

आयकर अपीलीय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Hon’ble Shri A. T. Varkey, JM & Hon’ble Shri Manish Borad, AM]

I.T.A. No. 416/Kol/2020
Assessment Year: 2014-15

Mohan Jute Bags Mfg. Co. (PAN: AAFFM3412R)	Vs.	Principal Commissioner of Income-tax-12, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	08.09.2021
Date of Pronouncement	15.09.2021
For the Appellant	Shri Akkal Dudhwewala, FCA
For the Respondent	Shri Tushar Dhawal Singh, CIT, DR

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. PCIT-12, Kolkata dated 17.03.2020 passed u/s 263 of Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) for Assessment year 2014-15.

2. At the outset, the Ld. AR Shri Akkal Dudhwewela assails the jurisdiction of the Ld. Pr. CIT-12, Kolkata to have invoked the revisional jurisdiction u/s. 263 of the Act. According to the Ld. AR, the order of the AO dated 25.09.2017 has been interdicted by the Ld. Pr. CIT is itself non-est in the eyes of law, therefore, the impugned order of the Ld. Pr. CIT is null in the eyes of law.

3. The brief facts of the case in respect of the jurisdictional issue is that the assessee had filed its return of income for AY 2014-15 on 29.09.2014 declaring taxable income of Rs.7,17,070/-. The AO noticing that the case was selected for scrutiny under CASS issued statutory notices, to commence the scrutiny assessment. The AO noticed that as the total transaction of the assessee with the related party exceeded Rs. 5 crores, and it attracted the provisions of Transfer Pricing, he referred the same to the Transfer Pricing Officer (*hereinafter referred to as ‘TPO’*) after getting approval of the Ld. Pr. CIT-12,

Kolkata dated 27.12.2016. Thereafter, the AO noted that pursuant to the reference the TPO passed the order u/s. 92 CA(3) of the Act on 31.07.2017 determining Arms Length Pricing Adjustment (*hereinafter referred to as 'ALP'*) at Rs.8,92,829/-; and thereafter he computed the total income by passing the assessment order u/s 143(3) of the Act dated 25.09.2017 at Rs.16,09,900/-. According to the assessee, he preferred an appeal before the Ld. CIT(A) which was dismissed ex parte. Thereafter, the assessee preferred an appeal before the Tribunal; and the Tribunal vide order dated 30.04.2019 in ITA No. 2169/Kol/2018 restored the appeal back to the file of the Ld. CIT(A) for fresh adjudication of the appeal. When the subject matter of the Transfer Pricing Adjustment was pending before the Ld. CIT(A) pursuant to the order of the Tribunal dated 30.04.2019, in between the Ld. Pr. CIT has issued Show Cause Notice (*hereinafter referred to as 'SCN'*) dated 30.11.2018 to the assessee conveying his desire to exercise his power u/s 263 of the Act to intervene in the order passed by the AO dated 25.09.2017. Pursuant to the SCN, the assessee objected to the exercise of revisional jurisdiction by pointing out that the *subject matter* of the issue regarding transfer pricing has already been agitated by the assessee before the appellate forum; and the *Lis pendens* matter cannot be interfered with. However, the Ld. Pr. CIT did not agree. According to him, the assessee has not raised before the Ld. CIT(A) the legal issue of failure on the part of AO to frame draft assessment order and, therefore, according to him, he can interfere and he was pleased to set aside the order of the AO dated 25.09.2017 and directed the AO to make assessment de novo after properly complying with the provisions of section 144C of the Act. Aggrieved, the assessee is in appeal before us.

4. We have heard rival submissions and gone through the material available on record. We note that the assessee's return of income was taken up for scrutiny proceedings and the AO had referred to the TPO the domestic transfer pricing issue. Pursuant to the reference made to the TPO, the TPO passed the order u/s. 92CA(3) of the Act dated 31.07.2017 determining ALP at Rs.8,92,829/-. Thereafter, the AO had issued the original assessment order u/s. 143(3) of the Act dated 25.09.2017 which according to the assessee, is *non est* in the eyes of law, since as per law the AO was bound to issue draft assessment order and

thereby *inter-alia* give an opportunity to assessee to avail to go before the Dispute Resolution Panel (*hereinafter referred to as* DRP). Thus by not framing the draft assessment order, after receipt of TPO order, the AO has acted arbitrarily without scant regard to the mandatory procedure to be followed as per section 144C of the Act and thereby vitiating the assessment order dated 25.09.2017.

5. The issue arising in the present appeal before us is whether such an assessment order passed by the Assessing Officer is void being passed without jurisdiction? So in such an event, whether the Ld. PCIT can interfere by exercising his jurisdiction u/s 263 of the Act by holding that such assessment order is erroneous as well as prejudicial to the interest of revenue, which would pave way for him to exercise the revisional jurisdiction u/s 263 of the Act. The Ld. PCIT on the examination of the record noted that the assessment order passed by the Assessing Officer was framed without issuing draft order of the proposed addition to the assessee as is required under section 144C of the Act, and had passed an order under section 143(3) of the Act making addition of Rs. 8,92,829/-. The said order passed by the Assessing Officer, as per the Ld. PCIT was not in conformity with law and was held to be erroneous and prejudicial to the interest of revenue and accordingly, show cause notice was issued under section 263 of the Act asking the assessee to explain as to why the said order passed by the Assessing Officer under section 143(3) of the Act should not be revised or set-aside under section 263 of the Act. The contention of the assessee before us is that the omission on the part of the Assessing Officer not to comply with the provisions of section 144C(2) of the Act by not framing the draft assessment order and by not providing the statutory prescribed time to the assessee to exercise the discretion to file objections before the DRP, makes the assessment order passed by the Assessing Officer to be without jurisdiction and so void.

6. Under the provisions of section 144C of the Act, it is provided that where the Assessing Officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned, which is prejudicial to the interest of assessee, then the Assessing Officer shall in the first instance forward the draft of the proposed order of assessment to the eligible assessee. Under sub-section (2) of section 144C of the Act on receipt of the draft order, the eligible assessee shall within 30 days of the receipt, file his acceptance of the

variation to the Assessing Officer or file his objections, if any, to such variation with the DRP and the Assessing Officer. Under sub-section (3) of section 144C of the Act, the Assessing Officer shall complete the assessment on the basis of draft order if the assessee intimates to the Assessing Officer the acceptance of the variation or no objections are received within period specified in sub-section (2) of section 144C of the Act. Thereafter, the Assessing Officer is empowered to pass the assessment order within one month from the end of month, in which the acceptance is received or the period of filing objections under sub-section (2) of section 144C of the Act expires. Under sub-section (5) of section 144C of the Act, it is provided that the Dispute Resolution Panel shall in case where objection is received under sub-section (2) issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. Upon receipt of the said directions, the Assessing Officer shall in conformity with the same, complete the assessment without providing any further opportunity of being hearing to the assessee within one month from the end of the month in which such direction is received, notwithstanding anything to the contrary contained in section 153 or 153B of the Act, as per sub-section (13) to section 144C of the Act. In view of the aforesaid provisions of section 144C of the Act it can be seen that where the TPO proposes any variation in the income or loss returned by the assessee, which is prejudicial to the interest of assessee, the Assessing Officer shall in the first instance forward the draft of the proposed assessment order to the assessee and thereafter, if no objections are received and/or the assessee files his acceptance to the variation to the Assessing Officer, then the Assessing Officer is empowered to complete the assessment within one month from the end of the month thereof. In case, the assessee files his objection before the DRP and where the said Panel issues directions as it thinks fit, then the Assessing Officer on receipt of such directions shall complete the assessment in conformity with such directions. In view of the said provisions of the Act, we note that the compliance to section 144C of the Act is mandatory in all such cases, where the TPO proposes variation in the income or loss returned, which is prejudicial to the interests of assessee. Only after complying with the conditions laid down in section 144C of the Act, the Assessing Officer is empowered to pass the assessment order under section 143(3) r.w.s. 144C of the Act by completing the assessment on such enhanced income or variation in the loss returned by the assessee.

7. In the case of Vijay Television vs. DRP [2014] 225 Taxman 35 (Mad), it was held in para 12 that non-passing of draft assessment order after adjustment made by the TPO renders proceedings null & void by observing as under:-

“Under Section 144C(1) of the Act, with effect from 1st October 2009, the Assessing Officer has to mandatorily issue a draft assessment order if there is a proposed variation to the return which are prejudicial to the eligible assessee. The fact that the petitioner is an eligible assessee is not in dispute. While so, under section 144C(2) of the Act, the eligible assessee has the option, either to accept the variation or to file their objections before the DRP and such option has to be exercised within 30 days. On such objections filed by the assessee, the DRP shall issue appropriate direction for the guidance of the Assessing Officer under section 144C(5) of the Act. It is only thereafter, the AO is bound to pass a final order of assessment in compliance with the directions issued by the DRP under section 144C(3) of the Act. In the present case, without following above mandatory procedure, the AO has passed the order of assessment on 26.03.2013 and subsequently issued a corrigendum on 15.04.2014 to rectify the mistake committed in passing the final order of assessment inter alia to treat it as a draft assessment order. This course of action adopted by the second respondent is contrary to the mandatory provisions contained in the Act and the corrigendum issued by the AO could not cure the defect. The very fact that the Assessing Officer has signed the order of assessment and also assessed the amount payable by the assessee has become complete and it cannot be simply treated as a draft assessment order or it can be rectified by issuing the corrigendum. In fact, pursuant to the order of assessment under section 143C, demand was also made for payment of the amount and such demand has not been withdrawn by the second respondent even after issuing the corrigendum. Even as per the website of the department, the demand made to the petitioner company continues till date and therefore, the final order as well as the corrigendum issued by the second respondent are vitiated by errors apparent on the face of the record and they are legally not sustainable.”

8. Further we note that the Hon'ble High Court of Andhra Pradesh in M/s. Zuari Cements Ltd. Vs. ACIT (Petition CC NO. 16694/2013 date 27.09.2013) on similar issue where after receipt of the order passed by the TPO under section 92CA(3) of the Act, the Assessing Officer had passed the assessment order under section 143(3) of the Act raising a demand of Rs.27,40,71,913/- without giving an opportunity to the assessee under section 144C of the Act, observed that where the Assessing Officer proposes to make on or after 01.10.2009, any variation in the income or loss returned by the assessee, then notwithstanding to the contrary contained in the Act, he shall first pass the draft assessment order, forward the same to the assessee and after assessee files his objections, if any, the Assessing Officer shall complete the assessment within one month, in view of the provisions of section 144C of the Act. It was further observed that the assessee is also given an option to file an objection before the DRP, in which the latter can issue directions for the guidance of Assessing Officer to enable him to complete assessment. Where the Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and pass the assessment order, it was held by the Hon'ble High Court of A.P that the impugned order of assessment was clearly contrary to section 144C of

the Act and was without jurisdiction, null and void. The objection of the Revenue that the Circular No.5/2010 of the CBDT which laid down that the provisions of section 144C of the Act shall not apply for the assessment year 2008-09 and would only apply from assessment year 2010-11 and later years was held to be not tenable where the language of sub-section (1) of section 144C of the Act referred to the cutoff date of 01.10.2009 indicates the intention of Legislature to make it applicable. The Hon'ble High Court of A.P further held that the Circular No.5/2010 issued by the CBDT stating that section 144C(1) of the Act would apply only from assessment year 2010-11 and subsequent years and not from assessment year 2008-09 was contrary to the expressed language of the section and the said view of the Revenue was held to be not acceptable. The Hon'ble High Court of A.P thereafter held that the impugned order of assessment dated 23.12.2011 passed by the respondent was contrary to the mandatory provisions of section 144C of the Act is declared as one without jurisdiction, null and void and unenforceable. The Hon'ble High Court of Andhra Pradesh held as under:-

“In this view of the matter we are of the view that the impugned order of assessment dt. 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside.”

9. The Hon'ble Supreme Court (supra) in ACIT Vs. Zuari Cements Ltd. (supra) had dismissed the Special Leave Petition filed by the Department upon hearing the Counsel. According to the Ld. A.R. Shri Akkal Dudhwewala since the said Special Leave Petition was dismissed after hearing the Counsel the view taken by the Hon'ble High Court of Andhra Pradesh has been approved by the Apex Court. And thus we are of the view that AO was bound to follow the mandatory provision of law scrupulously and therefore non-framing and issue of draft assessment order is not curable defect because it is a jurisdictional defect which cannot be subsequently corrected by the Ld. PCIT u/s 263 of the Act, since the assessment order of AO dated 25.09.2017 is null in the eyes of law.

10. In view of the aforesaid discussion of the issue we hold that the AO's omission to frame draft assessment order breached the Rule of Law and consequently, his non-action to frame draft assessment order before passing the final assessment order was in contravention of mandatory provision of law as stipulated in section 144C of the Act, consequently his

action is arbitrary & whimsical exercise of power which offends Article 14 & 21 of the Constitution of India and therefore an action made without jurisdiction and *ergo* the assessment order dated 25.09.2017 is null in the eyes of law and therefore, is non est. Therefore, when the foundation itself does not exist, i.e, assessment order dated 25.09.2017 is non-est, the Ld. PCIT could not have exercised his jurisdiction to interfere with void/null order which is not existing in the eyes of law and, therefore, the impugned order of Ld PCIT is also a nullity. The assessee succeeds on the legal issue.

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

Order is pronounced in the open court on 15th September, 2021.

Sd/-
(Manish Borad)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 15.09.2021

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s. Mohan Jute Bags Mfg. Co., 16A, Palace Court, 1, Kyd Street, Kolkata.
2. Respondent – PCIT- 12, Kolkata
3. ITO, Ward-35(4), Kolkata
4. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar/DDO
ITAT, Kolkata Benches, Kolkata