

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD 'B' BENCH, HYDERABAD.**

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER AND
SHRI LALIET KUMAR, JUDICIAL MEMBER**

**ITA No.123/Hyd/2020
(Assessment Year : 2015-16)**

M/s. Hyundai Motor India Engineering Pvt. Ltd., Hyderabad. PAN AABCJH7867C	Vs.	Dy. Commissioner of Income Tax, Circle 2(2), Hyderabad.
Appellant		Respondent
Appellant By : Shri H. Srinivasulu, Adv.		
Respondent By : Shri YVST Sai, CIT-DR.		
Date of Hearing : 27.07.2022.		
Date of Pronouncement : 29.07.2022.		

O R D E R

Per Shri Inturi Rama Rao, A.M. :

This is an appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-2, Hyderabad Dt.05.12.2019 for Assessment Year 2015-16.

2. The assessee raised the following grounds of appeal :

1. On the facts and in the circumstances of the case and in contrary to law, the Ld. CIT(A) erred in not appreciating the fact that the Appellant is an 'eligible assessee' under Section 144C(15) of the Act and the final assessment order passed by Deputy Commissioner of Income Tax, Circle 2(2) ('Ld. AO') by determining the tax liability and raising a notice of demand under section 156 of the Act, without passing draft assessment order is bad in law, thereby resulting in violation of procedure prescribed under the Act. Therefore, the impugned order of assessment is, clearly contrary to Section 144C of the Act and is without jurisdiction, null and void and liable to be quashed.
2. On the facts and in the circumstances of the case and in contrary to law, the assessment order passed by the Ld. AO is against the provisions of law and is illegal, which cannot be cured under section 292B of the Act.
3. On the facts and in the circumstances of the case and in contrary to law, the Ld. CIT(A) ought not to have observed that the Appellant's intention is to create frivolous litigation despite observing that the Ld. AO made an error.

Without prejudice to ground no. 1 and 2 taken herein above, the Appellant wishes to take below mentioned grounds

4. On the facts and in the circumstances of the case and in contrary to law, the Ld. CIT(A) erred in not adjudicating on the conceptual grounds from ground no. 5 to 13, as follows:
5. On the facts and in the circumstances of the case and in contrary to law, the Deputy Commissioner of Income Tax, Transfer Pricing Officer – 2 ('Ld. TPO') erred in invoking the provisions of section 92C(3) of the Act and rejecting the transfer pricing ('TP') documentation maintained by the Assessee.
6. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred in not allowing appropriate adjustments under Rule 10B.
7. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred in not applying the following considerations of the Appellant while computing the margin of the companies:
 - Companies with different financial year ending should not be rejected where they are functionally comparable;
 - Non consideration of provision for bad & doubtful debts and bad debts as operating in nature.
8. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred in applying the following arbitrary filters on his own conjectures and surmises to arrive at companies as comparables to the Appellant:
 - Employee cost filter of greater than 75 percent
 - Companies having ITES revenue less than 75 percent of the total revenue:

9. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred in not providing working capital adjustment ('WCA') to the Appellant and stated that the Appellant has not been able to demonstrate that the working capital differences had impacted its profits.
10. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO has erred by selecting certain companies though they are functionally not comparable, earning high margins due to extraordinary events, fails the Ld. TPO's own filters and having presence of brand and also erred in computing erroneous margins:
- Crossdomain Solutions Private Limited
 - Tech Mahindra Business Services Limited
 - AGS Health Private Limited
 - Infosys BPO Limited
 - SPI Technologies India Private Limited
 - Excel Infoways Limited
 - MPS Limited
11. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred in rejecting / not considering the following companies without cogent reasons though they are functionally comparable and passes all the filters applied by the Ld. TPO:
- Cosmic Global Limited
 - Informed Technologies India Limited
 - Suprawin Technologies Limited
 - Microland Limited
12. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred, in considering outstanding receivable as a separate and distinct international transaction and further erred in making transfer pricing adjustment in the nature of notional interest on receivables amounting to Rs. 4,96,340.
13. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO has not justified that the State Bank of India's ('SBI') term deposit rates will be construed as an appropriate comparable uncontrolled price ('CUP') to benchmark the Appellant's delay in receipt of outstanding receivables.

14. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred by not restricting the TP adjustment only to the associated enterprise segment and carrying out at the overall entity level which is against the principle of TP provisions.
15. On the facts and in the circumstances of the case and in contrary to law, the liability of education cess on the income tax paid for the year, ought to be allowed as tax deductible expense while computing the taxable income of the Appellant.

3. Briefly the facts are as under :

3.1 The appellant is a company incorporated under the provisions of Companies Act, 1956 is wholly owned subsidiary of M/s. Hyundai Motor India Limited engaged in the business of rendering support services in respect of Computer Aided Engineering. The Return of Income was filed on 27.11.2015 for the Assessment Year 2015-16 disclosing an income of Rs.27,62,60,640.

3.2 The assessee company also reports the international transactions within the meaning of section 92E of the Act. The assessee company reported the following international transactions :

1.	Provision of IT Enabled Services	Rs.149,47,38,605.
2.	Payment for services	Rs.1,52,32,990.
3.	Reimbursement of expenses paid	Rs.14,19,61,310.
4.	Trade receivables	Rs.17,00,85,605.
5.	Payables	Rs.47,16,769.

6.	Purchase of computer software	Rs.1,94,72,204.
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3.3 The assessee company also submitted the Transfer Pricing Study report by aggregating all its international transactions, selected TNMM method as Most Appropriate Method (MAM) and adopted the costless margin as a profit level indicator for the purpose of determining Arm's Length Price (ALP) of the above international transactions. It is claimed that the above international transactions entered by the assessee company are at arm's length, as the assessee had PLI of 15.37% which falls within the range of profit margin earned by the comparables i.e. 6.07% to 17.85%.

3.4 On noticing the above international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) for the purpose of bench marking the above international transactions u/s. 92CA(2) of the Act. The TPO vide order u/s. 92CA(3) of the Act dt.31.10.2018 suggested the Transfer Pricing Adjustment of Rs.24,87,35,361.

3.5 On receipt of the TPO order, the Assessing Officer passed the said draft assessment order on 11.12.2018 u/s. 143 r.w.s. 92CA determining the total income at Rs.52,49,96,000 after making Transfer Pricing Adjustment of Rs.24,87,30,361 as suggested by the TPO. The Assessing Officer also issued a demand notice in original calling upon the assessee company to pay a sum of Rs.11,83,97,330. The Assessing Officer initiated the penalty proceedings u/s. 271(1)(c) of the Act.

3.6 Being aggrieved by the above draft assessment order along with demand notice, the assessee filed an appeal before the learned CIT (Appeals) challenging inter alia the validity of assessment order on the ground that the assessee is an eligible assessee, within the meaning of provisions of section 144C(15) of the Act, the assessment order is passed in violation of the provisions of section 144C of the Act, therefore is null and void. The said contention of the assessee was rejected by the learned CIT (Appeals) by holding that the order passed by the Assessing Officer is

draft assessment order which is not an appealable order, accordingly, he dismissed the appeal of the assessee. Being aggrieved the assessee in appeal before us.

4. Learned counsel for the assessee submitted that the order passed by the Assessing Officer is null and void, in as much as, the Assessing Officer had not followed the procedure laid down in section 144C of the Act, as the assessee company is an eligible assessee, within the meaning of section 144C(15) of the Act. He also submitted that the order passed by the Assessing Officer cannot be termed as a draft assessment order, in as much as, it is accompanied by a notice of demand in original and the Assessing Officer also enforced the recovery proceedings against the assessee company. The defect in the assessment order is not a curable defect u/s. 292B of the Act. He also cited the following decisions in support of the propositions that an assessment order passed in violation of section 144C of the Act is null and void :

1) Zuari Cement Ltd. - VS. Asst. Commr. Of IT (AP High Court) W.P. No.5557 of 2012

- 2) Asst. Commr. Of IT Vs Zuari Cement Ltd. (SC) CC 16694/2013
- 3) IATA Vs Dy. Commr. Of IT & Ors. (Bombay High Court) 68 Taxmann.Com 246
- 4) JCB India Ltd. - Vs Dy. Commr. Of IT (Delhi High Court 398 ITR 189
- 5) Turner International India Pvt. Ltd. - Dy. Commr. Of IT (Delhi High Court) 398 ITR 177
- 6) Commissioner of IT Vs C-Sam (India) Pvt. Ltd. (Gujarat High Court) 398 ITR 182
- 7) Control Risk India Pvt. Ltd. - Vs Dy. Commr. Of IT (Delhi High Court) WP 5722/2017
- 8) Dy. Commr. Of IT Vs Control Risk India Pvt. Ltd. - SLP No.7090/2018
- 9) Honda Cars India Ltd. - Vs Dy. Commr. Of IT (Delhi High Court) 382 ITR 88
- 10) ESPN Star Sports Mauritius S.N.C. ET Compagnie Vs UOI (Delhi High Court) 388 ITR 383
- 11) ESS Distribution (Mauritius) S.N.C.E.T. Compagnie Vs Asst. Commr. Of IT (Delhi High Court 399 ITR 362
- 12) Pankaj Extrusion Ltd. - Vs Asst. Commr. Of IT (Gujarat High Court) 10 Taxmann.com 17

5. On the other hand, the learned Departmental Representative submitted that the order passed by the Assessing Officer dt.28.12.2018 has to be read and treated as draft assessment order as per the provisions of section 144C r.w.s. 92CA(4) r.w.s. 143(3) of the Act. Hence the appeal filed by the assessee is not maintainable, as draft

assessment order is not appealable before the learned CIT (Appeals) and the learned CIT (Appeals) had rightly dismissed the appeal of the assessee. Mere technicality in mentioning wrong section and a proposal to initiate penalty proceedings would not make the order as final assessment order.

6. We have heard the rival submissions and perused the material on record. The issue in the present appeal relates to, as to what is true nature of the assessment order, dt.28.12.2018 and its validity. The undisputed facts of the case are as under :

6.1 The Assessing Officer on receipt of the order from the TPO u/s. 92CA(4) of the Act suggesting Transfer Pricing Adjustment of Rs.24,87,30,361 passed an order stated or draft assessment u/s. 143(3) r.w.s. 92CA(4) of the Act on 11.12.2018, also issued the notice of demand in Form No.7 in original demanding the assessee company to pay a demand of Rs.11,83,97,330. The Assessing Officer also initiated the proceedings under the provisions of section

271AA of the Act and 271BA of the Act. In the bottom of the assessment order, it is clearly mentioned that the assessment is completed u/s. 143(3) r.w.s. 92CA of the Act. The Assessing Officer also enforced the recovery of the demand against the assessee. The assessment order accompanied by demand notice should be construed as a final assessment order as held by Hon'ble Madras High Court in the case of M/s. Volex Interconnect (India) Pvt. Ltd. Vs. ACIT 128 taxman.com 296 (Mad). In the present case, undisputedly the Assessing Officer issued assessment order along with notice of demand in original. In fact even enforced the recovery proceedings against the assessee company. This fact would go to show that the intent and purpose of the order is only a final assessment order. The mere fact that the order is styled as draft assessment order does not change the substance or intent purport of the order which is very clear. Therefore, the order passed by Assessing Officer can be safely construed as final assessment order. Thus the Assessing Officer had proceeded with the passing of the final assessment order after receipt of the

order of the TPO pursuant to the order passed by the TPO u/s. 92CA of the Act and confirmed the addition as proposed by the TPO. It is also admitted position that the assessee company is an eligible assessee within the meaning of the provisions of section 144C(15) of the Act. In the case of an eligible assessee under the provisions of section 144C(1) of the Act, the Assessing Officer had to at first instance forward a draft of the proposed assessment order, the assessee has an option either to file his acceptance of the assessment order or filed his objections to any such variations with DRP. In other words, in terms of section 144C(1), the Assessing Officer has no right to pass an assessment order pursuant to the order passed by the TPO. The Assessing Officer was mandatorily required to first pass a draft assessment order and communicate to the assessee, it is only after receipt of the draft assessment order the assessee has to accept the variations proposed by the Assessing Officer, it is only in case where the assessee opts to file appeal before the learned CIT (Appeals), the Assessing Officer can pass the final assessment order. In

the present case, the Assessing Officer had passed the final assessment order straightaway which is in clear violation of provisions of section 144C of the Act. It is now settled position of law that non-adherence to the provisions of section 144C would result in quashing the assessment proceedings as held by the catena of decisions as mentioned below :

i) CIT Vs. Shyam Cold Storage (2013) 215 Taxman 669 (All)

ii) CIT Vs. Durga Enterprises (2014) 44 taxmann.com 442

iii) JCB India Ltd. Vs. DCIT 398 ITR 189 (Del)

iv) Turner International India (P) Ltd Vs. DCIT 398 ITR 177 (Del).

Recently, the Hon'ble Madras High Court after making reference to the above decisions in the case of ACIT Vs. Vijay Television (P) Ltd. 407 ITR 642 (Mad), held as follows :

“ 46. The Revenue, with a view to squirm around from under wrongful act of passing the assessment order, which is prohibited by law and an unlawful one,

had issued a corrigendum, amending the Section under which the order has been passed, forgetting that the content of the order that matters and not the mere quoting of the Section alone. In other words, the window dressing which has been attempted by the Revenue would not give life to an order passed without jurisdiction. It is to be pointed out that the order of assessment, once issued under [Section 143](#) (3), becomes final and reopening the same is impermissible. The mistake committed by the Revenue in not following the mandatory requirement of [Section 144-C](#) by passing an order under [Section 143](#) (3) cannot be cured by the issuance of a corrigendum. In other words, the proceedings issued in the name of corrigendum trying to correct its mistakes only by introducing a Section without realising the consequences of not following the mandatory requirement u/s 144-C will not do justice to either of the parties.

47. The necessity for the Parliament to incorporate [Section 144-C](#) is not only to safeguard the Revenue, but also the assessee and any mistake committed by any one of them, the said party is supposed to face the consequences and cannot put the hands of the clock back and start afresh.

48. Though it is the submission of the Revenue that it is a procedural irregularity, which can be corrected through issuance of a corrigendum and no prejudice would be caused to the assessee, however, it is to be pointed out that the act committed by the Revenue is an incurable illegality, which cannot stand protected by [Section 292B](#) of the Act. If the contention of the Revenue is accepted, then it would literally render all the provisions of the [Income Tax Act](#) subservient to [Section 292B](#). In effect, any error or omission or mistake committed by the Revenue at any stage of a proceeding cannot be sought to be cured by taking umbrage under [Section 292B](#). Allowing such a contention would be misreading the intention of the Parliament in enacting [Section 292B](#) and [Section 144-C](#).

49. The question of limitation raised by the Revenue would in no way save the Revenue from the non-compliance of [Section 144-C](#) of the Act. The non-compliance of the mandatory provisions of [Section 144-C](#) of the Act, being an incurable illegality, renders the assessment order null and void. Learned single Judge has taken into account all the relevant facts and laws and has given a well considered finding and we are of the considered opinion that no interference is called for with the order passed by the learned single Judge.”

It is also admitted fact that the decision of the Hon’ble Andhra Pradesh High Court in the case of M/s. Zuari Cement Ltd. Vs. ACIT dt.21.2.2013 in W.C. No.5557 of

2012 has categorically held that failure to pass a draft assessment order u/s. 144C(1) of the Act would result in rendering the final assessment order without jurisdiction, is null and void and unenforceable. The decision of the Hon'ble Andhra Pradesh High Court was affirmed by the Hon'ble Supreme Court by dismissal of Revenue's SLP(c) (CC No.16694 of 2013) on 27.09.2013. Therefore in the light of above discussion, we hold that the assessment order dt.28.12.2018 is in the nature of final assessment order passed without adhering to the provisions of section 144C of the Act, is null and void and assessment dt.28.12.2018 is hereby quashed.

7. In the result, the assessee appeal is allowed.

Order pronounced in the open court on 29th July, 2022.

Sd/-

(LALIET KUMAR)
Judicial Member

Sd/-

(INTURI RAMA RAO)
Accountant Member

Hyderabad, Dt. 29.07.2022.

* Reddy gp

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3.	Pr. C I T-2, Hyderabad.
4.	CIT(Appeals)-2, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.