

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

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.559/Hyd/2017
निर्धारण वर्ष / Assessment Year : 2011-12

Vanderlande Industries B.V.,
C/o VIPL, 702, Level 7,
Pentagon Tower P4, Magarpatta City,
Hadapsar, Pune – 411028

PAN : AACCV3931C

.....अपीलार्थी / Appellant

बनाम / V/s.

Asst. Director of Income Tax,
(International Taxation) – II,
Hyderabad

.....प्रत्यर्थी / Respondent

Assessee by : S/Shri Aliasger Rampurawala,
Pratik Shah & Nachiket Barve
Revenue by : Smt. Usha Gaikwad

सुनवाई की तारीख / Date of Hearing : 19-02-2020

घोषणा की तारीख / Date of Pronouncement : 21-02-2020

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

This appeal by the assessee against the order dated 30-09-2016 passed by the Commissioner of Income Tax (Appeals)-10, Hyderabad [‘CIT(A)'] for assessment year 2011-12.

2. The ld. AR, Shri Aliasger Rampurawala submits that the assessee filed additional grounds of appeal vide an application dated 19-08-2019 and argued the said additional grounds are legal grounds praying to declare that the AO erred in passing draft assessment order without following the mandate as laid down u/s. 144C of the Act and consequentially to quash the final assessment order. He submits that no new facts are required to be examined and prayed to admit the additional ground Nos. 5 and 6. Upon hearing both the parties, we find that the issue is covered by the order of this Tribunal and we admit the additional ground Nos. 5 and 6 for adjudication. Therefore, we proceed to hear the additional grounds as preliminary issue.

3. The brief facts emanating from the record for the purpose of above said preliminary issue are that the assessee is a non-resident company having incorporated in Netherlands in 1966. The said company established its project office in India during F.Y. 2006-07 and registered as a foreign company under the provisions of Companies Act, 1956. The assessee filed its original return of income on 30-11-2011 and thereafter a revised return of income claiming refund of Rs.75,77,750/- which is the same identical amount claimed in the original return of income.

4. Under scrutiny assessment proceedings notice u/s. 143(2) of the Act was issued and in response to which the assessee claimed to have explained and furnished information and details called for by the AO. A draft assessment order dated 21-03-2014 passed by the AO u/s. 143(3) r.w.s. 144C of the Act proposing an addition of Rs.3,08,71,018/- and issued demand notice u/s. 156 of the Act and penalty notice u/s. 274 r.w.s. 271(1)(c) of the Act. The contention of ld. AR is that this was done without giving any directions to file acceptance of variation or file

objections to variation with the Dispute Resolution Panel (DRP) and referred to Annexure 2 for draft assessment order, demand notice and notice for initiating penalty proceedings. The contention of ld. AR is that the AO completed the assessment proceedings by confirming proposed additions in the draft assessment order vide its final assessment order dated 28-04-2014 u/s. 143(3) r.w.s. 144C(3) of the Act without following the mandate laid down u/s. 144C of the Act, the final assessment order lacked validity and is to be quashed.

5. The ld. AR submits that the issue is squarely covered by the decision of this Tribunal and placed on record compilation of orders at page Nos. 1 to 113. On perusal of the order dated 29-08-2019 of this Tribunal in the case of DCIT Vs. Atlas Copco (India) Limited in ITA No. 649/PUN/2013 and ITA No. 1726/PUN/2014 for A.Ys. 2008-09 and 2009-10 wherein this Tribunal held the final assessment order becomes null and void if the notice of demand is issued on the basis of draft assessment order.

6. The facts of the case therein was the assessee filed return of income declaring Rs.1,44,59,01,250/- and AO passed draft assessment order dated 29-12-2011 u/s. 143(3) r.w.s. 144C(1) of the Act determining the total income at Rs.1,56,72,76,785/- and issued demand notice along with penalty notice both dated 29-12-2011. Thereafter the AO passed final assessment order on 27-02-2012 for which the Tribunal held the final assessment order lacked validity and quashed the same. The Tribunal by placing reliance on the decision of Hon'ble Supreme Court in the case of Kalyan Kumar Ray reported in 191 ITR 634 (SC) which held that assessment order involves determination of income and tax as well and the assessment is an integrated process involving not only the assessment of the total income but also the determination of the tax. Further, the

Tribunal placed reliance on the decision of Hon'ble High Court of Madras in the case of Vijay Television (P) Ltd. reported in 369 ITR 113 (Mad) wherein the Hon'ble High Court was pleased to set aside the order passed by the AO by observing 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.

7. In the present case, the AO proposed a total addition of Rs.3,08,71,018/- vide its draft assessment order dated 21-03-2014 and issued demand notice dated 26-03-2014 u/s. 156 of the Act along with penalty notice u/s. 274 r.w.s. 271(1)(c) of the Act dated 26-03-2014. It is clear that the AO determined the liability of tax without on the basis of draft assessment order and admittedly there was no final assessment order passed as on the date of issuance of demand notice dated 26-03-2014. Therefore, as held by the Hon'ble Supreme Court in the case of Kalyan Kumar Ray (supra) the assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax, it means to say that the draft assessment order is necessarily followed by on final assessment order. In our opinion once a notice of demand is issued, the AO becomes functus officio in so far as the completion of assessment is concerned, therefore, in the present case, the final assessment order dated 28-04-2014 lacked validity and it is liable to be quashed.

8. Coming to the decision of Hon'ble High Court of Madras in the case of Vijay Television (P) Ltd. (supra), the Hon'ble High Court was pleased to hold where there was omission on the part of the AO to follow the mandatory procedure prescribed in the Act, such omission cannot be termed as a mere procedural irregularity and it cannot be cured. In the

present case, it appears that on the basis of TP study report rendered by the TPO, the AO proposed an addition of Rs.3,08,71,018/- vide its draft assessment order and issued demand and penalty notices before passing of final assessment order. The contention of the ld. AR, that was without any directions to file acceptance variation or file objections to variations with the Dispute Resolution Panel. We find force in the arguments of ld. AR is the AO issued demand notice and penalty notice under the Act without following the due procedure contemplated u/s. 144C of the Act, if that is the case, let us examine the provisions contemplated u/s. 144C of the Act.

9. The marginal head note of provisions of section 144C reads as reference to Dispute Resolution Panel. Sub-section (1) of section 144C provides the AO shall in the first instance, forward a draft of the proposed order of assessment to the eligible assessee for any variation prejudicial to the interest of such assessee.

10. Sub-section (2) of section 144C explains that on receipt of the draft order, the eligible assessee shall, within thirty days of the receipt of the draft order shall file acceptance of the variation to the AO or file its objections, if any, to such variation with the Dispute Resolution Panel and the AO.

11. Sub-section (3) of section 144C reads the AO shall complete the assessment, if the assessee acceptance of the variation or no objections are received within the period specified in sub-section (2).

12. Sub-section (4) of section 144C explains that the AO shall complete assessment within one month from the end of the month in which the

acceptance is received or the period of filing of objections under sub-section (2) expires.

13. It is clear that the AO did not await for specified thirty days for receiving intimation from assessee for acceptance of variation or for no objections and issued demand notice u/s. 156 of the Act. It is also on record the final assessment order passed after the issuance of notice u/s. 156 and 274 r.w.s. 271(1)(c) of the Act. As rightly contended by the ld. AR that without following the procedure as contemplated u/s. 144C of the Act the AO issued demand notice and penalty notice. Thereby, in our opinion, the final assessment order 28-04-2014 passed u/s. 143(3) r.w.s. 144C(3) of the Act lacked validity and it is liable to be quashed.

14. Smt. Usha Gaikwad, the ld. DR submits that it was a routine mistake by the AO. The assessee had participated in the proceedings and the provision u/s. 292BB is applicable. Nowhere in the provision u/s. 144C mentioned that the assessee has to approach DRP. The assessee itself approached CIT(A) admitting the fact that it is not approaching to DRP.

15. This Tribunal in the case of Atlas Copco (India) Limited (supra) held a detailed discussion in respect of provisions u/s. 144C of the Act, the decisions of Hon'ble Supreme Court in the case of Kalyan Kumar Ray (supra) and Hon'ble High Court of Madras in the case of Vijay Television (P) Ltd. (supra) and held that the final assessment order is null and void for the reason the AO issued notice of demand at stage of draft assessment order which actually ought to have been done at the stage of passing the final assessment order. Therefore, in our opinion, the facts and circumstances in the case of Atlas Copco (India) Limited (supra) and the

findings thereon by the Tribunal is applicable to the facts and circumstances in the present case and resulting to, the final assessment order dated 28-04-2014 passed u/s. 143(3) r.w.s. 144C(3) of the Act is set aside. Thus, additional ground Nos. 5 and 6 raised by the assessee are allowed.

16. In view of our decision in allowing additional ground Nos. 5 and 6 in favour of the assessee, the grounds of appeal raised by the assessee becomes academic and requiring no adjudication.

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

Order pronounced in the open court on 21st February, 2020.

Sd/-
(R.S. Syal)
VICE PRESIDENT

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21st February, 2020.

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-10, Hyderabad
4. The CIT (IT& TP), Hyderabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.
//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

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