

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.206/PN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Soktas India Pvt. Ltd.,
Plot No.T-8,
Five Star MIDC, Kagal,
Hatkanangale,
Kasaba Sangaon,
Kolhapur

.... अपीलार्थी/Appellant

PAN: AAKCS5899J

Vs.

The Asst. Commissioner of Income Tax,
Circle 1, Kolhapur

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Sharad Shah
प्रत्यर्थी की ओर से / Respondent by : Shri Subhash Chandra

सुनवाई की तारीख / Date of Hearing : 07.12.2016	घोषणा की तारीख / Date of Pronouncement: 09.12.2016
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This appeal filed by the assessee is against order of ACIT, Circle 1, Kolhapur, dated 28.02.2014 relating to assessment year 2010-11 passed under section 143(3) r.w.s. 92C(4) and 144C of the Income Tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

Grounds of Appeal, on the facts and in law, without prejudice to each other,

A) Grounds related validity of assessment proceedings -

- 1) *The learned AO failed, in consequence to the directions by DRP to pass appropriate final order of assessment when his predecessor has clearly stated in the covering letter that the said order is draft assessment order.*

1.1 The learned AO erred in concluding that "In this regard, DRP has clearly mentioned that the order passed on 28.02.2014 was a final order. So, I don't have any jurisdiction over the case".

- 2) *The learned DRP erred in treating the order dated 28-2-2014 to be final assessment order when the AO passing the said order has clearly stated in the covering letter that the said order is draft assessment order.*
- 3) *The orders passed by the AO be declared to be NULL in view of the fact that order have not been passed in accordance with specified provisions of the Income Tax Act, 1961 and the Losses of the year and to be carried forward be restored as returned by the assessee.*

Without prejudice to the above, the following grounds be considered on merit:

B) Grounds related to Transfer Pricing Issue –

- 3) *The learned AO/TPO has erred in making the adjustment of Rs.5,52,83,918/-.*

3.1 The Ld. AO erred in not considering the Lower capacity utilization adjustment, more so, this being the first full year of operation. The Lower capacity utilization, which happens because of teething trouble, did affect the profitability of the company in comparison with comparable who are fully established manufacturers.

3.2 The Ld. AO erred in not considering PBDIT (Profit before depreciation, Interest, Tax) to be an appropriate Profit Level Indicator (PLI) for comparing the profits of comparable companies.

3.3 The Ld. AO/TPO has erred in concluding that the assessee has no case of low capacity utilization when it has outsourced some activities. In fact, the assessee has not outsourced any of the operations during the year under assessment.

3.4 The Ld. AO/TPO has erred in concluding that the assessee's claim of low capacity utilization is merely based on 'first full year of operation' when it was only one of the reasons for justifying low capacity utilization.

4. *The Ld. AO/TPO erred in not considering the comparables given by the assessee in its study reports for bench marking the profit of the assessee, specifically the following-*

- a. Shiva Texyarn Ltd.*
- b. Soma Textiles & Inds. Ltd.*

5. *The Ld. AO/TPO has erred in making calculation errors in the below comparables companies and taking higher operating profit than actual as given in the following table.*

Sr. No.	Company Name	Remark
1	Salona Cotspin Ltd	The interest cost deducted twice
2	GTN Industries Ltd	Loss on sale of Fixed asset deducted twice
3	Eurotex Ind. & Exports Ltd	Wrong computation of notional depreciation

- 6) *The Ld. AO/TPO has erred in making the TP adjustments on total turnover of the assessee instead of making the adjustment on relevant International transactions only.*
- 7) *The Ld. TPO has erred by not giving adjustment for*
- i) Non-payment of royalty / fee for technical knowhow provided by the AE.*
 - ii) Corporate guarantee given by AE without any guarantee commission.*
 - iii) Working capital provided by the AE with whom all of the International transactions have taken place.*
- 8) *The Ld. AO/TPO has erred in not considering the fact that the segment in which AE transactions take place is having better profitability (lesser loss) and the higher loss has been incurred in the segment where the sales are to the non related party/ non associated enterprises.*
- 9) *The Ld. AO/TPO has erred in adopting the method of depreciation adjustment, in his second alternative (which is discussed but has not become the base of final TP adjustment) and has arrived at the TP adjustment amount of Rs.4,20,50,616/- by applying modified PBIT method. While the Ld. TPO should have taken PBDIT method only for arriving at ALP.*
- 10) *The Ld. AO/TPO be directed to allow the adjustment of +/- 5% while arriving at arm's length price, if there remains TP difference between the average price of comparables and the price at which the assessee has transacted with the AE. This should be reconsidered and recomputed after giving effect to the directions as regards all other objections.*
- 11) *The Ld. AO/TPO erred in not considering the lower TP adjustment of Rs.4,20,50,616/- which is arrived at by him applying another methodology.*

C) RELATING TO OTHER CORPORATE TAX ISSUES :-

- 12) *The Ld. AO erred in disallowing –*
- a) Exchange fluctuation gain on IFC loan reinstatement of Rs.4,40,61,081/- which is fully covered by the provision of section 43A.*
 - b) Bank Guarantee Charges of Rs.10,99,210/- considered by him as prior period item which have been charged by the bank due to revision in Bank Charges in the current year.*

- c) *The payment for professional/legal services to M/S DSK legal to the extent of Rs.7,61,369/- considered by him as prior period item, which has been invoiced in the current year so it cannot be termed as prior period item for income tax computation.*
 - d)
 - e) *Short Provision of Bonus of Rs.1,46,836/- considered by him as prior period item and also erred in disregarding the fact that the same is allowable only on actual payment and covered by the provision by section 43B.*
- 13) *The learned AO erred in making addition on account gross sale value of sale of fixed asset amounting of Rs.38,149/- and also further adding Rs.22,057/- being the book profit out of Rs.38,149/- when the assessee has already made proper adjustment in the relevant block of asset while computing allowable depreciation and assessee has correctly claimed reduction from profit (Addition to loss) for Rs.22,057/- considered as other income in financial books.*

3. The learned Authorized Representative for the assessee pointed out that the ground of appeal A raised by the assessee is against the validity of assessment proceedings which goes to the root of the matter and the same should be adjudicated first before addressing the issue on merits.

4. The learned Authorized Representative for the assessee pointed out that after the Transfer Pricing Officer (in short 'the TPO') proposed the adjustment to arm's length price vide order passed under section 92CA(3) of the Act dated 28.01.2014, the Assessing Officer had passed the order under section 143(3) r.w.s. 92C(4) and 144C of the Act. The learned Authorized Representative for the assessee further pointed out that along with the said order, the Assessing Officer had issued a letter dated 28.02.2014, wherein the subject was draft order under section 144(1) of the Act for assessment year 2010-11. The learned Authorized Representative for the assessee pointed out that the draft order was being forwarded for necessary action at the end of assessee. It was also stated in the said letter that on receipt of draft order, the assessee may within 30 days of receipt of the order either file acceptance of variation as proposed in the order or file objections to the variation to the

Dispute Resolution Panel (in short 'DRP') and the Assessing Officer. The assessee in view thereof, filed objections to the DRP on 07.04.2014 i.e. within time stipulated under the Act. However, the DRP vide order dated 27.11.2014 observed that the Assessing Officer had passed the assessment order under section 143(3) of the Act dated 28.02.2014 which was the final assessment order and not the draft assessment order, hence the DRP did not have any jurisdiction to issue any directions. After receipt of the said order, the Assessing Officer vide letter dated 30.01.2015 in response to letter of the assessee dated 09.12.2014 regarding order disposing objections filed before the DRP observed that the DRP had clearly mentioned that the order passed on 28.02.2014 was final order and not draft order. So, he says that he has no jurisdiction to pass any order. The learned Authorized Representative for the assessee pointed out that earlier order passed by the Assessing Officer was a draft assessment order, against which objections were filed before the DRP, who had not disposed of the same and hence, the draft assessment order cannot be upheld being invalid in law. Reliance was placed on the ratio laid down by the Hon'ble Bombay High Court in International Air Transport Association Vs. DCIT in WP (L) No.351 of 2016, vide judgment dated 18.02.2016 and the Hon'ble Madras High Court in Vijay Television Pvt. Ltd. Vs. DRP & Others in WP Nos 1526 and 1527/2014 and M.P Nos.1 and 1/2014.

5. The learned Departmental Representative for the Revenue strongly opposed the propositions of the learned Authorized Representative for the assessee.

6. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the Assessing Officer had made reference to the TPO

vis-à-vis to determine the arm's length price of international transaction entered into by the assessee with its associate enterprises. The TPO vide order dated 28.01.2014 under section 92CA(3) of the Act had proposed the adjustment to arm's length price of international transaction and had passed the said order. The Assessing Officer on receipt of said order passed order under section 143(3) r.w.s. 92C(4) and 144C of the Act. The said order of Assessing Officer was forwarded to the assessee along with letter dated 28.02.2014, wherein the Assessing Officer categorically said that the draft assessment order was being forwarded for necessary action at the end of assessee. It was clearly mentioned in the said letter that on receipt of draft order, the assessee may within 30 days of the receipt of draft order either file acceptance of variation as proposed in the order or file objections to the variation to the DRP or to the undersigned. However, the Assessing Officer also issued demand notice under section 156 of the Act dated 28.02.2014 and also issued notice under section 274 r.w.s. 271 of the Act. The assessee on understanding that it was draft assessment order filed objections before the DRP on 07.04.2014 i.e. within the time allowed under the Statute. However, the said objections of assessee were not considered by the DRP and the same were rejected on the surmise that the order passed by the Assessing Officer was final assessment order since the Assessing Officer had also issued demand notice under section 156 of the Act and show cause notice under section 274 r.w.s. 271 of the Act for levy of penalty. The DRP observed that since the assessment order passed by the Assessing Officer was final assessment order, it did not have any jurisdiction to issue any directions on such final assessment order. After receiving the DRP's order, the assessee filed an application before the Assessing Officer for necessary action. The Assessing Officer in reply, vide letter dated 30.01.2015 stated that the DRP

had clearly mentioned that the order passed on 28.02.2014 was final order and not draft order, so the Assessing Officer does not have any jurisdiction over the case.

7. In order to adjudicate the issue, reference needs to be made to the provisions of section 144C of the Act. Under the provisions of section 144C of the Act, it is provided that where the Assessing Officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned, which is prejudicial to the interest of assessee, then the Assessing Officer shall in the first instance forward the draft of the proposed order of assessment to the eligible assessee. Under sub-section (2) of section 144C of the Act on receipt of the draft order, the eligible assessee shall within 30 days of the receipt, file his acceptance of the variation to the Assessing Officer or file his objections, if any, to such variation with the Dispute Resolution Panel and the Assessing Officer. Under sub-section (3) of section 144C of the Act, the Assessing Officer shall complete the assessment on the basis of draft order if the assessee intimates to the Assessing Officer the acceptance of the variation or no objections are received within period specified in sub-section (2) of section 144C of the Act. Thereafter, the Assessing Officer is empowered to pass the assessment order within one month from the end of month, in which the acceptance is received or the period of filing objections under sub-section (2) of section 144C of the Act expires. Under sub-section (5) of section 144C of the Act, it is provided that the Dispute Resolution Panel shall in case where 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. Upon receipt of the said directions, the Assessing Officer shall in conformity with the same, complete the assessment without providing any

further opportunity of being hearing to the assessee within one month from the end of the month in which such direction is received, notwithstanding anything to the contrary contained in section 153 or 153B of the Act, as per sub-section (13) to section 144C of the Act. In view of the provisions of section 144C of the Act impliedly where the TPO proposes any variation in the income or loss returned by the assessee, which is prejudicial to the interest of assessee, the Assessing Officer shall in the first instance forward the draft of the proposed assessment order to the assessee and thereafter, if no objections are received and / or the assessee files his acceptance to the variation to the Assessing Officer, then the Assessing Officer is empowered to complete the assessment within one month from the end of the month thereof. In case, the assessee files his objection before the DRP and where the said Panel issues directions as it thinks fit, then the Assessing Officer on receipt of such directions shall complete the assessment in conformity with such directions. In view of the said provisions of the Act, the compliance to section 144C of the Act is mandatory in all such cases, where the TPO proposes variation in the income or loss returned, which is prejudicial to the interests of assessee. Only after complying with the conditions laid down in section 144C of the Act, the Assessing Officer is empowered to pass the order under section 143(3) r.w.s. 144C of the Act completing the assessment on such enhanced income or variation in the loss returned by the assessee.

8. The Hon'ble Madras High Court in the case of Vijay Television Writ Petition Nos.1526 and 1527 of 2014 & M.P. Nos.1 and 1 of 2014, it was held that non-passing of draft assessment order after adjustment made by the TPO renders proceedings null & void by observing as under:-

"Under Section 144C(1) of the Act, with effect from 1st October 2009, the Assessing Officer has to mandatorily issue a draft assessment order if there is

a proposed variation to the return which are prejudicial to the eligible assessee. The fact that the petitioner is an eligible assessee is not in dispute. While so, under section 144C(2) of the Act, the eligible assessee has the option, either to accept the variation or to file their objections before the DRP and such option has to be exercised within 30 days. On such objections filed by the assessee, the DRP shall issue appropriate direction for the guidance of the Assessing Officer under section 144C(5) of the Act. It is only thereafter, the AO is bound to pass a final order of assessment in compliance with the directions issued by the DRP under section 144C(3) of the Act. In the present case, without following the above mandatory procedure, the AO has passed the order of assessment on 26.03.2013 and subsequently issued a corrigendum on 15.04.2014 to rectify the mistake committed in passing the final order of assessment inter alia to treat it as a draft assessment order. This course of action adopted by the second respondent is contrary to the mandatory provisions contained in the Act and the corrigendum issued by the AO could not cure the defect. The very fact that the Assessing Officer has signed the order of assessment and also assessed the amount payable by the assessee has become complete and it cannot be simply treated as a draft assessment order or it can be rectified by issuing the corrigendum. In fact, pursuant to the order of assessment under section 143C, demand was also made for payment of the amount and such demand has not been withdrawn by the second respondent even after issuing the corrigendum. Even as per the website of the department, the demand made to the petitioner company continues till date and therefore, the final order as well as the the corrigendum issued by the second respondent are vitiated by errors apparent on the face of the record and they are legally not sustainable.”

9. The similar issue had arisen before the Pune Bench of Tribunal in Agfa India Pvt. Ltd. Vs. ACIT in ITA Nos.341/PN/2014 and 1072/PN/2014, relating to assessment year 2008-09, order dated 28.10.2015 and reference was made to the decision of the Hon’ble High Court of Andhra Pradesh at Hyderabad in M/s. Zuari Cements Ltd. Vs. ACIT in WP No.5557/2012, vide judgment dated 21.02.2013 and the Hon’ble Supreme Court in ACIT Vs. M/s. Zuari Cement Ltd. vide Special Leave Petition CC No.16694/2013, judgment dated 27.09.2013 and it was held as under:-

“20. The Hon’ble High Court of Andhra Pradesh at Hyderabad in M/s. Zuari Cements Ltd. Vs. ACIT (supra) on similar issue where after receipt of the order passed by the TPO under section 92CA(3) of the Act, the Assessing Officer had passed the assessment order under section 143(3) of the Act raising a demand of Rs.27,40,71,913/- without giving an opportunity to the assessee under section 144C of the Act, observed that where the Assessing Officer proposes to make on or after 01.10.2009, any variation in the income or loss returned by the assessee, then notwithstanding to the contrary contained in the Act, he shall first pass the draft assessment order, forward the same to the assessee and after assessee files his objections, if any, the Assessing Officer shall complete the assessment within one month, in view of the provisions of section 144C of the Act. It was further observed that the assessee is also given an option to file an objection before the DRP, in which

the latter can issue directions for the guidance of Assessing Officer to enable him to complete assessment. Where the Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and pass the assessment order, it was held by the Hon'ble High Court of A.P that the impugned order of assessment was clearly contrary to section 144C of the Act and was without jurisdiction, null and void. The objection of the Revenue that the Circular No.5/2010 of the CBDT which laid down that the provisions of section 144C of the Act shall not apply for the assessment year 2008-09 and would only apply from assessment year 2010-11 and later years was held to be not tenable where the language of sub-section (1) of section 144C of the Act referred to the cutoff date of 01.10.2009 indicates the intention of Legislature to make it applicable. The Hon'ble High Court of A.P further held that the Circular No.5/2010 issued by the CBDT stating that section 144C(1) of the Act would apply only from assessment year 2010-11 and subsequent years and not from assessment year 2008-09 was contrary to the expressed language of the section and the said view of the Revenue was held to be not acceptable. The Hon'ble High Court of A.P thereafter held that the impugned order of assessment dated 23.12.2011 passed by the respondent was contrary to the mandatory provisions of section 144C of the Act is declared as one without jurisdiction, null and void and unenforceable. The Hon'ble High Court of Andhra Pradesh held as under:-

"In this view of the matter we are of the view that the impugned order of assessment dt. 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside."

21. *The Hon'ble Supreme Court (supra) in ACIT Vs. Zuari Cements Ltd. (supra) had dismissed the Special Leave Petition filed by the Department upon hearing the Counsel. The learned Authorized Representative for the assessee contended that since the said Special Leave Petition was dismissed after hearing the Counsel and the view taken by the Hon'ble High Court of Andhra Pradesh at Hyderabad has been approved by the Apex Court and any order contradicting the conditions laid down in section 144C of the Act is null and void and unenforceable in law.*

22. *Further, the Delhi Bench of Tribunal in the case of Capsugel Healthcare Limited in ITA No.1356/Del/2012, vide order dated 30.09.2014 have upheld the similar view that "Failure to pass draft assessment order after TPO's order renders proceedings void. Show cause notice cannot be quoted with draft assessment order".*

10. Further, the Hon'ble Bombay High Court in International Air Transport Association Vs. DCIT (supra) have also down the similar proposition and held as under:-

"4. The Petitioner had consequent to the assessment order dated 23rd March 2015 filed its objection in terms of Section 144C(2) of the Act to the Dispute Resolution Panel ("DRP"). By an order dated 7th October, 2015, the DRP refused to pass any direction on the objections because the objections had been filed in respect of a final order under Section 143(3) of the Act and not in respect of the draft assessment order passed under Section 144C(1) of the Act. The order dated 7th October, 2015 of the DRP holds that its jurisdiction is only to entertain objections with regard to draft assessment order passed under Section 144C(1) of the Act.

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."*

11. The learned Authorized Representative for the assessee has placed reliance on the ratio laid down by the International Air Transport Association Vs. DCIT (supra) and the Hon'ble Madras High Court in the case of Vijay Television Writ Petition Nos.1526 and 1527 of 2014 & M.P. Nos.1 and 1 of 2014 vis-à-vis. Whereas the learned Departmental Representative for the Revenue strongly opposed and pointed out that the Assessing Officer has sent the draft assessment order wherein the letter clearly says that it is draft assessment order. He pointed out that the DRP had mis-interpreted and the issue may be sent back to the file of DRP. He also pointed out that the facts before the Hon'ble Bombay High Court were different and the said proposition is not applicable. We find no merit in the plea of learned Departmental Representative for the Revenue. The Assessing Officer passed the order on 28.02.2014 along with which it also issued the demand notice and show cause notice for levy of penalty. In other words, the Assessing Officer has crystallized the demand in the case of assessee. Whereas, as per the

provisions of the Act where the Assessing Officer proposes to vary the income in the hands of assessee, there was requirement to issue show cause notice to the assessee to the said additions, by way of draft assessment order. The demand does not get crystallized in draft assessment order. Undoubtedly, the Assessing Officer had issued covering letter where it says that it is draft assessment order but in spirit, it had finalized the assessment, wherein the demand was crystallized and demand notice was issued to the assessee. The Assessing Officer has not followed the correct procedure as provided in the Statute and has passed final assessment order without passing draft assessment order which is against the provisions of the Act and hence, the same is invalid in law. Reliance is placed on the ratio laid down by the Hon'ble Bombay High Court in International Air Transport Association Vs. DCIT (supra) and the Hon'ble Madras High Court in Vijay Television Pvt. Ltd. Vs. DRP & Others (supra) and the Hon'ble High Court of Andhra Pradesh in M/s. Zuari Cements Ltd. Vs. ACIT (supra). We hold that the assessment order passed in the case is invalid and the same is set aside. Since we have decided the preliminary issue in favour of assessee, the other grounds of appeal against the additions made become academic and the same are dismissed.

12. In the result, the appeal of the assessee is allowed.

Order pronounced on this 9th day of December, 2016.

Sd/-	Sd/-
(ANIL CHATURVEDI)	(SUSHMA CHOWLA)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER
पुणे / Pune; दिनांक Dated : 9 th December, 2016.	
<i>GCVSR</i>	

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The CIT(A)-IT/TP, Pune ;
4. The DIT (TP/IT), Pune;
5. The DR 'B', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune