Irregularity in passing the assessment order by the Assessing Officer is incurable as mandated as per the provisions of the Act and the same was held so by the following judicial pronouncements:-

- (i) ACIT v. Apollo Tyres Ltd. ITA No.247, 302, 339, 268 and 336/Coch/2018 (order dated 21st March, 2019).

In the above case, the ITAT Cochin Bench of the Tribunal has decided the issue in favour of the assessee holding that when the final assessment order is passed without passing the draft assessment order, it is illegal and without jurisdiction. The Tribunal has held as under:-

"In view of the above decisions, the facts of the present case being similar to that considered by the various Courts and Supreme Court, we hold that when the final assessment order is passed without passing the draft assessment order, it is illegal and without jurisdiction. Accordingly, we quash the assessment orders for both the assessment years."

The Tribunal had placed reliance on the following case laws, while deciding the issue in favour of the assessee :-

- (a) JCB India Ltd. v. DCIT (2017) 398 ITR 189 (Delhi High Court)

(b) Addl.CIT v. Nokia India (P) Ltd. (259 Taxman 81 (SC)
(c) ACIT v. Vijay Television (P) Ltd. (2018) 95 taxmann.com
101 (Madras High Court)

- (ii) JCB India Ltd. v. DCIT (2017) 398 ITR 189 (Delhi High Court)

The Hon'ble Court has held that the impugned final assessment order dated 30th March, 2016 passed by the AO for AYs 2006-07, 2007-08 and 2008-09 are without jurisdiction on account of the failure, by the AO, to first pass a draft assessment order and thereafter, subject to the objections filed before the DRP and the orders of the DRP, to pass the final assessment order. The Court also sets aside the orders of the TPO dated 30th March, 2016 issued pursuant to the remand by the ITAT.

- (iii) Nokia India Private Limited v. Addl.CIT (WP © No.3629/2017 dated 07.09.2017.

The issue involved in this case is that the impugned final order of the AO has been passed in violation of Section 144C of the Act in as much as it was not preceded by a draft assessment order as was mandatory in terms of Section 144C(1) of the Act.

The Hon'ble Delhi High Court has followed the decision given in JCB India (supra) and has held the order to be without jurisdiction.

The Hon'ble Supreme Court has dismissed the Special Leave Petition filed by the Department vide SLP (C) No.7302 of 2018.

- (iv) ACIT v. Vijay Television (p.) Ltd (2018) 95 taxmann.com 101 (Madras High Court)

The Hon'ble High Court has held as under-

"It is unambiguously clear that the Assessing Officer is duty bound to adhere to the mandatory requirement mandated under section 144C(1) by first passing a draft assessment order, the failure of which would invalidate the final assessment order and the consequent demand notices and penalty proceedings. [Para 39]"

- (v) Turner International India (p.) Ltd. v. DCIT (2017) 398 ITR 177 (Delhi High Court)

"The Hon'ble Court has held that "failure by the AO to adhere to the mandatory requirement of Section 144C (1) of the Act

and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings."

- (vi) CIT v. C-Sam (India) (p.) Ltd (2017) 398 ITR 182 (Gujarat High Court)

The High Court dismissed the appeal observing as under-

"The statutory provisions of section 144C make it abundantly clear that the procedure laid down under section 144C is of great importance and is mandatory. Before the Assessing Officer can make variations in the returned income of an eligible assessee, as noted, sub-section (1) of section 144C lays down the procedure to be followed notwithstanding anything to the contrary contained in the Act. This non obstante clause thus gives an overriding effect to the procedure 'notwithstanding anything to the contrary contained in the Act'. Sub-section (5) of section 144C empowers the DRP to issue directions to the Assessing Officer to enable him to complete the assessment. Sub-section (10) of section 144C makes such directions binding on the Assessing Officer. As per sub-section (13) of section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee."

- (vii) In the case of M/s.Zuari Cements Ltd. v. ACIT in WP No.5557/2012 also, the Hon'ble Supreme Court has dismissed the SLP filed by the Department against the judgment of the Hon'ble Andhra Pradesh High Court. The High Court in the said case vide judgment dated 21.02.2013 held that the order passed is contrary to the mandatory provisions of section 144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable.

The Hon'ble Supreme Court has dismissed the Special Leave Petition on 27th September, 2013 filed by Department vide (C) [CC No.16694/2013].

6.1 In view of the above said reasoning and judicial pronouncements cited supra, the Revenue's appeal is rejected.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 14th day of January, 2020.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 14th January, 2020.
Devadas G*

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-II, Kochi
4. The Pr.CIT, Kochi .
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin