

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.2285/Bang/2019 : Asst.Year 2007-2008

The Dy.Commissioner of Income-tax, Circle 7(1)(1) Bangalore.	v.	M/s.Tally Solutions Pvt.Ltd. No.331-336, Raheja Arcade Koramangala Bangalore – 560 095. PAN : AAACP7879D.
(Appellant)		(Respondent)

Appellant by : Smt.R.Premi, JCIT-DR

Respondent by : Smt.Tanamayee Rajkumar, Advocate

Date of Hearing : 08.12.2020	Date of Pronouncement : 08.12.2020
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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 23.08.2019. The relevant assessment year is 2007-2008.

2. The grounds raised read as follow:-

"1. The Order of the CIT(A) is opposed to the Law and facts of the case.

2. The learned CIT(A) erred in holding that the assessment order made u/s 143(3) r.w.s. 254 of the Act is invalid by relying on the decision of the Hon'ble High Court of Delhi in the case of M/s.JCB India Ltd., without appreciating the fact that the SLP filed by the Revenue vide appeal No.SLPC-26331/2018 against the said order of the Hon'ble High Court of Delhi, is pending for disposal and the issue has not reached finality.

3. The learned CIT(A) erred in holding that the assessment order made u/s 143(3) r.w.s. 254 of the Act is invalid by relying on the Hon'ble Supreme Court in the case of Control Risk India Pvt. Ltd., since the said decision of the Apex Court cannot be taken to have laid down any principle of law as only the SLP has been dismissed in that case.

4. In the facts and circumstances of the case, the learned CIT(A) erred in not considering the fact that as per Sec.144C(1)

of the Act the Assessing Officer is mandated to forward draft of the proposed order of assessment only in the "first instance" to the assessee whereas the "first instance" draft assessment order was already served on the assessee, and the present assessment order is in consequence to the directions given by the ITAT, and hence is not the "first instance".

5. *The Appellant craves leave to add, to alter or to delete any of the grounds that may be urged at the time of hearing of the appeal."*

3. Brief facts of the case are as follow:

The assessee is a company engaged in providing software development services to its AE. For the assessment year 2007-2008, the return of income was filed on 30.10.2007 declaring loss of Rs.3,98,49,431. The assessment was completed vide order dated 28.10.2011 u/s 143(3) r.w.s. 144C(1) of the I.T.Act, wherein the Transfer Pricing Adjustment u/s 92CA of the I.T.Act of Rs.4,60,42,886 was incorporated. The Dispute Resolution Panel (DRP) confirmed the TP adjustment. On appeal, the ITAT in IT(TP)A No.1364/Bang/2011 (order dated 19.08.2016) set aside the issue of adjustment u/s 92CA of the I.T.Act to the files of the AO / TPO with a direction to re-do the exercise of determination of Arms Length Price (ALP). The TPO thereafter gave opportunity to the assessee-company for hearing and passed fresh orders u/s 92CA r.w.s. 254 of the I.T.Act on 31.10.2017 by making TP adjustment of Rs.2,39,33,030. The A.O. passed final assessment order u/s 143(3) r.w.s. 92CA(3) & 254 of the I.T.Act, without passing a draft assessment order.

4. Aggrieved by final assessment order passed by the Assessing Officer, the assessee preferred an appeal to the first appellate authority. The assessee challenged the issues both

on merits and on technical grounds. It was submitted that the Assessing Officer erred in passing an order u/s 143(3) r.w.s. 254 of the I.t.Act without passing a draft assessment order, thereby not complying with the provisions of section 144C of the I.T.Act. The CIT(A), by relying various judicial pronouncements, held that the assessment order passed by the A.O. u/s 143(3) r.w.s. 254 of the I.T.Act on 29.12.2017, without first passing a draft assessment order, is invalid and quashed the same. Accordingly, the appeal of the assessee was allowed.

5. Aggrieved by the order of the CIT(A), the Revenue has filed this appeal before the Tribunal. The learned Departmental Representative relied on the grounds. The learned AR submitted that the legal issue raised is squarely covered in favour of the assessee by the various judicial pronouncements relied on by the CIT(A) in his impugned order.

6. We have heard the rival submissions and perused the material on record. Admittedly, in this case, subsequent to the ITAT's remand for re-determination of the ALP, the A.O. had merely incorporated the TP adjustment made by the TPO without passing a draft assessment order. The Hon'ble Delhi High Court in the case of *Turner International India Pvt. Ltd. v. DCIT [(2017) 398 ITR 177 (Delhi)]* was considering a case, wherein the ITAT had set aside to the AO / TPO for redetermination of ALP and the AO in the said case had not passed a draft assessment order. In such circumstances, the Hon'ble Delhi High Court had held that final assessment order passed by the Assessing Officer without a draft assessment

order is to be quashed. The relevant finding of the Hon'ble Delhi High Court reads as follow:-

“The short ground on which the aforementioned final assessment orders and the consequent demand notices have been challenged is that there was non-compliance with the mandatory provision contained in section 144C(1) of the Act requiring the Assessing Officer to first frame draft assessment orders.

The question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirements of first passing draft assessment order in terms of section 144C(1) of the Act is no longer res integra. There is a long series of decisions to which reference would be made presently.

In Zuari Cement Ltd. v. Asst.CIT (decision dated February 21, 2013 in W.P. (C) No.5557 of 2012), the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under section 144C(1) of the Act would result in rendering the final assessment order “without jurisdiction, null and void and unenforceable”. In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was affirmed by the Supreme Court by the dismissal of the Revenue’s SLP (C) (CC No.16694 of 2013) on September 27, 2013.

In Vijay Television P. Ltd. v. DRP [2014] 369 ITR 133 (Mad), a similar question arose. There, the Revenue sought to rectify a mistake by issuing a corrigendum after the final assessment order was passed. Consequently, not only the final assessment order but also the corrigendum issued thereafter was challenged. Following the decision of the Andhra Pradesh High Court in Zuari Cement Ltd. v. Asst.CIT (supra) and a number of other decisions, the Madras High Court in Vijay Television P. Ltd. v. DRP (supra) quashed the final order of the Assessing Officer and the demand notice. Interestingly, even as regards the corrigendum issued, the Madras High Court held that it was beyond the time permissible for issuance of such corrigendum and, therefore, it could not be sustained in law.

Recently, this court in ESPN Star Sports Mauritius S.N.C. ET Compagnie v. Union of India [2016] 388 ITR 383 (Delhi), following the decision of the Andhra Pradesh High Court in Zuari Cement Ltd. v. Asst.CIT (supra), the Madras High Court in Vijay Television P. Ltd. v. DRP (supra) as well as the Bombay High Court in International Air Transport Association v. Deputy

CIT [2016] 7 ITR-OL 227 (Bom); [2016] 290 CTR (Bom) 46, came to the same conclusion.

Mr.Dileep Shivpuri, learned counsel for the Revenue sought to contend that the failure to adhere to the mandatory requirement of issuing a draft assessment order under section 144C(1) of the Act would, at best, be a curable defect. According to him the matter must be restored to the Assessing Officer to pass a draft assessment order and for the petitioner, thereafter, to pursue the matter before the Dispute Resolution Panel.

The court is unable to accept the above submission. The legal position as explained in the above decisions is unambiguous. The failure by the Assessing Officer 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 notice and penalty proceedings.

For the aforementioned reasons, the final assessment orders dated March 31, 2015 passed by the Assessing Officer for the assessment years 2007-08 and 2008-09, the consequential demand notices issued by the Assessing Officer and the initiation of penalty proceedings are hereby set aside.”

6.2 Further, the Hon’ble Supreme Court in the case of DCIT v. Control Risks India (P.) Ltd. reported in 107 taxmann.com 83, had held that when TPO proposes additions to assessee’s ALP, the AO is duty bound to pass a draft assessment order. It was held by the Hon’ble Supreme Court that the final assessment order which is passed without a draft assessment order depriving the assessee an opportunity of questioning the draft assessment order before the DRP is in contravention of the provisions of section 144C of the I.T.Act. The relevant finding of the Hon’ble Supreme Court reads as follow:-

“7. That consequent upon an order of the TPO under Section 92CA(3) of the Act, it is incumbent upon the AO to pass a draft assessment order under Section 144C of the Act, is the settled legal position as explained by the Court in its decision in Turner International India (P.) Ltd. v. Dy.CIT [2017] 82 taxmann.com 125/398 ITR 177 (Delhi). In the present case, clearly the AO

overlooked the above legal position and proceeded to pass a final assessment order, thereby depriving the Assessee of an opportunity of questioning the draft assessment order under Section 144C of the Act before the DRP.”

6.3 Similar view has been held by the Hon'ble Delhi High Court in the case of *JCB India Ltd. v. DCIT & Anr. [(2017) 398 ITR 189 (Delhi)]* and *Control Risk India Pvt. Ltd. 107 taxmann.com 83*. In view of the above judicial pronouncements, we hold that the CIT(A) is justified in quashing the assessment order u/s 143(3) r.w.s. 254 dated 29.12.2017. It is ordered accordingly.

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

Order pronounced on this 08th day of December, 2020.

Sd/-
(B.R.Baskaran)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 08th December, 2020.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-7, Bangalore
4. The Pr.CIT-7, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore