

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 129 of 2017

FOR APPROVAL AND SIGNATURE :
HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

PRINCIPAL COMMISSIONER OF INCOME TAX - 1....Appellant(s)
Versus
WOCO MOTHERSON ADVANCED RUBBER TECHNOLOGIES
LIMITED....Opponent(s)

Appearance :
Mr PRANAV G DESAI, ADVOCATE for the Appellant(s) No. 1

CORAM: HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA
20th February 2017

ORAL JUDGMENT (PER : HONOURABLE Mr. JUSTICE M.R. SHAH)

Feeling aggrieved and dissatisfied with the *impugned* judgment and order dated 29th September 2016 passed by the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot in ITA No. 593/RJT/2015 for A.Y 2011-2012, the Revenue has preferred the present Tax Appeal with the following proposed questions of law :-

{A} “Whether the ITAT has erred in law in deleting the addition made by the Assessing Officer on account of upward adjustment to the arm's length price adjustment of Rs. 1,48,43,000/= to the payment of technical services paid by assessee to its associated enterprise ?”

{B} “Whether the ITAT has erred in law in deleting the addition made by the Assessing Officer on account of 50% disallowance of deduction u/s. 10AA being excess claim by the assessee amounting to Rs. 7,64,15,421 ?”

{C} “Whether the ITAT has erred in law in holding that any non

compliance with the scheme of Section 144C is fatal to the assessment ?”

{D} “Whether the ITAT has erred in law in holding that the issue which is not raised in draft assessment order cannot be raised in the assessment order and A.O taking up such issues at the stage of passing final assessment order will be contrary to the scheme of Section 144C ?”

2. Having heard Shri Pranav G. Desai, learned counsel appearing on behalf of the Revenue, the present Tax Appeal is **admitted** to consider the following substantial question of law :-

“{A} Whether the ITAT has erred in law in deleting the addition made by the Assessing Officer on account of upward adjustment to the arm's length price adjustment of Rs. 1,48,43,000/= to the payment of technical services paid by assessee to its associated enterprise ?”

3. Now so far as proposed Questions No. **B to D** are concerned, for the reasons stated hereinbelow, we find that no substantial question of law arises, and therefore, the present Tax Appeal *qua* proposed Questions no. B to D is required to be dismissed and/or those proposed questions are required to be held against the Revenue, we propose to consider the proposed Questions nos. B to D separately and independently.

4. The facts leading to the present Tax Appeal in nutshell are as under :-

4.1 That, the assessee is engaged in manufacturing of high quality rubber parts, rubber plastic parts, rubber metal parts and liquid silicon rubber parts. The assessee company is a Joint Venture [JV] company between Woco Franz Josef Wolf Holding GmbH, Germany [Woco Holding]; Woco Industrietechnik GmbH [Woco, Germany] and Motherson Sumi Systems Limited [MSSL] India. In the assessment year under consideration *ie.*, A.Y 2011-2012, the assessee filed

return of income declaring total income at Rs. 9,71,366/=. That thereafter, by considering the TPO's order dated 28th August 2014, a draft assessment order under Section 143 (3) read with Section 144 [C] of the Income-tax Act, 1961 was passed by determining the total income at Rs. 1,58,14,366/=; after making addition on account of adjustment to the arm's length price of Rs. 1,48,43,000/= in the business income of the assessee [the aforesaid is the subject matter with respect to **Question "A"** for which Tax Appeal is **admitted**]. That, the Assessing Officer while passing the final assessment order dated 20th October 2015, made disallowance of Rs. 7,64,15,421/= on account of 50% disallowance of deduction under Section 10AA of the Act, being excess claimed by the assessee and assessed the total income at Rs. 9,22,29,790/= [rounded off].

5. Feeling aggrieved and dissatisfied with the order passed by the Assessing Officer making disallowance of Rs. 7,64,15,421/= under Section 10AA of the Act, the

assessee preferred appeal before the Tribunal. It was contended on behalf of the assessee that no such disallowance was proposed in the draft assessment order dated 30th December 2014 passed under Section 143 [3] read with Section 144C of the Act and the Assessing Officer only proposed APL adjustment of Rs. 1,4,43,000/=. Therefore, it was submitted that the disallowance of claim under Section 10AA of the Act was not permissible, as the same was not proposed in the draft assessment order dated 30th December 2014. Accepting the above, while holding that disallowance of Rs. 7,64,15,421/= under Section 10AA of the Act by the Assessing Officer *vide* assessment order dated 20th October 2015 can be said to be in breach of Section 144C of the I.T Act, by the *impugned* judgment and order, the learned Tribunal has set-aside such disallowances made by the Assessing Officer under Section 10AA of the Act.

6. Feeling aggrieved and dissatisfied with the *impugned* judgment and order passed by the learned

Tribunal, the Revenue has preferred the present Tax Appeal to consider the following questions of law :

[A] “Whether the ITAT has erred in law in deleting the addition made by the Assessing Officer on account of upward adjustment to the arm's length price adjustment of Rs. 1,48,43,000/= to the payment of technical services paid by assessee to its associated enterprise ?”

[B] “Whether the ITAT has erred in law in deleting the addition made by the Assessing Officer on account of 50% disallowance of deduction under Section 10AA, being excess claim by the assessee amounting to Rs. 7,64,15,421/= ?”

[C] “Whether the ITAT has erred in law in holding that any non compliance with the scheme of Section 144C is fatal to the assessment ?”

[D] “Whether the ITAT has erred in law in holding that the issue which is not

raised in draft assessment order cannot be raised in draft assessment order and A.O taking up such issues at the stage of passing the final assessment order will be contrary to the scheme of Section 144 C ?”

7. We have heard Shri Pranav G Desai, learned counsel appearing on behalf of the Revenue at length.

8. Shri Pranav Desai has taken us to the relevant provisions of Section 144C of the Act. It is vehemently submitted by Shri Desai, learned counsel for the Revenue that the learned Tribunal has materially erred in deducting the disallowance made by the Assessing Officer under Section 10AA of the Act solely on the ground that in the draft assessment order, such disallowance was not proposed.

8.1 It is vehemently submitted by Shri Desai, learned counsel appearing on behalf of the Revenue that there is no such restriction provided under Section 144C of the Act by which the Assessing Officer is barred and/or precluded from making any additions and/or

disallowances other than those mentioned in the draft assessment order. It is submitted that after the objections were raised by the assessee with respect to the proposed variation in the income or loss return so mentioned in the draft assessment order and after considering the report of Dispute Resolution Panel [**“DRP”** for brevity], if the Assessing Officer is of the opinion that some further additions or deduction is required to be made [other than those referred to in the draft assessment order], the Assessing Officer can make such additions/disallowances in accordance with the provisions of Income-tax Act, 1961.

8.2 It is further submitted by Shri Desai, learned counsel appearing on behalf of the appellant-Revenue that even non mentioning of any proposed addition/disallowance in the draft assessment order can be said to be a procedural lapse, and therefore, the matter could have been remanded by the learned Tribunal to the Assessing Officer to pass afresh order of assessment. It is submitted that in any case, in the

present Tax Appeal, when the Assessing Officer specifically observed and found that the disallowance was required to be made under Section 10AA of the Act, and therefore, while passing the final assessment order, when the Assessing Officer made disallowance of Rs. 7,64,15,421/= under Section 10AA of the Act, it cannot be said that the A.O has committed any error.

8.3 It is submitted that therefore, the learned Tribunal has committed a grave error in directing to delete disallowance made by the Assessing Officer under Section 10AA of the Act.

8.4 Shri Pranav Desai, learned counsel appearing on behalf of the Revenue has vehemently submitted that as there is no decision of this Court on the point, the present Tax Appeal may be admitted to consider the aforesaid questions of law.

8.5 Making the above submissions, it is requested to admit the present Tax Appeal even qua Questions no. B to D also.

9. Heard Shri Pranav G Desai, learned counsel for the

Revenue at length on the proposed Questions no. B to D. We have considered the Questions No. B to D and the issue with respect to the scope and ambit of Section 144C of the Act in detail and at length *vis-a-vis* the *impugned* order passed by the learned Tribunal deleting the disallowance made by the Assessing Officer under Section 10AA of the Act.

10. In the present case, it is an admitted position that when the Assessing Officer forwarded a draft of the proposed assessment order to the assessee on 30th December 2014, he has not proposed to make disallowance of Rs. 7,64,15,421/= under Section 10AA of the Act. It is also not in dispute that in the draft assessment order issued by the Assessing Officer dated 30th December 2014, the Assessing Officer proposed only APL adjustment of Rs. 1,48,43,000/=. It is an admitted position that no disallowances were proposed in the draft assessment order. The said draft assessment order was carried before Dispute Resolution Panel and proposed adjustment was

contested by the assessee by filing detailed objections, but the assessee did not succeed before DRP. That thereafter, the matter went before the Assessing Officer for framing the final assessment order. While passing the final assessment order dated 20th October 2015, the Assessing Officer not only made addition of APL adjustment of Rs. 1,43,43,000/=, but also made disallowance under Section 10AA of the Act amounting to Rs. 7,64,15,421/=. The learned ITAT, by the impugned judgment and order has directed to delete such disallowance made by the Assessing Officer amounting Rs. 7,64,15,421/= made under Section 10AA of the Act on the ground that as in the draft assessment order, it was not proposed to make disallowance of the claim under Section 10AA of the Act, and therefore, it was not open for the Assessing Officer to make disallowance of such claim under Section 10AA of the Act, while passing the final order of assessment under the Act. The Revenue is aggrieved by such deletion.

11. While considering the aforestated issue, therefore,

a short question which is posed before this Court, in the facts and circumstances of the case is – whether the learned Tribunal is justified in deleting the disallowance made by the Assessing Officer under Section 10AA of the Act ? While considering the aforesaid question/s, the scheme of the relevant provisions of Section 144C of the Act is required to be referred to and considered.

11.1 Section 144C of the Act reads as under :-

“144C. Reference to dispute resolution panel:

(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) 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) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely :-

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer,

Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),

—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be

decided according to the opinion of the majority of the members.

(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-sec.(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) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

12. On considering Section 144C of the Act, as a

whole, the following eventualities emerge :

[A] That, as per sub-section (1) of Section 144C, the Assessing Officer shall, notwithstanding anything to the contrary contained in the Act, in the first instance, is required to forward a draft of the proposed order of assessment to the eligible assessee, if he proposes to make any variation in the income or loss returned which is *prejudicial* to the interest of such assessee.

[B] That, on receipt of the draft order, the eligible assessee, within a period of thirty days of the receipt by him of the draft order, is required to [i] file his acceptance of the variations to the Assessing Officer, or [ii] file his objections, if any, to such variation with (a) the Dispute Resolution Panel; and (b) the Assessing Officer.

[C] As per sub-section [3] of Section 144C, in case the assessee intimates to the Assessing Officer, the acceptance of the variation; or no objections are forwarded within the period specified in sub-section [2] thereof *ie.*, thirty days from the date of receipt of the

draft order, the Assessing Officer is required to complete the assessment on the basis of the draft order.

[D] As per sub-section [4] of Section 144C, the Assessing Officer is required to pass assessment order under sub-section [3] within one month from the end of the month in which (i) the acceptance is received; or (ii) the period of filing of objections under sub-section [2] expires; *notwithstanding anything* contained in Section 153, or Section 153B of the Act.

[E] In case objections are raised by the assessee against such proposed variation [so mentioned in the draft assessment order], in that case, the Dispute Resolution Panel is required to issue such directions, as it things fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

[F] As per sub-section [6] of Section 144C, the DRP is required to issue directions referred to in sub-section [5], after considering *viz.*, (i) draft order; (ii) objections filed by the assessee; (iii) evidence furnished by the

assessee; (iv) report, if any, by the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority; (v) records relating to the draft order; (vi) evidence collected by, or caused to be made by it.

[G] As per sub-section [8] of Section 144C, the DRP may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set-aside any proposed variation or issue any direction under sub-section [5] for further enquiry and passing of the assessment order.

[H] As per sub-section [10] of Section 144C, every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

[I] As per sub-section [11] of Section 144C, no direction under sub-section [5] shall be issued by the DRP 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.

[J] As per sub-section 13 of Section 144C, upon

receipt of the directions issued under sub-section [5], the Assessing Officer shall, in conformity with the directions issued by DRP, complete, notwithstanding anything to the contrary contained in Section 153 or Section 153B of the Act, 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 issued.

13. Considering the aforesaid, it appears that there is complete machinery provided under Section 144C of the Act. In the entire scheme of Section 144C, it refers to the draft assessment order *ie.*, variation in the income or loss returned proposed in the draft assessment order. Even the objections are required to be submitted by the assessee with respect to the variation proposed in the draft assessment order. Even, the DRP is also required to consider the objections raised by the assessee with respect to the variation proposed in the draft assessment order. The DRP is also required to issue directions with respect to the variation

proposed in the draft draft assessment order and even considering the records relating to the draft order. Considering the entire scheme of Section 144C of the Act, it appears that in conformity with the principles of natural justice, the assessee is required to be given an opportunity to submit objections with respect to the variation proposed in the income or loss returned. Therefore, while passing the final assessment order, the Assessing Officer cannot go beyond what is proposed in the draft assessment order. If the submissions made on behalf of the Revenue are accepted that the Assessing Officer, while passing the final assessment order can also go beyond the variation proposed in the draft assessment order, then in that case, it can be said that the assessee shall not given any opportunity to raise objections against such additions or disallowances which were not even proposed in the draft assessment order. Therefore, the same can be considered to be in breach of the principles of natural justice.

13.1 At this stage, it is required to be noted that even

while passing the regular assessment order, if the officer proposes to make any further addition and/or disallowances, in that case also, the Assessing Officer is required to issue required notice under Section 142 of the Act and the assessee is required to be given an opportunity to raise objection against such addition and/or disallowance. Under the circumstances, considering the entire scheme of Section 144C of the Act, the Assessing Officer cannot make any addition and/or disallowance then what is proposed in the draft assessment order.

14. The contention raised on behalf of the Revenue that the aforesaid lapse can be said to be a procedural lapse has also no substance. Such additions/disallowances other than those proposed in the draft assessment order cannot be said to be a mere procedural lapse.

14.1 Under the circumstances, we are of the opinion that the learned Tribunal has not committed any error in deleting the disallowance made by the Assessing

Officer with respect to the claim of the assessee under Section 10AA of the Act, as the same was not proposed by the Assessing Officer in the draft assessment order and for which, no opportunity was given to the assessee to submit the objections against such disallowance.

15. Under the circumstances and for the reasons stated above, the proposed Questions no. B to D are held against the Revenue. However, it is made clear that nothing is submitted before us whether subsequently another draft assessment order came to be issued by the Assessing Officer with the fresh proposal of deduction of claimed by the assessee under Section 10AA of the Act, and therefore, we express no opinion on the same. We have restricted ourselves to the *impugned* order passed by the learned Tribunal by which the learned Tribunal has directed to delete disallowance made by the Assessing Officer with respect to the claim of the assessee under Section 10AA of the Act, as the same is found to be in breach of

Section 144C of the Act in as much as the same was not proposed by the Assessing Officer in the draft assessment order.

16. In view of the above, the proposed Questions nos. B to D proposed in the present Tax Appeal fails and the same deserves to be dismissed and are accordingly dismissed. However, as observed hereinabove, the present Tax Appeal is **admitted** *qua* Question “A” alone.

Prakash

{M.R Shah, J.}

{B.N Karia, J.}

