

**IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI**

**BEFORE MS PADMAVATHY S, AM &
SHRI RAJ KUMAR CHAUHAN, JM**

**I.T.A. No. 4206/Mum/2023
(Assessment Year: 2018-19)**

Feedertech Pte. Ltd., D-301-305, Level 3, Tower No.2, Seawoods Grand Central Mall, Nerul Node-III, S.O. Navi Mumbai, Thane-400706. PAN: AAPCS9504B	Vs.	ACIT (International Tax) Circle- 2(3)(1), Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	Respondent)

Appellant / Assessee by : Shri M.P. Lohia, AR

Revenue / Respondent by : Shri Krishna Kumar, Sr. DR

Date of Hearing : 05.02.2025

Date of Pronouncement : 18.02.2025

ORDER

Per Padmavathy S, AM:

This appeal by the assessee is against the order of the Commissioner of Income Tax (Appeals)-56, Mumbai [for short 'the CIT(A)] dated 25.09.2023 for the AY 2018-19. The assessee raised the following ground of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned Assistant Commissioner of Income-tax (International Taxation)-2(3)(1), Mumbai (ACIT) erred in passing the impugned assessment order under section 143(3) of the Income-tax Act, 1961 (IT Act), which is in grave violation of section 144C of the Act as the Appellant assessee is an Eligible Assessee" under clause (b) of sub Section 15 of Section 144C of the Act and

the assessment has been completed without issue of the draft assessment order, which is mandatory as per section 144C of the Act. Thus, the impugned assessment order suffers from an illegality and ought to be quashed on this ground alone.

2. On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in upholding disallowance made by Assessing Officer by failing to appreciate that the Appellant assessee's case is liable for relief under Article 8 of the Double Taxation Avoidance Agreement (DTAA) between India and Singapore on the freight income earned by the Appellant and therefore, the impugned addition of Rs. 3,41,77,870/- made by the Ld Assessing officer is illegal and bad in law and is liable to be deleted.

3. On the facts and in the circumstances of the case and in law the CIT(A) erred by failing to appreciate that the profits from the operation of ships in international traffic shall be taxable only in Singapore and therefore, the Appellant company has rightly offered the same for the Purpose of taxation in the jurisdiction of the Singapore.

4. On the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to consider the fact that, assessee company is eligible to claim relief of the taxable profit under India Singapore treaty.

5. The Learned CIT did not recognise the fact that, the appellant had submitted all DIT certificates for which DIT exemption was claimed.

6. On the facts and circumstances of the case and in law, the learned CIT erred in levying interest under section 234B and section 234C of the IT Act despite the fact that the Appellant was not liable to pay any advance tax on the basis of 100% Double Income-tax Relief Certificate issued by the learned CIT.”

2. The assessee is a company registered under the domestic laws of Singapore and is engaged in the business of operation of ships in international traffic. The assessee earns income from freight from shippers/ customers from the vessel voyages performed. The assessee filed the return of income for AY 2018-19 on 10.09.2018. During the year under consideration, the assessee earned freight income of Rs. 45,57,04,930/- from the vessel voyages performed in the international traffic and claimed the relief under Article-8 of the Double Taxation

Avoidance Agreement (DTAA) between India and Singapore. The assessee while filing the return of income has disclosed Rs. 3,41,77,870/- (7.5% of Rs. 45,57,04,930/-) as deemed income under the provisions of section 44B of the Income Tax Act, 1961 (the Act). Since the income is not taxable in India by virtue of Article-8 of India and Singapore DTAA, the assessee claimed relief accordingly in the return of income. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The assessee submitted before the Assessing Officer (AO) that the freight income earned by the assessee is not taxable in India as per Article-8 of India Singapore DTAA. The AO however based on the details furnished in the various schedule of the return of income filed by the assessee made an addition of Rs. 3,41,77,870/- stating that the assessee itself has offered the same to tax under section 44B of the Act and that the AO does not have power to reduce the income declared by the assessee in the return. On further appeal, the CIT(A) upheld the decision of the AO by placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetz (India) Ltd. vs. CIT [284 ITR 323 (SC)]. The assessee is in appeal before the Tribunal against the order of the CIT(A).

3. Ground No.1 pertains to the legal issue of the AO passing the final assessment order under section 143(3) of the Act without issuing the draft assessment order as is required under section 144C of the Act. The ld. AR submitted that the assessee is a non-resident and falls within the definition of eligible assessee under section 144C of the Act. The ld. AR in this regard drew our attention to the return of income filed by the assessee wherein the assessee has clearly mentioned the status as non-resident and in Schedule-FSI (page 66) has declared the details of income outside India and tax relief sought accordingly. The ld. AR further submitted that the assessee instead of treating the income as not

taxable under Article-8 of India Singapore DTAA has inadvertently computed 7.5% of the freight income earned under section 44B of the Act and claimed the same as exempt under Article-8. The ld. AR drew the attention of the Bench to the return of income filed by the assessee to submit that the assessee though is eligible for exemption under Article 8 of the DTAA, has erroneously computed income under section 44B @ 7.5% and claimed the same as exempt in the return. The ld. AR submitted that it is a well-settled position that in the case of eligible assessee as per section 144C(15) of the Act, the final assessment order passed by the AO without passing the draft assessment order is held to be null and void for the reason that the order passed is contrary to the provisions of section 144C(1) of the Act. The ld. AR relied on various judicial pronouncements of the Hon'ble High Court and the Co-ordinate Bench in this regard. The ld AR also made the alternate submission that the AO has made variation to the income returned which is prejudicial to the interest of the assessee and on that count also the AO ought to have passed the draft assessment.

4. The ld. DR on the other hand relied on the order of the lower authority.

5. We heard the parties and perused the material on record. The primary legal contention of the assessee is with regard to the AO passing the final assessment order without passing the draft assessment order in case of the assessee who is "eligible assessee" within the definition of section 144C(15) of the Act. Therefore, before proceeding further let us look at the provisions of section 144C of the Act.

“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 in the income or loss returned which is prejudicial to the interest of such assessee.

(2) to (14) *****

(15) *For the purposes of this section,—*

(a)*****

(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:***

Provided that such eligible assessee shall not include person referred to in sub-section (1) of section 158BA or other person referred to in section 158BD

6. In assessee's case, it is not in dispute that the assessee is a non-resident foreign company and this fact is being recorded both in the assessment order as well as the CIT(A) order where the residential status of the assessee is being recorded as non-resident. From the perusal of the above provisions of section 144C(1) of the Act, it is clear that the AO should mandatorily issue the draft assessment order before passing the final assessment order in the case of the eligible assessee i.e. foreign company. From the perusal of fact, we notice that the AO has passed the final assessment order without passing any draft assessment order and the fact is not disputed by the Revenue. We notice that the Hon'ble Bombay High Court in the case of International Air Transport Association vs. DCIT [2016] 68 taxmann.com 246 (Bom.)] has considered a similar issue where it has been held that

"5. However, it is pertinent to note that the order dated 7th October, 2015 of the DRP in paragraph (3) thereof records that "There is no dispute that the assessee is a foreign company". This position is undisputed even before us. Therefore, in view of Section 144C(15) of the Act which defines eligible assessee to whom Section 144C(1) of the Act applies to inter alia mean any foreign company. Therefore, a draft assessment order under Section 144C(1)

of the Act is mandated before the Assessing Officer passes a final order under Section 143(3) of the Act in case of eligible assessee. An draft assessment order passed under Section 144C(1) of the Act bestows certain rights upon an eligible assessee such as to approach the DRP with its objections to such a draft assessment order. This is for the reason that an eligible assessee's grievance can be addressed before a final assessment order is passed and appellate proceedings invoked by it. However, these special rights made available to eligible assessee under Section 144C of the Act are rendered futile, if directly a final order under Section 143(3) of the Act is passed without being preceded by draft assessment order.

6. In the above view, the assessment order dated 23rd March, 2015 passed by the Assessing Officer for the assessment year 2012-13 is completely without jurisdiction. This is so as it has not been preceded by a draft assessment order. Hence, the foundational/basic order viz. the assessment order dated 23rd March, 2015 is set aside and quashed as being without jurisdiction. Consequent orders passed on rectification application as well as on penalty are also quashed and set aside being unsustainable.”

7. Similar view has been expressed in many other judicial pronouncements. As already stated in assessee's case, the revenue has not disputed the fact that the assessee falls within the definition of "eligible assessee" as per the provisions of section 144C(15)(ii) and therefore the AO ought to have passed the draft assessment order before passing the final assessment order. It is relevant to mention that failure of passing of a Draft Order under Sec 144C (1) is not a curable defect since this a violation of a statutory right of the assessee to raise grievance that can be addressed before a final assessment order is passed and appellate proceedings invoked. Therefore, respectfully following the above decision of the Hon'ble Bombay High Court we hold that the final assessment order passed by the AO is liable to be quashed.

8. Since we have allowed the appeal in favour of the assessee on the above legal contention, the other submissions made on the issue of amendment to section 144C(1) being prospective and also on merits as to the eligibility of the assessee to

claim exemption under Article-8 of India Singapore DTAA has become academic and left open accordingly.

9. In result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 18-02-2025.

Sd/-
(RAJ KUMAR CHAUHAN)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai