IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'G' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Saktijit Dey (Judicial Member)]

ITA No. 2361/Mum/2018
Assessment year: 2011-12

Galaxy Surfactants Limited **…….……Appellant**
C-49/2, TTC Industrial Area
Pawne, Navi Mumbai 400 703
[PAN: AAACG1539P]

Vs.

Assistant Commissioner of Income Tax
Circle 15(1)(2) Mumbai **……Respondent**

Appearances by
Dr. C P Ramaswamy *for the appellant*
Jayant Jhaveri *for the respondent*

Date of concluding the hearing: : April 8, 2021
Date of pronouncement of the order : May 24, 2021

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 16th March 2018, passed by the learned Principal Commissioner of Income Tax under section 263 r.w.s. 143(3) and 144C(4) of the Income Tax Act, 1961, for the assessment year 2011-12.

2. The core issue arising for our adjudication in this case is whether or not the learned PCIT was justified in subjecting an assessment order, passed under section 143(3) r.w.s. 144C(4), for the reason that the disallowances proposed in the draft assessment order have been dropped by the Assessing Officer *suo motu* and without any interference on those points by the Dispute Resolution Panel.

3. The material facts are not in dispute. The assessee had filed an income tax return disclosing a taxable income of Rs 42,43,47,423, on 25th November 2011. This appeal was subjected to a scrutiny assessment under section 143(3). In addition to the arm's length price adjustment of Rs 4,04,566, as determined by the TPO, the Assessing Officer proposed disallowances by rejecting deduction claims, as made by the assessee, to the extent of Rs

2,97,83,922 as inadmissible under section 36(1)(iii), to the extent of Rs 6,19,20,626 as inadmissible claim under section 37(1), to the extent of Rs 3,13,50,440 as inadmissible claim under section 10B, and to the extent of Rs 3,01,01,049 as an inadmissible claim under section 14A. The draft assessment order was, accordingly, served upon the assessee. Vide letter dated 22nd April 2015, the Assessing Officer was informed that the assessee does not wish to file any objections before the Dispute Resolution Panel. The Assessing Officer thus proceeded to frame the assessment under section 143(3) r.w.s. 144C(3), but what he did was that he *suo motu* dropped the disallowances of 2,97,83,922 under section 36(1)(iii), of Rs 6,19,20,626 as inadmissible claim under section 37(1), and of Rs 3,13,50,440 as inadmissible claim under section 10B. So far as disallowance under section 14 A was concerned, as against the proposed disallowance of Rs 3,09,01,049 was concerned, he scaled it down to Rs 6,197. The assessment under section 143(3) was thus completed at Rs 42,47,58,190, as against an assessed income of Rs 56,24,27,870 in the draft assessment order. The assessee successfully challenged the additions made by the Assessing Officer in appeal before the CIT(A). The matter, however, did not end at that. On 22nd August 2017, the learned Principal Commissioner sought to invoke his revisionary powers under section 263 by issuing a show cause notice, which, *inter alia*, stated as follows:

> **On examination of the case records it is noticed that the assessment u/s. 143(3) r.w.s. 144C(4) of I.T. Act was passed on 22.05.2015, determining the total income at Rs.42,47,58,190/-. The said order is found erroneous in so far as it is prejudicial to the interest of revenue in view of the following reasons:-**
>
> **It is seen from the records that the assessing officer while passing the final order has omitted the addition u/s. 36(1) (iii) to the tune of Rs.2,97,83.922/- disallowance u/s.37(1) of Rs.6,19,20,626/- and addition made u/s. 10B of Rs.3,13,50,440/- which were made in draft assessment order. Further on disallowance made u/s. 14A to the tune of Rs.3,01,01,049/ in the draft assessment order, the assessing officer reworked the calculation under Rule 8D and reduced the disallowance u/s 14A r.w. Rule 8D to Rs.6,197/- in the final order, thereby computing the total income at Rs.42,47,58, 186/-**
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> **You are therefore, requested to show cause as to why the assessment order dated 22.05.2015 passed u/s 143(3) r.w.s.144C(4) of the I.T Act, dated 22.05.2015 should not be revised or cancelled or modified within the meaning of section 263 of the I.T Act. 1961. In this connection a hearing is fixed on 06.09.2017 at 11.30 a.m you may attend before me at the above given address, either in person or through your authorized representative.**
>
> **In case of non-compliance on the stipulated date and time, it will be presumed that you have no objection to the proposed revision of the assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 144C(4) of the I.T. Act dated 22.05.2015 as discussed above.**

4. On 14th September 2017, the assessee responded to the aforesaid notice as follows:

1. At the outset, we submit that the impugned assessment order passed u/s.143(3) r/w. 144C(4) of the Income Tax Act, 1961 is neither erroneous nor prejudicial to the interests of the revenue in the view that all the four situations given the Explarnation-2 to section 263 are absent in our case with regard to the four issues raised in the show cause notice.

2. In particular, with regard to the four issues listed in the show cause notice namely:

a) Omission to add u/s.36(1)(iii),

b) Disallowance not made u/s37(1), and

c)Addition not made u/s. 10B these three though proposed to be made as additions/ disallowance in the draft assessment order, none was made in the final order, and

d) Reduced disallowance made under section 14A, of only Rs.6,197/- in the final order of assessment against proposed disallowance of Rs.3,01,01,049/ in the draft assessment order.

3. We respectfully submit that in the case of all the four issues mentioned above full enquiry was conducted by the Leaned Assessing Officer (the A.O) during course the assessment proceedings by issuing notices and getting responses from the assessee on every issue. For your kind reference enquiry letter/queries received and replies filed by the authorized representative of the assessee are enclosed. Consequently the A.O was obviously convince of the reasons given by the assessee of the factual and legal position in respect of each and every issue. Accordingly no disallowance or additions were made in respect of issues (a), (b) and (c) listed above. With regard to item (d), disallowance u.s. 14A, the A.O was convinced to restrict the same to Rs.6,197/.

4. Indeed of the above four issues mentioned in your honour's show cause notice dated 22.08.2017, the three issues namely:

(a) Addition u.s. 36(1)(iii) of Rs.2,97,83.922/-
(b) Addition u.s. 10B of Rs.3,13,50,440/-
(c) Disallowance u.s. 144 of Rs.3,01,01,049/-

are fully covered by the decisions of the Hon. ITAT in the assessee' s own case in the earlier years as under:

S.N	A.Y	I.T.A Nos. & ITAT Bench	Date of order	Para Nos.
1	2008-09	3481/Mum/2011-G Bench	03.09.2014	11.13 and 15
2	2009-10	2760/Mum/2015-B Bench 2760/Mum/20	03.04.2017	4-6, 7-9 and 13-14

		15-B Bench		
3	**2010-11**	**3452/Mum/20 15-F Bench 3029/Mum/20 15-F Bench**	**23.08.2017**	**12-14, 16-16 and 17-21**

Copies of the Orders of Hon. ITAT-enclosed.

To the best of our knowledge no appeal has been filed against ITAT No.3481/Mum/ 2011 for A.Y 2008:09 and it has become final.

Thus in respect of issues (a), (c) and (d), the final order passed by the A.O. cannot be held to be erroneous and consequently not prejudicial to the interests of the revenue.

5, With regard to the issue of dropping the proposed disallowance Rs.6,19,20,626/- regarding registration charges under REACH, we submit that the AO has wrongly stated in his draft assessment order that it was a one-time payment required to trade in the European market, in fact it is a one-time activity subject to the condition that the chemical composition of that particular product remain the same or is manageable as specified by the European Chemical Agency (ECHA). Copies of the guidelines enclosed. It is a matter of record that the assessee has already been marketing its products namely Specialty Chemicals in Europe It is necessary to submit themselves to additional regulation of the European Union Parliament with which all the existing sellers including the ones manufacturing the Chemical products in Europe were expected to comply within the time frame stipulated depending on the quantities already being sold in the European Union"

5. Not impressed by these submissions, the learned PCIT proceeded to exercise his powers under section 263, and held as follows:

The above submission of the assessee has been considered however the same is not acceptable based on following discussion.

Draft order is passed as per the provisions of Section 143(3) r.w 144C of the Act. The assessee company is allowed thirty days, time from the date of receipt of the order to file its acceptance of the variations under section 144C (2)(a), made to its total income as per the return of income filed, or to file its objection, if any as per the provisions of section 144C(2)(b) of the Act, tailing which this order shall attain finality and the same shall be treated as final assessment order u/s.143(3) of the Act.

For the case reference, section 144C(3) is reproduced here.

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 period specified in sub-section (2)

However, in this case Draft Assessment Order has been passed u/s.143(3) r.w.s. 144C(1) completed on 27-03-2015 determining assessed income of Rs.56,24,27,870/ and the assessee vide its letter dated 22 April 2015 intimated that the assessee is not opting to file its objections to the Dispute Resolution Panel (DRP). After this the assessing officer passed Final Assessment order u/s.143(3) r.w.s. 144C(4) dated 22-05-2015 determining assessed income of Rs.42,47,58,186/- which was marginally more than the return of income e-filed on 25-11-2011 declaring total income of Rs.42,43,42,423/-.

Assessing Officer is not empowered to review his own draft assessment order without any direction from the DRP and reduce the additions made in the drat assessment order. There are no provisions in the Act and rules nor does any instruction issued by the CBDT in this regard that an Assessing officer can review its own Draft Assessment order. As per section 144C(3), the final order shall be based on the draft assessment order. Reviewing the draft Assessment order without any direction from the DRP is erroneous. There is no section of law to do such review by due Assessing Officer Further, the AO has not given any reason why he is doing so. Therefore it is also a non-speaking order which accentuates the error further. This is a serious breach of procedure codified for assessment when transfer pricing matters are involved. In view of this the first limb of section 263 if fully satisfied. By deleting the additions made in the draft order without assigning any reasons, the AO's order is prejudicial to the interest of revenue as well, fulfilling the 2nd limb of due section 263.

Accordingly, in exercise of the powers conferred upon me, under the provisions of section 263(1) of the Income-tax Act, 1961 and in view of the circumstances of the case. I hereby cancel the assessment order dated 22.05.2015 passed u/s. 14313 r.w.s. 144C(4) of the I.T Act. The Assessing Officer is further directed to pass a fresh assessment order u/s 143(3) r.w.s. 144C(3).

6. The assessee is aggrieved and is in appeal before us.

7. We have heard the rival contentions perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

8. The basic contention of Dr Ramaswamy, learned counsel for the assessee, is that the expression used in section 144C (3) is "on the basis of" inasmuch as it requires the Assessing Officer "to complete the assessment on the basis of draft assessment order" but then this expression is quite distinct and broader in approach vis-à-vis the expression "in conformity with" used in Section 92CA(4) and the specific command of Section 144C(10) that "every direction issued by the Dispute Resolution Panel will be binding on the Assessing Officer". It

is thus contended that the expression "on the basis of" does give the liberty to the Assessing Officer to deviate from the draft assessment order as long as the Assessing Officer does not enhance the assessment i.e. by making the additions or disallowances which are not part of the draft assessment order. Learned counsel then refers to certain judicial precedents pointing out the reason, judicially noticed by Hon'ble Courts above, that Assessing Officer cannot make further additions, vis-à-vis the additions proposed in the draft assessment order, because there is no further opportunity of hearing to the assessee, by the Assessing Officer, after the draft assessment order is passed and before the final assessment order is passed. He submits that this reason does not hold good in the context of scaling down the disallowances inasmuch as no opportunity of hearing to the assessee in the event of doing something which does not prejudice the interests of the assessee, and, therefore, scaling down or omission of disallowances is permissible under the scheme of Section 144C. He has also made submissions on the merits of the additions in question, and submitted that these additions were not justified on merits, as also on account of the fact the 14A issue was in appeal before the CIT(A) anyway. For the reasons we will now set out, it is not really necessary to go any deeper on that aspect of the matter.

9. In our considered view, once the Assessing Officer has prepared a draft assessment order, and served the same upon the assessee, it is not open to him to revisit the draft assessment order so prepared except to give effect to the directions of the Dispute Resolution Panel. The expression used in Section 92CA(4) is indeed different inasmuch as, upon receipt of order under section 92CA(3), the "Assessing Officer shall proceed to compute total income of the assessee under section 92C(4) 'in conformity with' the arm's length price so determined by the Transfer Pricing Officer", but then context is also different. It provides a mechanism to give effect to the scheme of Section 92C(4) which requires that when a reference for ALP determination is made the Assessing Officer shall compute the total income of the assessee having regard to the ALP so determined. The determination of an arm's length price by the TPO is one of the inputs before the Assessing Officer, and the assessment order has to be essentially in conformity with the same. Could it be said, going by the argument of the learned counsel, that the Assessing Officer shall proceed to compute total income of the assessee 'in conformity with' the draft assessment order when all that the draft assessment order does it to compute the total income of the assessee. The variation in the language is thus warranted by the context rather than the scope of the exercise. Similarly, when learned counsel refers to the wordings in Section 144C(10) to the effect that "every direction issued by the Dispute Resolution Panel will be binding on the Assessing Officer", and compares it with the expression "on the basis of" appearing in Section 144C(3), he overlooks the fact that once again comparison is fallacious inasmuch as an external factor binding the statutory functioning of public office can only come into play when it is so mandated by law, but quite to the contrary of such a position, it is only when a public functionary deviates from the stand that such an authority has already taken that the support of law is needed. As regards learned counsel's reliance upon the judgment of Hon'ble

Madras High Court in the case of **Cognizant Mauritius Ltd Vs DCIT [(2019) 106 taxmann.389 (Madras)]**, that was a case in which even though the Transfer Pricing Officer concluded the matter by stating that "no adverse inference is drawn", the Assessing Officer proceeded to frame the assessment which was not "in conformity with" this conclusion. That was a case of an external input and the question before His Lordship was as to what extent the observations of the Transfer Pricing Officer actually fetter the discretion of the Assessing Officer. Apart from the fact that it was in a writ jurisdiction, and no adjudication was done on merits anyway, this case was materially different from the present situation inasmuch as here is a situation in which Assessing Officer comes to certain conclusions, confronts the assessee with these conclusions, there is no further hearing on these issues, there are no further directions by any authority on these issues, yet a change of heart takes place and the Assessing Officer decides those issues in favour of the assessee. Nothing, therefore, turns on this judicial precedent. As regards the learned counsel's contention, on the basis of judgments of Hon'ble Gujarat High Court in the case of **PCIT Vs Woco Motherson Advanced Technologies Ltd [(2017) 80 taxmann.63 (Guj)]** and **CIT Vs Sanmina SCI India Ltd [(2017) 85 taxmann.com19 (Madras)]**, that there is no enhancement of income in the present case, and, therefore, the Assessing Officer has the freedom to deviate from his draft assessment order, we are unable to see any merits in this plea either. These two cases were dealing with the situations in which enhancements were made, and Their Lordships held that no enhancements could be made at the stage of passing final assessment order, but then it will be fallacious logic to assume that if there are no enhancements, variations could be made at the stage of passing final assessment order. Their Lordships had no occasion to deal with a situation in which variations were made at that stage, and these variations resulted in reduction of income, and, in any event, enhancement of income is one facet of the matter, there are many other facets of this issue as well. As cautioned by Hon'ble Supreme Court in the case of **H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9**, "**It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment**". We are, therefore, unable to accept the plea that except in the case of enhancements of income of the assessee, all other variations in final assessment order vis-à-vis draft assessment order framed under section 144C(1) are permissible. That is unsustainable in law and fallacious in logic. Coming to the merits of the issue on the first principles, the scheme of section 144C is unambiguous. Once an Assessing Officer prepares a draft assessment order, that is the end of his domain of powers so far as framing of assessment is concerned- unless of course there are any directions from the Dispute Resolution Panel which are required to be implemented by the Assessing Officer. When Dispute Resolution Panel declines to interfere, the Assessing Officer proceeds to finalize the assessment order on the basis of the draft assessment order only. Similarly, when an assessee does not propose to take the matter to the Dispute Resolution Panel, the Assessing Officer has to proceed to pass the final assessment order "on the basis" of the draft assessment order. There are no further hearings on the issues in assessment in question. The expression used in

Section 144C(3) undoubtedly is that "the Assessing Officer shall complete the assessment on the basis of the draft assessment order" but in a situation in which the final assessment drops certain proposed disallowances, can it really be said that the Assessing Officer has completed the assessment on the basis of the draft assessment order- more so when there is no further hearing, no further directions and no occasion for further application of mind. The answer has to be, in our humble understanding, emphatically in negative. When a draft order is finalized by the Assessing Officer, no further hearings take place on the issues raised therein, no directions are received by the Assessing Officer to make any variations from the stand so taken, there is no occasion for making any variations from such a draft assessment order. When the Assessing Officer does not have an obligation to hear the assessee to review the draft orders or any specific powers enabling such a review, it is a natural corollary thereto that the Assessing Officer does not have the discretion, that too in such an unfettered and most opaque manner, to review the draft order nevertheless. The change of heart on the part of the Assessing Officer, howsoever well meaning and justified as it may be, is not permissible at the stage of passing the final assessment order. We disapprove and deprecate the same. The line of reasoning adopted by the learned PCIT was thus indeed correct. As regards the grievance raised by the assessee to the effect that some of the proposed disallowances, on merits, are covered in favour of the assessee, in our considered view, these issues cannot be raised at this stage. Right now the limited question before us is whether an assessment order, contrary to the draft assessment order, could be subjected to revision or not, and, on that point, we uphold the action of the PCIT. Whether these disallowances were covered in favour of the assessee or not is immaterial because it is a conscious decision to keep the matters alive or not, and, in any case, all this was relevant before finalizing the draft assessment order. The remedy against unjust disallowances, on merits, lies in the appellate process and not in review by the Assessing Officer on his own. In our considered view, an Assessing Officer cannot revisit his conclusions at the stage of passing the final order under section 144C(3). In addition to these points, the assessee has also raised several other facets of this controversy in grounds of appeal before us, but arguments of the learned counsel were restricted to these points. We see no legally sustainable merits in the arguments of the learned counsel on these points. The order of the Assessing Officer was thus clearly erroneous as also prejudicial to the interest of the assessee, and the learned PCIT was indeed justified in assuming the powers under section 263 on the facts of this case, and direct the Assessing Officer to pass the assessment order on the basis of draft assessment order issued by the Assessing Officer. No interference is called for.

10. In the result, the appeal is dismissed. Pronounced in the open court today on the 24th th day of May, 2021

Sd/-	**Sd/-**
Saktijit Dey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 24th day of May, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai