

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1871/Kol/2019
Assessment Year: 2013-14**

Linc Pen & Plastics Ltd. 7C & 7D, Satyam Towers, 3, Alipore Road, Kolkata-700027 (PAN: AAACL6426C)	Vs.	Deputy Commissioner of Income-tax, Circle-11(1), Kolkata.
(Appellant) (Respondent)		

Present for:

Appellant by : Shri Anil Kochar, Advocate
Respondent by : Smt. Ranu Biswas, Addl. CIT, DR

Date of Hearing : 09.02.2023
Date of Pronouncement : 24.02.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)-22, Kolkata vide Appeal No. 50/CIT(A)-22/13-14/16-17/Kol dated 28.06.2019 passed against the assessment order by DCIT, Circle-11(1), Kolkata u/s. 143(3)r.w.s. 144C(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 07.12.2016.

2. The assessee in this appeal has originally taken the following grounds of appeal:-

"(1) For that the orders passed by the lower authorities are arbitrary, erroneous, without proper reasons, invalid and bad-in-law, to the extent to which they are prejudicial to the interests of the appellant.

(2) For that the ld. CIT(A) ought to have taken into consideration the factual aspect of the case and should not have only modified the order of the TPO.

(3) *For that the ld. CIT(A) ought to have considered the submission made before him relating to consideration of method to be adopted for determination of Arm's Length Price.*

(4) *For that the ld. CIT(A) ought to have considered RPM Method or CUP Method as mentioned in the submission of the appellant for determination of the Arm's Length Price instead of altering TNMM Method as adopted by the TPO.*

3. Apart from the above grounds of appeal, assessee vide letter dated 26th November, 2021 had taken the following additional grounds of appeal:-

- (1) *For that the orders passed by the lower authorities are arbitrary, erroneous, without proper reasons, invalid and bad-in-law, to the extent to which they are prejudicial to the interests of the appellant.*
- (2) *For that the Ld. A.O. having failed to forward a draft of the proposed order of assessment to the appellant proposing to make variation to the total returned income the order so passed u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 is bad-in-law, liable to be annulled.*
- (3) *For that the A.O. having not followed the mandatory provision of Sec.144C of the Act to provide a draft assessment order to the appellant before making a final assessment the order so passed u/s 143(3) r.w.s. 144C(3) is non-est, liable to be annulled.*

WITHOUT PREJUDICE

- (4) *For that the Ld. CIT (A) ought to have taken into consideration the factual aspect of the case and should not have only modified the order of the TPO.*
- (5) *For that the Ld. CIT (A) ought to have considered the submission made before him relating to consideration of method to be adopted for determination of Arm's Length Price.*
- (6) *For that the Ld. CIT (A) ought to have considered RPM Method or CUP Method as mentioned in the submission of the appellant for determination of the Arm's Length Price instead of altering TNMM Method as adopted by the TPO.*
- (7) *For that the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds.*

4. Through the additional grounds, ld. Counsel for the assessee *inter alia* has taken the jurisdictional issue that Ld. Assessing Officer was required to serve draft of proposed order of assessment upon the assessee before issuing the final assessment order. Since Ld. Assessing Officer had failed to serve such draft order upon the assessee, depriving it to file objections against the said draft of proposed order of assessment, therefore, the final assessment order is not sustainable in the eyes of law. Tribunal after considering the aforesaid grounds and after hearing the ld. Representatives of the parties, admitted the additional grounds of appeal taken by the assessee vide its order dated 7th April, 2022.

5. On 14.11.2022, ld. Counsel for the assessee at the time of hearing has submitted that he does not want to press the main grounds of appeal on merits rather he stresses solely on the additional grounds of appeal. The ld. Counsel in this respect has invited our attention to the provisions of section 144C of the Act to submit that since this was a case of Transfer Pricing Adjustment, provisions of section 144C were applicable. As per the said provisions, Ld. Assessing Officer was supposed to forward a draft of proposed order of assessment and give opportunity to the assessee, either to accept the same or to file objections against it before the Dispute Resolution Panel and the Assessing Officer.

5.1. Relevant part of the provisions of section 144C of the Act for the sake of ready reference is reproduced as under:-

“144C.(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the

first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall within thirty days of the receipt by him of the draft order,-

(a) file his acceptance of the variations to the Assessing Officer, or

*(b) file his objections, if any, to such variation with,-
(i) the Dispute Resolution Panel; and*

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-

(a) The assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) No objections are received within the period specified in sub-section (2).....”.

6. Ld. Counsel for the assessee has invited our attention to para 9 of the impugned assessment order, wherein Ld. Assessing Officer has made the following observations:-

“9. As per Section 144C(2), the assessee is required to (a) file its acceptance of the variations to the Assessing Officer, or (b) file is objections, if any, to such variations made in the returned income as discussed above with the Dispute Resolution Panel, 8th Floor, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069 and the Assessing Officer within 30 (Thirty) days of the receipt of draft order. The assessee has stated that they do not intend to exercise the option available u/s 144C to file objections before the Dispute Resolution Panel. In view of above, final order is being passed without making any draft assessment order”.

6.1. A perusal of the above part of the assessment order reveals that before the Assessing Officer, assessee had stated

that they did not intend to exercise the option available under section 144C to file objections before the Dispute Resolution Panel. In view of the above waiver given by the assessee, Ld. Assessing Officer passed the final assessment order without forwarding any draft of the proposed order of assessment.

7. Ld. Counsel before us, submitted that this statutory provision of section 144C required the ld. Assessing Officer to frame a draft of the proposed order of assessment and thereafter give opportunity to the assessee to file objections in respect of variations made by the ld. Assessing Officer in respect of Transfer Pricing Adjustments. Assessee can file objections to the Dispute Resolution Panel and to the Assessing Officer.

8. We agree with the contention of the Ld. Counsel that this mandatory requirement of forwarding a draft of the proposed order of assessment cannot be done away with, by any waiver given by the assessee during assessment proceedings. Despite the contention of the Ld. Sr. DR that though the Ld. AO was supposed to pass draft of the proposed order of assessment in terms of mandatory provision of section 144C of the Act and that he should not have depended on the waiver given by the assessee of it not intending to file the objections, yet the assessee should not be allowed to take benefit of its own waiver before the ld. AO and come with the plea at the second appellate stage by raising an additional ground that Ld. AO failed to pass the mandatory draft of the proposed order of assessment, seeking quashing the entire assessment.

8.1. Ld. D.R. in this respect has submitted that since Ld. Assessing Officer had proceeded to frame the assessment order due to waiver exercised by the assessee, therefore, to meet the principles of natural justice, the matter may be remanded to the file of Ld. Assessing Officer for passing a fresh draft assessment order, whereupon the assessee would be entitled to file its objections, if any, as per the provisions of section 144C of the Act.

9. We find that in this case, the mandatory procedural compliance error has been committed by the Ld. Assessing Officer in not passing the draft of the proposed order of assessment. From the perusal of the provisions of section 144C(1) of the Act, we note that the AO is required "*in the first instance*" to forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation which is prejudicial to the interest of the assessee. Usage of verbiage "*in the first instance*" in the said section indicates that the eligible assessee would come to know of any variation being proposed by the AO, only by way of forwarding a draft of the proposed order of assessment. Thus, the assessee would come to know of any variation which is prejudicial to its interest only by way of forwarding of a draft of the proposed order of assessment by the Ld. AO. Without forwarding a draft of the proposed order of assessment by the AO, assessee has given its waiver that it did not intend to file objection which does not meet mandatory compliance requirement of the provisions of section 144C of the Act.

10. In the present set of facts, we note that principles of estoppels will not operate against the Act. It is obligatory on the part of the Ld. AO to comply with the mandatory procedural requirements of completing the assessment. Hon'ble jurisdictional High Court of

Calcutta in the case of *CIT v. Bhaskar Mitter* 73 *Taxman* 437 (Cal) observed in para 8 that “*There is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law.*”

11. In the instant case, Ld. AO straightaway passed the assessment order, without passing any draft of the proposed order of assessment for which he noted, “*In view of above, final order is being passed without making any draft assessment order*”. As held in various decision of the Tribunal, a final assessment order without passing of the draft of the proposed order of assessment, being not in accordance with the provisions contained in section 144C of the Act, is liable to be quashed.

11.1. Some of the decisions of various benches of the Tribunal which have held that passing of the draft of the proposed order of assessment is *sine qua non* before passing of the final assessment order are as under:

“1. *Decision of the Mumbai Bench of the Tribunal in the case of Jazzy Creations Pvt. Ltd. v/s. ITO reported in [2017] 83 taxmann.com 244.*

2. *Decision of the Delhi Bench of the Tribunal in the case of Olympus Medical Systems India Pvt. Ltd. vis. DCIT [ITA No. 8892/ Del/2019]*

3. *Decision of the Delhi Bench of the Tribunal in the case of Perfetti Van Melle India Pvt. Ltd. vis. ACIT [ITA No. 91161 Del/ 2019]*

4. *Decision of the Delhi Bench of the Tribunal in the case of Suretex Prophylactics (India) Ltd. vis. ACIT [IT (TP) A No. 430/ Bang/2016]*

5. *Decision of the Pune Bench of the Tribunal in the case of Atlas Copco India Ltd. v/s. DCIT [ITA No. 649/Pun/2013 and 1726/Pun/2014 along with CO Nos. 34 & 35/Pun/2019]*

6. *Decision of the Pune Bench of the Tribunal in the case of DCIT v/s. Rehau Polymers Pvt. Ltd. reported in [2017] 85 taxmann.com 23*

7. *Decision of the Pune Bench of the Tribunal in the case of Soltas India Pvt. Ltd. vis. ACIT reported in [2017] 77 taxmann.com 19*

8. *Decision of the Delhi Bench of the Tribunal in the case of Mavenir India Put. Ltd. v/s. DCIT [ITA no. 2031 Del/2010]*

9. *Decision of the Pune Bench of the Tribunal in the case of Skoda Auto India Pvt. Ltd. v/s. ACIT [ITA No. 2344/Pun/2012]"*.

12. In view of the above discussion, the impugned assessment order is hereby quashed. Additional grounds raised by the assessee in this respect are allowed. Since the jurisdictional issue has been held in favour of the assessee as dealt hereinabove, issues raised on the merits of the case are not adjudicated upon, as also, the same have been 'not pressed' by the Ld. Counsel.

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

Order pronounced in the open court on 24th February, 2023.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 24th February, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A)-22, Kolkata
 4. The Pr. CIT, Kolkata.
 5. DR, ITAT, Kolkata Bench, Kolkata
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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata