

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.1423/Kol/2019
Assessment Year: 2014-15

Witzenmann India Private Limited..... Appellant
NSC Building, Plot No.12,
Block – AQ, Sector-V,
Salt Lake City, Kolkata-91.
[PAN: AAACH7739L]

vs.

DCIT, Circle-2(2), Kolkata..... Respondent

Appearances by:

Shri Arun Chhabra, CA, appeared on behalf of the appellant.

Smt. Ranu Biswas, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : November 16, 2022

Date of pronouncing the order : January 10, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order of assessment dated passed by the Assessing Officer u/s 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') pursuant to the transfer pricing adjustment.

2. At the outset, the ld. counsel for the assessee has submitted that the impugned order passed by the Assessing Officer dated 12.04.2019 u/s 143(3)/147 read with section 144C & 144C(5) of the Act was wrong and illegal and void ab initio. The ld. counsel has invited our attention to the following sequence of events:

<i>Particulars</i>	<i>In case of the Appellant</i>

<i>Return of Income u/s 139(1) filed</i>	<i>28 Nov 2014</i>
<i>Notice u/s 143(2)/142(1) of the Act issued</i>	<i>31 Aug 2015</i>
<i>Case referred to the TPO w/s 92CA(1) of the Act</i>	<i>7 Sep 2015</i>
<i>Final Assessment Order passed u/s 143(3) of the Act</i>	<i>22 Dec 2016</i>
<i>Transfer Pricing notice u/s 92CA(2) r.w.s. 92D issued by the TPO initiating proceedings</i>	<i>6 Jan 2017</i>
<i>Transfer Pricing order u/s 92CA passed by the TPO</i>	<i>30 Oct 2017</i>
<i>Reassessment proceedings initiated by the AO by issuing notice u/s 148</i>	<i>26 Feb 2018</i>

3. A perusal of above sequence of event would show that though the Assessing Officer had referred the matter to the TPO u/s 92CA(1) on 7th September 2015, however, without waiting for the order of the TPO, the Assessing Officer passed the final assessment order on 22nd December 2016 itself. However, the ld. TPO continued the proceedings on the reference made by the Assessing Officer for transfer pricing adjustment. However, the assessee objected to the continuation of the proceedings before the TPO pleading that since the final assessment order has already been passed. The TPO, therefore, had become functus officio and that any proceedings before the TPO were invalid proceedings. However, the ld. TPO ignored the above objections and passed the transfer pricing order u/s 92CA on 30th October 2017. After receiving the TPO proposal, the Assessing Officer reopened the assessment u/s 147 of the Act. However, without following the due process of law by again making reference to the TPO, the Assessing Officer on the basis of

invalid and void order of the TPO dated 30th October 2017, framed the draft assessment order on 1st November 2018. The assessee filed objections with the Dispute Resolution Panel against the aforesaid proposed transfer pricing adjustments. However, the Dispute Resolution Panel held that the aforesaid order passed by the Assessing Officer, itself, was wrong and illegal. And since there was no legally valid reference made by the Assessing Officer to the TPO during the reassessment proceedings, therefore, the Dispute Resolution Panel decided that it had no jurisdiction to interfere with the aforesaid invalid and void draft assessment order. The Dispute Resolution Panel held that the case of the assessee not being a “eligible assessee” as per the provisions of section 144C(15) of the Act, therefore, it declined to interfere with the said order without any adjudication. The relevant part of the order of the Dispute Resolution Panel is reproduced as under:

“2.1 In this case the return of income was filed on 18.01.2014 which was selected for scrutiny assessment under CASS. The A.O referred the case to the TPO on 07.09.2015 determination of arm's length price (ALP). Accordingly, the TPO was required to pass order u/s 92CA(3) of the Act by 30.10.2017 and the draft assessment order was to be passed by the AO by 31.12.2017 incorporating the adjustments proposed by the TPO. The assessee thereafter has the option to accept the order of AO or to file Objection before the DRP, within 30 days of the receipt of the draft assessment order passed by the AO. In a case where Objection is filed before the DRP, under intimation to the AO, within the prescribed time period, the DRP is mandated to issue Direction u/s 144C(5) of the Act and the AO, thereafter, is mandated to pass final assessment order within 30 days of the end of the month in which the Directions of the DRP is received by him/her [s. 144C(15) of the Act].

2.2 In this case the AO passed final assessment order on 22.12.2016 without waiting for the order of the TPO u/s 92CA(3) of the Act, which was in fact passed by the TPO on 30.10.2017, thus without the TP adjustment proposed by the TPO later. Realising his mistake, the AO issued notice u/s 147 of the Act on 21.02.2018 and passed re-assessment order on 01.11.2018. In this re-assessment order the AO took the loss of Rs. 4,02,56,132/- "as per order passed u/s 143(3)(3) 1.T.

Act 1961 on 22.12.2016" as the starting point of computation of income and added the adjustment proposed in the TPO's order dt. 30.10.2017, i.e. there is no discussion, in the re-assessment order, on the corporate issues considered and assessed in the original assessment order:

2.3 Considering the background of the present draft re-assessment order under consideration before the DRP, the primary fact noticed is that the AO was statutorily required to refer the transfer pricing issue related to international transaction to the TPO in terms of s.92C(3) of the Act and the TPO is mandated to pass necessary orders u/s 92CA(3) of the Act and the AO, thereafter, is required to pass draft assessment order in conformity with the order of the TPO in terms of s.92CA(4) of the Act. In this case no reference was made by the AO to the TPO u/s 92C(3) of the Act during the re-assessment proceedings, and therefore, in effect, no order u/s 92CA(3) of the Act existed which could be incorporated in the draft re-assessment order passed in terms of s.92CA(4) of the Act. Thus, in effect, there was no transfer pricing adjustment order available for incorporation in the final assessment order, which was in fact passed on 30.10.2017 in terms of the reference made by the AO to the TPO during the original assessment proceedings. Without making a reference during the re-assessment proceedings the AO could not have incorporated any TP adjustment. The Hon'ble AP High court in the case of Zuari Cement Ltd. v ACIT has categorically held that violation of the mandatory provisions of s. 144C of the Act would make the complete assessment proceedings void-ab-initio and invalid, affirmed by the Apex Court in ACIT v Zuari Cement Ltd., SLP CC No. 16691/2013.

2.4 In this situation the objection of the assessee that for assessment u/s 144C the assessee should have been an 'eligible assessee' in terms of s. 144C(15) (b)(i) but that in the absence of any order u/s 92CA(3) during the re-assessment proceedings the assessee was not an 'eligible assessee', becomes relevant.

2.5 In view of the provisions under the Dispute Resolution Panel Rules 2009 and Chapter XIV and the relevant s. 144C (1) of the Act, it is observed that the Panel has the power to issue directions to the Assessing Officer to enable him to complete the assessment only in regard to the cases of 'eligible assessee' in whose case the variation referred to in s.144C(1) of the Act arises as a consequence of the TPO order passed u/s 92CA(3) of the Act. The relevant s. 144C (15) (b) of the Act is reproduced below:

"(15) For the purposes of this section,-

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means,-

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company."

2.6 In view of the above provisions, and the fact that there was no legally valid reference made by the AO during the re-assessment proceedings, and that no draft assessment order was passed after the TPO's order dt. 30.10.2017 with regard to the reference made during the original assessment proceedings and rather final assessment order was passed on 22.12.2016, it is evident that the case of the assessee is not covered under the provisions of s. 144C (15) of the Act as there was not any issue pertaining to cross-border transactions or business connection coupled with the existence of a permanent establishment, and therefore the DRP is of the view that the assessee's case is beyond the jurisdiction of the DRP, the case of the assessee not being an "eligible assessee" as per s.144C(15) of the Act. Hence, the draft re-assessment order passed by the AO on 01.11.2018 is beyond jurisdiction of the DRP.

3. In view of the above decision, the other grounds of objections become redundant and are therefore not adjudicated."

4. The ld. counsel, in this respect, has relied upon the decision of the Coordinate Bench of the Tribunal in the case of Nomura Research Institute Financial Technologies India (P) Ltd. vs. DCIT [2020] 121 taxmann.com 217 (Kol-Trib), wherein, the Tribunal in the almost exactly identical facts and circumstances, held that the Assessing Officer cannot pass final assessment order without making a valid reference to TPO and further that the TPO cannot initiate any proceedings against the assessee after passing of a final order by the Assessing Officer as reference made by the Assessing Officer to the TPO becomes infructuous after passing of final assessment order. Even the Dispute Resolution Panel, in this case, has also made the same observation. In view of this, the reassessment order, passed by the Assessing Officer on the basis of illegal and invalid order of the TPO

without following the due procedure as laid down in the relevant provision of section 144C of the Act, is not sustainable in the eyes of law and the same is, therefore, quashed.

5. In the result, the appeal of the assessee stands allowed.

Kolkata, the 10th January, 2023.

Sd/-
[गिरीश अग्रवाल /Girish Agrawal]
लेखा सदस्य/Accountant Member

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य/Judicial Member

Dated: 10.01.2023.

RS

Copy of the order forwarded to:

1. Witzenmann India Private Limited
- 2 DCIT, Circle-2(2), Kolkata
3. CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches