आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री संजय अरोड़ा,लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष
BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./ITA N0.818/Mds/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Daewon Kang Up Co. Limited 16-5, Namdaemunno 5-GA, Chung-Gu Seoul, Korea – 100 095. [PAN:AADCD 7280P]	v.	Deputy Director of Income Tax, International Taxation-I, Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Lalith Kumar, CA &
Shri Girish Kumar, CA
प्रत्यर्थी की ओर से/Respondent by : Shri Muruga Boopathy, Jt. CIT

सुनवाई की तारीख/Date of Hearing : 21.10.2016
घोषणा की तारीख/Date of Pronouncement : 30.12.2016

आदेश /O R D E R

Per Sanjay Arora, Accountant Member:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-16, Chennai ('CIT(A)' for short) dated 23.01.2015, disposing it's appeal contesting its assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 28.03.2013 for assessment year (AY) 2010-11.

2. The back ground facts of the case are that the assessee, a Korea based foreign company, did not return its income by way of guarantee fee, charged at 1% of the amount of the borrowings of its Indian subsidiary guaranteed by it. While the Assessing Officer (AO) brought it to tax as 'interest', the ld. CIT(A) confirmed the same, albeit on the ground that it was 'fee for technical services'. Aggrieved, the assessee is in second appeal.

3. Before us, the assessee's plea was two-fold. That guarantee fee, though interest within the meaning of the term as defined under section 2(28A) of the Act, is not so as defined under Article 5 of the Indo-Korean tax treaty, even as held by the Tribunal in *Asst. CIT v. GMAC Financial Services India Ltd.* [2012] 16 ITR (Trib) 422 (Chennai). Though rendered in the context of Indo-US treaty, 'interest' stands defined identically therein as in Indo-Korea treaty. Guarantee fee if also not technical fee as no services, managerial or technical in nature, as held by the Authority for Advance Rulings in *Invensys International Holdings Ltd.* (in AAR No. 959/2010 dated 13/7/2015/copy on record). The only head under which, therefore, the same is taxable is as 'business of income', which is liable to tax in the case of a non-resident only in case of a permanent establishment (PE) in India; which is admittedly absent, the Indian company being a separate person. The second ground on which the assessment is assailed is that it is without jurisdiction. The assessee being a foreign company, is an 'eligible assessee' under section 144C of the Act and, accordingly, the AO was bound to pass a draft order, against which the assessee could raise objections before the Dispute Resolution Panel (DRP), which are required to be disposed by it, and whose decision is binding on the AO. The procedure prescribed having not been observed, the assessment fails, as expressed by the Hon'ble Jurisdictional High Court in *Vijay Television (P) Ltd. v. DRP* [2014] 369 ITR 113 (Mad).

The ld. DR would submit that the term 'eligible assessee' is defined under section 144C (15) as a person in whose case a variation is proposed under section

92CA and a foreign company, so that only where both the conditions are satisfied would the person concerned qualify to be an eligible assessee. Further, even if considering the assessee as one, so that the AO ought to have followed the procedure envisaged in sec. 144C before passing the assessment order, the only consequence of not doing so is that the assessment is to be restored to the stage where the procedural lapse has occurred. The decision in the case of *Vijay Television (P.) Ltd.* (supra) is distinguishable in-as-much as in that case the AO lacked the inherent jurisdiction to pass the order and, further, there were incidents indicting the order, vitiating it. It was under these circumstances that the same was considered as a nullity. On merits, guarantee fee is clearly a financial service, even as held by the AO; any service involves inputs, being even otherwise widely defined under *Explanation 2* to section 9(1)(vii). In fact, service-tax is also leviable in respect of such services.

The ld. AR would submit that rather than a financial service, it is a consideration for assumption of financial risk of it's 100% Indian subsidiary. The same gets excluded from the definition of interest which is only in respect of a debt claim.

4. We have heard parties, and perused the material on record.

We shall first consider the jurisdictional aspect. In our considered view, the assessee, a foreign company, is an 'eligible assessee' under section 144C(15) of the Act. Accordingly, assessment in it's case, where any variation in the income returned prejudicing the assessee is sought to be made by the AO (s.144C(1)) could be framed only by observing the procedure enshrined therein. Sec.144C(15) reads as:

> **'Reference to dispute resolution panel**
> **s. 144C**
> 1 to 14 ------
> (15) For the purpose of this section,-
> (a) "Dispute Resolution Panel" means a collegiums comprising of three Principal Commissioners of 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 92-CA; and
(ii) any foreign company.'

The use of the word 'and' instead of 'or' in s. 144C(15) must be regarded as the law prescribing two categories of persons in whose case sec. 144C shall apply. That is, persons falling under sub-clauses (i) and (ii) of clause (b) of section 144C(15). This is apparent from a plain reading of the provision; the identification of a 'foreign company' being preceded by the word "means", and followed by the sub-clauses (a) and (b), and not, for example, by the words to the effect or signifying a person satisfying the conditions as set out in the said sub-clauses. As such, a foreign company is an eligible assessee, independent of the variation to its returned of income being by way of a transfer pricing adjustments - the other condition set out in s. 144C(15)(b)(i), or otherwise.

The next question to consider is the consequence of the AO failing to observe the procedure set out in s.144C, falling under Chapter-XIV, titled 'Procedure for assessment'. Toward this, the assessee has relied on *Vijay Television (P.) Ltd.* (supra) by the Hon'ble jurisdictional High Court, which is binding on us. The same has been perused, so as to discern it's ratio. In that case, the AO passed the assessment order without first passing a draft assessment order proposing additions, to enable the assessee to, at its option, file objections with the DRP, whose opinion in the matter, after hearing the assessee, would be final as far as AO is concerned, so that he would pass the final assessment order in conformity with the directions issued by the DRP. The AO in that case, realizing his mistake on it being pointed out, passed an corrigendum on 15.04.2013, stating that the earlier order dated 26.03.2013 is only a draft assessment order. The said, subsequent order was stated as passed u/s. 154 of the Act, and which could therefore relate back to 26.03.2013, so that the first order was in effect and substance only a draft assessment order. The Hon'ble High Court upheld the writ petition dated 16.04.2013 by the assessee against the order dated 15.04.2013, on

principally two grounds. Firstly, relying on *Deepak Agro Foods v. State of Rajasthan* [2008] 16 VST 454 (SC), it was held that the order dated 15.04.2013 could not extend the limitation for passing the assessment order, which stands already expired on 31.03.2013. The same, i.e., the order dated 26.03.2013, having been passed contrary to s. 144C was, therefore, bad in law. Further, any order that would now stand to be passed by the AO, i.e., treating the order dated 26.03.2013 as a draft order, would be, being beyond 31.03.2013, a nullity in law. That being so, the order dated 26.03.2013 was only a final assessment order. Why, the Department had even raised a demand on the assessee on that basis, which had not been withdrawn, as well as issued penalty notice in pursuance thereto. The second reason that prevailed with the Hon'ble High Court, relying on several authorities, was that the order passed without observing the mandatory procedure in its respect could not but be bad in law, to which no sanction in law could be given. Omission on the part of the AO to follow the mandatory procedure could not be said to be a procedural irregularity, which could be cured. The Revenue's reliance on *L.Hazuri Mal Kuthiala v. ITO* [1961] 41 ITR 12 (SC) was found misplaced as in that case an omission by the AO to consult the Central Board of the Revenue upon passing, similarly, a draft assessment order u/s. 5(3) of the Patiala Act was considered as merely directory and not mandatory. In the present case, the Hon'ble Court held that the procedure was mandatory, and the AO had no jurisdiction to proceed without passing a draft assessment order.

In our considered view, the lapse committed by the AO in passing the assessment order without first passing a draft order, against which the assesee may file objections with the DRP, seeking its directions to the AO, is only a procedural irregularity, which does not impinge on the jurisdiction on the AO to pass the assessment order, which he assumes on the issue of notice u/s. 143(2), even as observed by the Hon'ble jurisdictional High Court itself in a number of cases, reference to one of which, i.e., *R.V. Sarojini Devi v. IAC* [2000] 242 ITR 329 (Mad) stands made in the decision itself (also refer *Asst. CIT v. Hotel Blue Moon* [2010] 321 ITR 362 (SC)). Reference in this regard may be made to the decision in

Guduthur Bros. v. ITO [1960] 40 ITR 298 (SC), wherein the Apex Court clarified that the AO assumes jurisdiction to assess on issue of a valid notice, and which obtained till the same remained to be disposed of. The proceedings completed without allowing the assessee an opportunity of being heard was an illegality, vitiating the proceedings, which would relate back in time, having occurred during the course of the assessment proceedings itself. The impugned order was to be set aside, and the proceedings to commence from the stage the illegality or the irregularity had occurred. In the present case too, the order has been passed by the AO by, in effect, without allowing the assessee the opportunity of being heard by the DRP, i.e., prior to it being finalized. That there is no vested right against procedure is well-settled. Again, it is nobody's case that the same was done to purchase time, or that in the event the said opportunity was allowed, the assessment would get barred by time. In fact, no such contention could in law be raised as s. 144C(13) itself excludes the operation of s. 153 (or s. 153B), stipulating time limit for passing orders order the Act, setting it at one month after the receipt by the AO of the directions by the DRP. There is no question of the assessment getting time barred or having crossed the bar of time by which it could have been passed. The decision in *Deepak Agro Foods* (supra) would also thus not apply in the facts and circumstances of the case, i.e., even assuming non-application of the decision in *Guduthur Bros*. (supra). Why, in many a case, as in *GKN Drive Shafts (India) Ltd. v. ITO* [2003] 259 ITR 19 (SC), the Apex Court, finding the assessment to be procedurally deficient, set aside the same to the file of the AO to pass a fresh assessment order complying with the conditions or the procedure as prescribed or laid down. Further, once the Revenue itself admits the order passed to be a draft assessment order, it cannot in law proceed to collect the demand raised, so that the raising of demand would be without the sanction of law.

So, however, the decision in *Vijay Television (P.) Ltd.* (supra) is judicially binding on us. The same is directly on the point, and is therefore squarely applicable. In fact, in the present case there is no attempt by the AO to rectify his mistake. We have set out our humble opinion in the matter only with a

view of its consideration by the Hon'ble Court in a given case. Respectfully following the decision in *Vijay Television (P.) Ltd.* (supra), we hold the assessment in the present case as bad in law. In consequence, the assessee is only liable for tax on its' returned income (refer: *CIT v. Shelly Products* [2003] 261 ITR 367 (SC)). The assessment failing, we do not consider it relevant or necessary to address the issue arising in quantum assessment on merits.

We decide accordingly.

5. In the result, the assessee's appeal is allowed.

Order pronounced on December 30th, 2016 at Chennai.

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	(संजय अरोड़ा)
(Duvvuru RL Reddy)	(Sanjay Arora)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 30th December, 2016.
Edn.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT,
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.