

IN THE HIGH COURT OF BOMBAY AT GOA***TAX APPEAL NO.144 OF 2017***

The Principal Commissioner of
Income Tax,
having office at Aayakar Bhavan,
Patto-Plaza,
Panaji Goa.

... Appellant

Versus

M/s Andrew Telecommunications P. Ltd.,
Plot No.N-2, Phase IV,
Verna Salcete Goa.
PAN: AABCA 8820A

.... Respondent

Ms. Amira Razaq, Junior Central Government Standing Counsel for
the Appellant.

Mr. Percy Pardiwala, Senior Advocate with Ms. Priyanka Kamat,
Advocate for the Respondent.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Date : 16 July 2018.

Judgment (Per N. M. Jamdar, J)

The Revenue has filed this appeal taking exception to the
order passed by the Income Tax Appellate Tribunal, Panaji, on 21

January 2016. By the impugned order, the Tribunal dismissed the appeal filed by the Revenue and confirmed the order passed by the Commissioner of Income Tax (Appeals) dated 13 March 2015. The Assessee had filed cross objection which the Tribunal allowed.

2. The Respondent-Assessee had taken an additional ground before the Tribunal that the order was passed by the Assessing Officer without forwarding a draft of the proposed order of assessment contrary to the procedure laid down under Section 144C of the Income Tax Act. The Tribunal held that the factual assertion of the Assessee was correct and the absence of draft assessment order goes to the root of the assessment. Consequently the Tribunal held the same in favour of the Respondent-Assessee.

3. In this appeal the Revenue contends that the order passed by the Tribunal is incorrect in view of the provisions of Section 144C(13) of the Act and there is no need for a draft assessment order in the said sub-section and that the Assessee never took any objection to the non-issuance of the draft order. It is also contended that if the matter is remanded, a draft assessment order is not necessary. These according to the Revenue are the substantial questions of law in the present appeal.

4. We have heard Ms. A. Razaq, learned Standing Counsel for the Appellant-Revenue and Mr. P. Pardiwala, learned Senior Advocate for the Respondent-Assessee.

5. Since the appeal raises a question relating to Section 144C of the Income Tax Act, a brief overview of this provision is necessary. Section 144C lays down a scheme for reference to Dispute Resolution Panel. The Assessing Officer at the first instance forwards a draft of the proposed order of assessment to the eligible Assessee if he proposes to make any variation in the income or loss which is prejudicial to the interest of the Assessee. Once such a draft order is received, the Assessee can, within 30 days accept the variations or file his objections to the Dispute Resolution Panel. If the Assessee accepts the variations or no objections are received within a period specified, the Assessing Officer proceeds to complete the assessment on the basis of draft order. When an objection is lodged with the Dispute Resolution Panel, the Dispute Resolution Panel issues necessary directions for the guidance of the Assessing Officer. Before passing any directions, the Dispute Resolution Panel take into consideration the draft order, the objections, evidence furnished by the assessee, report of the Transfer Pricing Officer, Assessing Officer or Valuation Officer as the case may be, the record relating to the draft order, the evidence collected by the

Panel, and the result of the enquiry. The Dispute Resolution Panel may confirm, reduce or enhance the variations. Direction issued by the Dispute Resolution Panel is binding on the Assessing Officer. Before issuing any directions, the Dispute Resolution Panel is required to give opportunity of hearing. After such directions are received from the Dispute Resolution Panel, the Assessing Officer proceeds to complete the assessment under Section 144C(13) of the Act. If the Assessing Officer proceeds to complete the assessment pursuant to the directions issued by the Panel under Section 144C(13), he is not required to give further opportunity of hearing to the assessee. This is broadly the scheme of Section 144C.

6. Turning now to the facts of the case at hand. The Assessee is in the business of manufacturing and assembly of telecommunication cables, wave-guides, connector antennas and accessories and also trades in the related products. The Assessee filed its return of income on 29 November 2006 declaring a loss of Rs.14,93,68,912/-. The Assessment Order was passed under Section 143(3) on 16 December 2009 on an income of Rs.31,21,13,590/- on the basis of the order passed by the Transfer Pricing Officer under Section 92CA(3) dated 30 October 2009. The Transfer Pricing Officer concluded that the excess payment being adjustment under Section

92CA in the manufacturing segment towards the purchase of goods from the associated enterprises was at Rs.50,50,38,712/- and the income derived from the industrial undertaking was at Rs.14,66,97,731/- against returned loss of Rs.35,83,40,981/-.

7. The Assessee filed its objection before the Dispute Resolution Panel on 28 January 2010. The Panel, by order dated 24 September 2010, directed the Assessing Officer to modify the order passed on Arms Length Price by the Transfer Pricing Officer. The Transfer Pricing Officer, by its order dated 29 October 2010, directed the transfer pricing adjustment be made under Section 92CA at Rs.44,18,04,792/-. The Assessing Officer passed an order on 24 November 2010, giving effect to the revised transfer pricing adjustment of Rs.44,18,04,792/-.

8. The Assessee filed an appeal before the Income Tax Appellate Tribunal against the order passed by the Assessing Officer under Section 144C(13) dated 24 November 2010. Since the Transfer Pricing Officer had changed in the meanwhile, the Tribunal held that the new Transfer Pricing Officer should have given hearing to the assessee and by order dated 1 October 2012 set aside the Assessment Order dated 24 November 2010.

9. The matter was sent back to the Transfer Pricing Officer who gave hearing to the Assessee and passed a fresh order on 30 January 2014. Thereafter, the Assessing Officer, without issuing any draft assessment order, proceeded to pass an order on 2 February 2015. The Assessee challenged the said order before the Commissioner of Income Tax (Appeals) and the appeal was partly allowed by the Commissioner of Income Tax (Appeals) by order dated 13 March 2015. As against this order, the Revenue filed the Income Tax Appeal No.271/2015 before the Income Tax Appellate Tribunal and the Assessee filed a Cross Objection No.62/2015.

10. Before the Tribunal, the Assessee filed an additional ground on 4 September 2015, which reads thus :

“The Assessing Officer has erred in passing the assessment order 12th March, 2014 without forwarding a draft of the proposed order of assessment to the assessee and thereby not following the procedure laid down in Sec.144C of the Income Tax Act, 1961. The appellant submits the order dated 12th March 2014 is void, bad in law, non est and a nullity”.

The Tribunal entertained the additional ground and disposed of the appeal with the following observations.

“10. We have considered the rival submissions. As it is noticed that the draft assessment order has not been produced before us to counter the specific allegations in respect of non-availability of the draft assessment order, we are of the view that the assessment order passed is liable to be annulled, respectfully following the decision of the Hon'ble Andhra Pradesh High Court in the case of M/s. Zuari Cement Ltd.(supra), wherein it has been held that where the assessment order has been passed contrary to the mandatory provisions of sec. 144C of the Act and violation thereof, the assessment order is liable to be declared as one without jurisdiction, null and void and unenforceable.”

11. It was an admitted position before the Tribunal and so also in this Court that before the order was passed by the Assessing Officer on 2 February 2015, no draft assessment order was given. The question that is debated before us is whether it was necessary.

12. As regards the admission of the additional ground before the Tribunal, the Tribunal had relied on the decision of the Supreme Court in the case of *National Thermal Power Co. Ltd. Vs CIT*¹. As stated earlier, there is no factual dispute that there was no draft assessment order. A draft assessment order is an essential requirement of the scheme of Section 144C and in view of the admitted factual position, the Tribunal was not in error in admitting the additional

1 229 ITR 383

ground.

13. Ms. Razaq, the learned Standing Counsel contended that since the proceedings themselves show that the order was passed under Section 144C(13) and as per the scheme of the Section there was no requirement of any draft assessment order. It was also submitted that upon remand it is not necessary to issue draft assessment order again.

14. Mr. Pardiwala contended that a draft assessment order ought to have been issued and upon failure of the Officer to do so the Assessee has lost a valuable right. Mr. Pardiwala submitted that, when the Dispute Resolution Panel sent the proceedings back to the Transfer Pricing Officer, categorical observations were made that the order was passed in violation of the principles of natural justice and exercise had to be taken afresh. He submitted that therefore the earlier draft assessment order did not exist and a fresh draft order had to be issued and the failure has vitiated the further proceedings and, therefore, there is no error in the order passed by the Tribunal and there is no question of law arises. Mr. Pardiwala relied upon the decisions in the case of the *Deputy Commissioner of Income Tax Delhi Vs Control Risks India Pvt. Ltd.*²; *Control Risks India Pvt. Ltd. Vs Deputy*

² Special Leave Petition (Civil) No.7090/2018.

*Commissioner of Income Tax*³; *International Air Transport Association V/s Deputy Commissioner of Income Tax and Others*⁴; *JCB India Ltd. Vs Deputy Commissioner of Income Tax & Another*⁵; *and Turner International India Pvt. Ltd. Vs Deputy Commissioner of Income Tax Circle 25(2) New Delhi*⁶

15. It is settled law that mere wrong reference to a provision in the order cannot be determinative of the source of power. Questions which therefore arise for consideration are as follows. First, what was the effect of not issuing the draft assessment order by the Assessing Officer. Second, when the proceedings were remanded whether a draft assessment order was required to be issued. Thirdly, whether the order of the Assessing Officer could be said to an order under Section 144C(13).

16. We have gone through the order of the Tribunal dated 1 October 2012 by which the proceedings were remanded. The Tribunal noted that during the course of the proceedings, a new Transfer Pricing Officer took charge of the Assessee's case and he passed an order without issuing any show cause and without hearing the

3 W.P.(C)5722/2017 & C.M.No.23860/2017(Stay) dated 27 July 2017.

4 WP(L) No.351 of 2016 dated 18 February 2016

5 W.P. (C) No.3399/2016 dated 7 September 2017

6 W.P.(C)4260/2015 dated 17 May 2017

Assessee. The Tribunal upheld the grievance of the Assessee that a notice ought to have been issued when the new Transfer Pricing Officer took charge by observing thus :-

“11. In view of the aforesaid decision of the Hon'ble Supreme Court and the other case laws, we are of the view that the new TPO should have given a show cause notice and also the copy of the material gathered by him which he wanted to use against the assessee prior to making adjustment. There is clear cut violation of principles of natural justice. We, accordingly, set aside the assessment order and restore the matter back to the file of the assessing officer in the interest of justice and fair play to both the parties as in our opinion no prejudice shall be caused to either of the parties if matter is restored to the file of the assessing officer. The assessing officer is directed to pass a fresh order in accordance with law after providing adequate and sufficient opportunity of being heard on the various objections and then decide the matter afresh in accordance with the law.

Thus, the Tribunal set aside the assessment order and restored the matter back to the file of the Assessing Officer. Ms. Razaq raised a contention that the order of the Panel was not set aside. In paragraph 10 of the order the tribunal had adverted to this issue. After reaching the conclusion that the assessment has to be set aside, the Tribunal considered to which authority it should be sent to. In that context, the Tribunal noted that even the Dispute Resolution Panel had not dealt

with all objections including the objections regarding the denial of natural justice. Therefore, the Tribunal found it necessary that the matter should be *de novo* considered by the Assessing Officer. It is in this context the matter was relegated to the stage of Section 144C(1). Further proceedings were therefore not under Section 144C(13) as the entire exercise was set aside to be started afresh. Therefore the contention that the order passed thereafter was under Section 144C(13), cannot be accepted.

17. In the case of *International Air Transport Association*, the Division Bench of this Court has held that the order passed by the Assessing Officer without their being any draft assessment order is illegal and without jurisdiction. The same view has been reiterated in the case of *Zuari Cement Ltd., Vs ACIT*⁷ by the Division Bench of Andhra Pradesh High Court which also held that the failure to pass a draft assessment order under Section 144C(1) of the Act would result in rendering the final assessment as one without jurisdiction. This position of law is settled.

18. Now to consider whether after remand, it was necessary to issue a draft assessment order. Firstly, the issuance of a draft assessment

⁷ WP(C) No.5557/2012 dated 21 February 2013

order is not an empty formality. When a draft assessment order is passed and copy is given to the Assessee, the Assessee can raise objections before the Dispute Resolution Panel on any of the proposed variations. There is a right given to the Assessee to object, and to have the objections considered not by the Assessing Officer, but by the Dispute Resolution Panel.

19. The Tribunal, by order dated 1 October 2012, set aside the entire exercise and the matter was relegated to the Assessing Officer. Once the matter was sent back to be decided afresh it went back to the stage of Section 144C(1) of the Act. Since the Tribunal set aside the proceedings on the ground of violation of principles of natural justice, the first exercise was void and without jurisdiction. Therefore, nothing remained on the record, including the draft assessment order. Therefore, issuance of a draft assessment order was necessary. We do not find from the scheme of Section 144C that if the proceedings were to be started afresh on remand, the draft assessment order is not required to be given. Non issuance of the draft assessment order has thus vitiated the final assessment order.

20. In the case of *JCB India*, the Division Bench of the Delhi High Court in identical circumstances has held that after the remand

on facts, the draft assessment order was necessary.

21. The view taken by the Tribunal in the impugned order that for want of issuance of draft order, the assessment order is without jurisdiction, cannot be faulted with. No substantial question of law arises in the present appeal. The appeal is dismissed.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.