

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 822/Mum/2022
(Assessment Year: 2017-18)

Carrier Technologies India Limited Office No. 8, The Centrium, Level-1, Phoenix Market City, Kamani Junction, Lal Bahadur Shastri Marg, Kurla (W), Mumbao-400 070	Vs.	Dy. CIT-3(1)(1), Mumbai
PAN/GIR No. AAACV 2873 P		
(Appellant)	:	(Respondent)
Assessee by	:	Shri M P Lohia
Revenue by	:	Dr. Yogesh Kamat
Date of Hearing	:	23.11.2022
Date of Pronouncement	:	17.02.2023

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the assessment order passed by the Assessing Officer (A.O. for short) u/s. 143(3) r.w.s. 144C(13) r.w.s 144B of the Income Tax Act, 1961 ('the Act'), pursuant to the direction of the Hon'ble Dispute Resolution Panel-1, Mumbai ('DRP' for short) and the order of the Transfer Pricing Officer – 4(2)(ii), Mumbai ('TPO' for short), pertaining to the Assessment Year ('A.Y.' for short) 2017-18.

2. The assessee has challenged the assessment order on various grounds - both non corporate tax and on corporate tax grounds.

3. The brief facts are that the assessee company is part of the UTC group and is engaged in the business of import and resale of various fire protection and security

systems (trading activity) and assisting its group companies in sale of these systems in India in manufacturing, erection, installment and maintenance of fire protection and security system as per various government and semi government turnkey projects and rendering research and development services to its group companies in relation to fire protection and security business. The assessee company has three different divisions namely trading and commission business from Gurgaon (GGN Segment), manufacturing businesses from Mumbai (MUM segment) and Research and development services business from Hyderabad (HYD Segment). The assessee company filed its return of income for A.Y. 2017-18 dated 30.11.2017, declaring total income at Rs.Nil. The assessee's case was selected for scrutiny and the assessment order u/s. 143(3) r.w.s. 144C of the Act dated 28.02.2022 was passed, where the A.O. determined the total income at Rs.16,80,09,929/-, as against the loss of Rs.26,34,96,140/-, declared by the assessee in its return of income and made the transfer pricing adjustment of Rs.5,77,09,121/- pursuant to the direction of the Id.DRP after disposing off the objections raised by the assessee.

4. Aggrieved by the said order, the assessee is in appeal before us, challenging the assessment order on various grounds.

5. It is pertinent to point out that the assessee has challenged the assessment proceeding as being null and void on the ground that the draft assessment order dated 20.04.2021 was passed without issuing show cause notice cum draft order in respect of the proposed addition as mandated u/s. 144B of the Act, thereby rendering the assessment proceeding as non est, bad in law and contrary to the provisions of the Act. The assessee has also challenged the assessment order on the ground that section 144B of the Act is

not applicable, where the draft assessment order is passed u/s. 144C of the Act, which is contrary to the provision of section 144B of the Act. The assessee has also challenged the transfer pricing grounds and corporate tax grounds. As the above legal ground goes to the root of the present appeal, we hereby proceed to decide this legal ground before getting into the merits of the case.

6. It is observed that the assessment was conducted as per the Faceless Assessment Scheme and the assessee submits that the A.O. has to examine the draft assessment order prepared by the assessment unit and by giving an opportunity to the assessee in case of any variation proposed by serving a notices to the assessee to show cause as to why the proposed variation should not be made. The assessee relied on notification no. 6 & 7 of 2021 for this proposition. The assessee further submitted that an addition amounting to Rs.44,10,97,476/- was proposed in the draft assessment order. It is alleged that the A.O. has issued the draft assessment order u/s. 144C of the Act without issuing the draft order as per the faceless assessment scheme. The assessee contends that the A.O. has failed to comply with the procedures laid down under the Faceless assessment scheme by not issuing the draft assessment order before passing the draft order as per section 144C of the Act, where the assessment order is bad in law and contrary to the provisions of the Act. The Id. DRP, for the objection filed by the assessee has held that section 144C of the Act is a complete code in itself which is applicable to the eligible assessee defined u/s. 144C(15)(b) of the Act. The Id. DRP further stated that section 144C(1) provides that A.O. shall forward the draft of the proposed assessment to the assessee if he makes any variation in the income or loss returned which is prejudicial to the interest of such assessee, thereby holding that no final order is passed in the case of an eligible assessee if

the assessee exercise its operation to file objection before the DRP to the proposed addition/adjustment made by the A.O. The ld. DRP further held that addition cannot be made without rendering opportunity to the assessee to be heard. The ld. DRP stated that section 144C mandates that the eligible assessee is to be given an opportunity to be heard before the A.O. at the draft stage itself, if the assessee chooses to file objection before the DRP. The ld. DRP further held that the decisions relied upon by the assessee are related to cases in which section 144C was not applicable or to cases where at the assessment stage, the assessee was not given an opportunity of being heard. In this observation, the ld. DRP rejected the objection of the assessee and subsequently the A.O. passed the impugned assessment order.

7. The assessee has challenged the action of the lower authorities before us. The ld. AR for the assessee contended that the A.O. has failed to issue show cause notice-cum-draft order which is mandated in section 144B of the Act which come into play with effect from 01.04.2021. The ld. AR further contended that non-compliance of the procedure will make the assessment order null and void. The ld. AR relied on the decision of Hon'ble Jurisdictional High Court in the case of *Piramal Enterprises Ltd. vs. Addl. CIT* [2021] 129 taxmann.com 18 (Bom), which held that the assessment u/s. 143(3) or section 144(4) of the Act which is not made in accordance with the provisions of section 144B shall be non est. The ld. AR also relied on the decision of the Hon'ble Delhi High Court in the case of *Gurgaon Realtech Ltd. vs. National Faceless Assessment Centre* [2021] 127 taxmann.com 726 (Del), which also laid the said proposition.

8. The learned Departmental Representative (ld. DR for short) for the Revenue, on the other hand, controverted the same and contended that the draft assessment order issued u/s. 144C by the A.O. was not the final assessment order and that non issue of show cause cum draft order does not make the assessment non est in the eyes of law. The ld. DR relied on the orders of the lower authorities.

9. We have heard the rival submissions and perused the materials on record. The assessee has challenged the draft assessment order on the ground that the same was passed without issuing the show cause notice along with the draft order as mandated in section 144B of the Act, thereby challenging the impugned transfer pricing adjustment and the other additions/disallowances made by the A.O. The assessee has relied on the Notification No. 6 & 7 of 2021 whereby the A.O. has to examine the draft assessment order prepared by the assessment unit by giving the assessee an opportunity to be heard where any variation prejudicial to the interest of the assessee is proposed. The A.O. has to issue notice to show cause to the assessee as to the proposed variation. The assessee contends that for the impugned year, the addition aggregating to Rs.44,10,97,476/- was proposed to be made in the draft assessment order, thereby contending that the same was prejudicial to the interest of the assessee for which the A.O. should have issued a draft order proposing the impugned addition. The assessee further contended that the A.O. has issued draft assessment order without issuing draft order which was mandated as per the provisions of section 144B. The objection raised by the assessee before the Hon'ble Dispute Resolution Panel ('DRP' for short) was not considered on the ground that section 144C in which the draft assessment order was passed was in itself a complete code and that merely by issuing a draft assessment order in case of an eligible assessee does not

contemplate the same to be a final order. The assessee has the option to file objection before the DRP against the proposed additions/adjustments and that the impugned addition was made giving the assessee sufficient opportunity of being heard. The ld. DRP further held that the decisions relied upon by the assessee does not relate to section 144C and that the assessee was not prejudiced by non issuance of show cause notice along with the draft order. It is pertinent to extract section 144B(vii) of the Act for ease of reference :

Faceless Assessment.

144B. (1) *Notwithstanding anything to the contrary contained in any other provision of this Act, the assessment, reassessment or recomputation under sub-section (3) of section 143 or under section 144 or under section 147, as the case may be, with respect to the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—*

...
...

(vii) *the National Faceless Assessment Centre shall send the report received from the verification unit or the technical unit, as the case may be, based on the request referred to in clause (vi) to the concerned assessment unit;*

10. This provision mandates that in case of variation proposed in the transfer assessment order, a show cause notice is to be issued as to provide with an opportunity to the assessee for the reason that the assessee can request for personal hearing to make oral submissions or to present his case on the proposed variation, also provides for virtual hearing through video conferencing, video-telephone for the purpose of presenting the assessee's case. We would like to place our reliance on the decision of the Hon'ble Jurisdictional High Court in the case of *Piramal Enterprises Ltd.* (Supra), wherein it has stated that in assessment order passed u/s. 143(3) r.w.s. 144(4) of the Act without adhering the procedure laid down u/s. 144B shall make the assessment non est in the eyes of law. The relevant extract of the said decision is cited hereunder:

64. Section 144-B of the Income Tax Act, 1961 captioned 'Faceless Assessment' commences vide its sub-section (1) with a non- obstante clause and compulsively requires assessment u/ss 143(3)

and 144 shall be by prescribed procedure contained in sub-section (1) of section 144-B in the cases referred to in sub-section (2) thereof.

65. Sub-section (9) of section 144B declares that assessment made under section 143(3) or under section 144(4) referable to sub-section (2) other than sub-section (8) on or after 1 st day of April, 2021 shall be non est if such assessment is not made in accordance with the procedure laid down under section 144B. There is a telling / pronounced rigour, to follow the procedure under section 144B, lest the assessment would be non est.

66. Going by the provisions under section 144B, when hearing has been envisioned and incorporated, it is imperative to observe principles of natural justice as stipulated.

11. We would also like to place our reliance on the decision of the Hon'ble Jurisdictional High Court in the case of *Abacus Real Estate (P.) Ltd. vs. Dy. CIT* [2021] 133 taxmann.cm 277 (Bom) in which the Hon'ble Jurisdictional High Court held that the mandatory procedure prescribed u/s. 144B of the Act if not followed the same would make the assessment order and the draft assessment order as non est.

12. From the above observation, we are of the considered view that the assessment order passed in variation of the procedures prescribed u/s. 144B of the Act would render the assessment order as non est. This proposition has been reiterated by various decisions cited by the Id. AR.

13. By respectfully following the said decision, we hereby hold that the impugned draft assessment order is non est under the eyes of law and hence quashed.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 17.02.2023.

Sd/-

(Prashant Maharishi)
Accountant Member

Mumbai; Dated : 17.02.2023

Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai