

Section 144B of the Income-tax Act, 1961 - Draft assessment order - Approval by IAC — Draft assessment order under section 144B mentioned proposed additions and disallowances but did not contain computation of total income - Whether such draft assessment order was a nullity—Held, no - Whether tribunal was justified in directing ITO to frame fresh assessment - Held, yes

Facts

For the assessment year 1973-74, the assessee returned its income at Rs. 2,83,873, but the ITO assessed the same at Rs. 6,97,136. As the amount of variations in the income returned exceeded Rs. 1 lakh, a draft assessment order under section 144B was served on the assessee on 6-3-1976. Since the assessee did not file objection within the prescribed period of seven days, the ITO completed the assessment under section 144B(3) on 16-3-1976. On appeal, the AAC set aside the assessment order since the draft order did not quantify the total income. The Tribunal, on appeal by the revenue, held (i) that the defect in the draft order, i.e., it did not contain the computation of total income, did not make the assessment a nullity and since it contained the proposed additions and disallowances, there was substantial compliance with section 144B(1) ; and (ii) that the said defect could be cured by restoring the case to the ITO for making a fresh assessment after serving a fresh draft order on the assessee.

On reference :

Held

1. *It is well-settled that if a power is conferred and the manner of exercising the power is also indicated, the power must be exercised in the manner indicated by the Act conferring the power and not otherwise. But this principle does not mean that every defect in the manner of exercise of the power makes the ultimate order passed in the exercise of the power invalid.*

If the draft order issued is capable of giving full opportunity to the assessee to meet the proposed variations, it cannot be said that the defect in the draft order makes the entire proceedings invalid. A draft order of assessment like the final order of assessment should contain the quantification of the total income but the omission to quantify the total income in every case will not nullify the assessment if no prejudice was caused to the assessee.

2. *In the instant case, since various proposed additions and disallowances were mentioned in the draft order, there was full opportunity to the assessee to meet the proposed variations in the income returned by it. The draft order was wanting merely in the computation of total income, the necessary material for which was already mentioned in the order. The defect in the draft order was, therefore, not such which could have in any, way be prejudicial to the assessee. Further, the Tribunal took a view more favourable to the assessee by setting aside the assessment and sending back the case to the ITO which would now enable the assessee to object within time to the variations that the ITO proposed to make and thus the assessee will also get the advantage of the guidance that the IAC may give in the matter by issuance of directions.*

Therefore, the assessment order passed by the ITO could not said to be nullity and the Tribunal was justified in directing the ITO to frame a fresh assessment.

Y.S. Dharmadhikari and **V.S. Malhotra** for the Applicant. **P.S. Khirwadkar** for the Respondent.

JUDGMENT

G.P. Singh, C.J. — This is a reference under section 256(1) of the Income-tax Act, 1961, referring for our answer the following questions of law :

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessment was not a nullity, as there was substantial compliance with section 144B of the Income-tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in setting aside the order passed by the Income-tax Officer and the Appellate Assistant Commissioner and directing the Income-tax Officer to frame a fresh assessment after duly complying with the provisions of section 144B of the Income-tax Act? "

The relevant assessment year is 1973-74. The assessee returned an income of Rs. 2,83,873. The ITO assessed the total income at Rs. 6,97,136. As the amount of variations in the income returned exceeded rupees one lakh, the ITO followed the procedure under section 144B. A draft of the proposed order of assessment was served on the assessee on 6th March, 1976. The assessee's objections were received by the ITO on 17th March, 1976. As the objections were not received within seven days, the ITO completed the assessment on 16th March, 1976, under section 144B(3). In appeal, the AAC held that the draft order of

assessment was defective for the reason that the total income had not been quantified. On this ground, the assessment order was set aside by him. In the department's appeal before the Income-tax Appellate Tribunal, it was held that the draft order served on the assessee contained the proposed additions and disallowances separately under different heads and there was substantial compliance with section 144B(1). It was further held that the defect in the draft order that it did not contain the computation of total income, did not make the assessment a nullity and) that the defect could be cured by restoring the case to the ITO for making a fresh assessment after serving a fresh and complete draft order on the assessee.

Section 144B of the Act reads as follows :

" 144B. (1) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of section 143, the Income-tax Officer proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Income-tax Officer shall, 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 assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Income-tax Officer the acceptance of the variation, the Income-tax Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Income-tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment :

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income-tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit:

Provided that different amounts may be fixed for different areas :

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the functions of an Income-tax Officer in pursuance of an order made under section 125 or section 125A."

The argument of the learned counsel appearing for the assessee is that the ITO is required to complete the assessment under section 153(1)(a)(iii) within two years from the end of the assessment year; that all steps including the issuance of a draft order must be taken within this period ; and that as the draft order issued was defective, the assessment made was a nullity and the Tribunal could not direct the making of a fresh assessment.

The issuance of a draft order as required by section 144B is not necessary to clothe the ITO with jurisdiction to make the assessment. The ITO has jurisdiction to make the assessment under section 143. Section 144B provides special procedure to be followed in cases where the variation in the income or the loss returned which is prejudicial to the assessee exceeds the amount fixed by the Board, *i.e.* , Rs. 1 lakh. In such a case, a draft order is required to be served on the assessee and if the assessee takes objection within seven days, the ITO has to seek the directions of the IAC by forwarding the draft order and the objections to him. A direction issued by the IAC for the guidance of the ITO is binding on him and he has to complete the assessment in the light of such a direction. The entire scheme of sections 143 and 144B will go to show that the jurisdiction to assess continues in all cases with the ITO; but in cases where the variation in the income or loss returned is to exceed Rs. 1 lakh, a special procedure has to be followed and if the assessee files an objection within the time fixed, the guidance of the IAC has to be obtained. The object behind the issuance of a draft order is to give a comprehensive opportunity to the assessee to object to the proposed variations in the income or loss returned by the assessee. The question whether a defect in the draft order is fatal to the assessment has to be decided having regard to the object behind the issuance of the draft order. It is true that a draft order of assessment like the final order of assessment should contain the quantification of the total income but the omission to quantify the total income in every case will not nullify the assessment if no prejudice was caused to the assessee. In the instant case, the draft order contained the various additions and disallowances which the ITO proposed in making the assessment under different heads and, therefore, there was full opportunity to the assessee to meet the proposed variations in the income returned by it. The draft order was wanting merely in the computation of total income, the necessary material for which was already mentioned in the order. The defect in the draft order was, therefore, not such which could have in any way caused prejudice to the assessee. Indeed the assessee had no difficulty in filing its objections but as it did not do so within 7 days, the assessment order was made before the receipt of the objections by the ITO. The assessment order passed by the ITO in the instant case could not be said to be a nullity even though the draft order suffered from the defect that it did not contain the computation of total income.

This is not a case where the ITO did not start the assessment proceedings within limitation or did not complete them within limitation. Any procedural defect in making the assessment order could be set right as held by the Tribunal by sending back the case to the ITO. The expiry of limitation for making the assessment in such a situation is taken care of by section 153(2); which allows a period of two years for making the fresh assessment from the date of the order of the Tribunal setting aside the assessment and directing the making of fresh assessment. The Tribunal under section 254 can pass in an appeal " such orders thereon as it thinks fit ". It is now well settled that the Tribunal has the authority to set aside an assessment and direct the ITO to make a fresh assessment. (See Kanga and Palkhivala's *The Law and Practice of Income Tax*, 7th Edn., Vol. 1, p. 1139). The Tribunal in the instant case could have even affirmed the assessment made by the ITO. The Tribunal, in our opinion, took a view more favourable to the assessee by setting aside the assessment and sending back the case to the ITO which would now enable the assessee to object within time to the variations that the ITO proposes to make and thus it will also get the advantage of the guidance that the IAC may give in the matter by issuance of directions.

Learned counsel for the assessee relied on the well-known principle that if a power is conferred and the manner of exercising the power is also indicated, the power must be exercised in the manner indicated by the Act conferring the power and not otherwise. But this principle does not mean that every defect in the manner of exercise of the power makes the ultimate order passed in the exercise of the power invalid. A question of this nature has to be answered having regard to the relevant statutory provision, the object behind it and the deviation in the particular case from its strict compliance. We have already indicated that section 144B is a procedural provision and the object behind this section is to give a comprehensive opportunity in cases where the variations proposed by the ITO in the income returned are in excess of Rs. 1 lakh. If the draft order issued is capable of giving full opportunity to the assessee to meet the proposed variations, it cannot be said that the defect in the draft order makes the entire proceedings invalid. At any rate, no question of jurisdiction is involved in such cases. Any non-compliance with section 144B can be set right by the Tribunal by remanding the proceedings to the ITO.

For the reasons given above, we answer the questions referred as follows :

1. The Tribunal was right in holding that the assessment was not a nullity and there was substantial compliance with section 144B.
2. The Tribunal was justified in setting aside the assessment order passed by the ITO and the order passed by the AAC and in directing the ITO to make a fresh assessment.

High Courts Vol.6 - Sec.IITAXMAN May, 1981