

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 311/Coch/2015
(Assessment Year:2009-10)

Kera Fibertex International (P.) Ltd. Plot No. 53-57, Kinfra (EPIP) Kusumagiri, Kakkanad Kochi 683030 [PAN:AABCK4613P]	vs.	Asst. CIT, Circle – 1(2), C.R. Building, IS Press Road Kochi 782018
(Appellant)		(Respondent)

ITA No. 361/Coch/2015
(Assessment Year: 2009-10)

Asst. CIT, Circle – 1(2), C.R. Building, IS Press Road, Kochi 782018	vs.	Kera Fibertex International (P.) Ltd. Plot No. 53-57, Kinfra (EPIP) Kusumagiri, Kakkanad Kochi 683030 [PAN:AABCK4613P]
(Appellant)		(Respondent)

Assessee by:	Shri P. Sathisan, Advocate
Revenue by:	Shri Sajit Kumar Das, CIT-DR

Date of Hearing:	12.09.2023
Date of Pronouncement:	30.10.2023

ORDER

Per Bench

These are cross appeals arising out of the Order dated 26.3.2015 by the Commissioner of Income Tax (Appeals), Kochi-1 [CIT(A)], partly allowing the assessee's appeal contesting its assessment under section 144C read with section 143(3) of the Income Tax Act, 1961 ('the Act') dated 28.3.2013 for Assessment Year (AY) 2009-10.

The background facts

2. At the very outset, it was observed by the Bench that the order dated 28.3.2013 on record, signifying the impugned assessment, is titled 'Draft Assessment Order'. The parties were accordingly required to bring on record the final assessment order for the relevant assessment year, duly attested, or otherwise inform if the words 'draft assessment order' inscribed on the top of the order is by way of a mistake, i.e., in not deleting/removing the said words from the draft order. This is as in case of acceptance thereof, or no objection thereto raised by the assessee before the Dispute Resolution Panel (DRP), within the prescribed time u/s.144C(2), as obtains in the instant case, the draft assessment order is to be adopted as the final order; the Assessing Officer (AO) having no power to review his order. It was, upon being allowed time for the same, clarified by both the parties that the same is indeed the draft order and, further, has not been followed by any formal order as the final assessment order or, correctly speaking, assessment order. This led to an issue as to if the same could be in law regarded as the assessment order, i.e., on the expiry of the 30-day period provided u/s.144C(2) for acceptance of/raising objection/s to the draft assessment by an assessee. While the assessee would question it, claiming non-assessment, raising an additional ground for the purpose, the Revenue would contest it, emphasizing the absence of power of review with the AO, so that the draft becomes, by operation of law, the final order at the end of the prescribed period, with the assessee in the instant case having in fact appealed there-against before the first appellate authority by the end of the 30-day period reserved for filing the objections. There was as such no doubt as regards the finality of the assessment. The issue being legal, with the relevant facts admitted and not in dispute, the same was admitted.

The Law

3. Section 144C of the Act, which also delineates the procedure to be followed in respect of an assessment there-under, also read out during the hearing, reads as under:

Reference to dispute resolution panel.

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).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any 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.

(6)(9)

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14)...

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or 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 non-resident not being a company, or any foreign company.”

(emphasis, ours)

The Controversy

4.1 The law in the matter is, thus, amply clear, and the procedure well laid out, *qua* which there could therefore possibly be no cleavage of opinion. The issue, as we discern, however, is not with regard to the procedure *per se*, but the consequence of not following the prescribed procedure. That is, would it; there being no vested right in procedure, not observing the same amount to an irregularity, particularly in the absence of any prejudice being caused; the AO, being even otherwise incompetent to, having admittedly not carried out any changes to the draft. And, accordingly, proceedings restored to the stage where the irregularity intervened (*Guduthur Bros. v. ITO* [1960] 40 ITR 298 (SC)) or, considering he being powerless to review his order, so that the same is to be in any case adopted as such in view of no objection/s having been raised, the same deemed as the assessment order, i.e., at the end of the defined period for raising objections by the assessee with the DRP. Or, the AO having not followed the prescribed procedure, the assessment fails, rendering the draft order as of no consequence in law, which cannot now be acted upon. This is as, equally, where a particular act is required by the statute to be done in a particular manner, the same is to be done in that manner or not at all. All the legal propositions afore-stated are well-settled, case law on which is legion.

4.2 Sure, the AO is to pass a final order at the end of the prescribed time u/s. 144C(2) of the Act on the non-raising of the objection by the assessee. We say so not

solely on the basis of the use of the word 'shall' in s. 144C(3), as Sh. Sathisan, the ld. counsel for the assessee, would emphasize, inasmuch as the said word may not always convey a mandatory intent (*CIT vs. Malayalam Plantation* [1976] 103 ITR 835 (Ker)). But, on reading the provision as a whole. The issue of the legal consequence of not passing the said order assumes significance as the machinery provisions are to be construed in a manner to make the scheme of the Act workable, and not defeat it. *Clearly, the law deems an acceptance of the draft order at the end of the stipulated period on the non-raising of the objection thereto.* Would, therefore, to place the matter in perspective, the said deemed acceptance translate into deeming the draft order as a final order at the end of the defined period; the AO being bound to adopt the same, and at best a curable irregularity in view of no prejudice caused; the assessee having in fact already conveyed his acceptance and acquiescence by appealing there-against. Or, it would be not so, and the AO, even if he is to formally adopt the said order, reducing the same to a mere formality, has yet to necessarily pass an assessment order, which therefor fails in its absence.

Decision

5.1 In our considered opinion, notwithstanding the clear position in law that the AO cannot review his order, so that the draft order is to be necessarily adopted as the assessment order u/s. 144C(3) on no objection being raised by the assessee before the DRP u/s. 144C(2) of the Act, as obtains in the instant case, the draft order cannot be raised to, or assume the status of, or otherwise deemed as, the final assessment order at the end of the prescribed period. *There is no operation of law, and the AO is by law obliged to actually pass the assessment order.* There is no deeming in the matter. The AO is obliged by law to, at the end of the period prescribed therefor, record the fact of no acceptance of the draft assessment or, as the case may be, no objection/s thereto with the DRP, having been filed, and that therefore the draft order is being adopted as the final assessment order. It is in such a case not necessary for him to repeat the entire body of the draft order again, and appending it to such a statement, duly signed

and dated, the draft would assume the status of a final assessment on the later date, i.e., the date of signing by him of the said statement, of which the draft order becomes thus an integral part. Of course, it is open for him to repeat the entire order verbatim; sign and date it. It is only on passing such an order that the assessment process is completed, and an assessment in law comes into being, and not before, and on the basis of which therefore a notice of demand could be issued. No demand notice, which only gives the Revenue the right to recover the amount specified therein, can be issued on the basis of, or arise out of or in consequence of a draft order. We say so as the demand notice in original forms part of the documents required to be submitted while filing first appeal. Though no such case stands made by the Revenue before us, we say so by way of abundant caution, so that even assuming issue of a demand notice by the AO, which does not appear to be the case inasmuch as he could not have on 28/3/2013 possibly presumed the non-raising of any objection/s by the assessee, it would be of little consequence. This is as it is a concomitant of an assessment order and, therefore, follows it, and not otherwise. That is, would not validate the non-passing of the assessment order, an admitted fact. Put succinctly, the principle of no cognizance to an act not done in the manner prescribed by law (refer, inter alia, *Babu Varghese v. Bar Council of Kerala* [1999] 3 SCC 422) shall to prevail over other considerations of deemed acceptance; no prejudice; *de minimis*; and procedural irregularity.

5.2 The next issue before us if the proceedings are to revert to the AO to pass an assessment order in terms of section 144C(3) of the Act. We would have, with a view to complete the proceedings, taking them to a logical end, surely done so, taking shelter in the same principle that the manner prescribed by law is to be adhered to. However, the time limit for completion of the assessment under the Act having expired (s. 144C(4)), no useful purpose would be served by such a remittance.

6. *In Conclusion*

In sum, the statement in the ‘assessment order’ as ‘under section 144C(1)’ in its head-note notwithstanding, there is no assessment in law for the relevant year. That the assessee appealed there-against, which stands admitted and adjudicated upon by the first appellate authority, is to no consequence. There is no estoppel against law. Equally, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (*CIT v. C. Parakh & Co. (India) Ltd.* [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)). Further, there being no assessment in law, the assessee’s returned/admitted income is to be regarded as it’s income for the year, and its liability to tax under the Act is to be with reference thereto (*CIT v. Shelly Products*[2003] 261 ITR 367 (SC)). Both the appeals are disposed of accordingly. Further, having held so, the adjustments to the returned income do not arise for adjudication on merits. We decide accordingly.

7. In the result, the appeals by the assessee is allowed, and that by the Revenue, dismissed.

Order pronounced in the open court on October 30, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: October 30, 2023

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The CIT concerned
4. The DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin