

ANUP SINHA & ASSOCIATES

TAX ALERT FOR AUGUST, 2021



SHL (India) (P.) Ltd v. Deputy Commissioner of Income Tax, Bombay¹

The final assessment order passed by the Assessing Officer in contravention of section 144C of the Income-tax Act, 1961, is liable to be set aside as void ab initio.

Executive Summary

- The Transfer Pricing Officer proposed to make an arm's length price adjustment in his order under section 92CA(3) of the Income-tax Act, 1961 ('Act').
- The Assessing Officer directly passed the final assessment order under section 143(3) of the Act.
- As no draft order of assessment was passed by the Assessing Officer as per the provision of section 144C(1) of the Act, the assessee could not file objection before the Dispute Resolution Panel.
- The assessee filed a writ petition before the Hon'ble High Court of Bombay.
- The Hon'ble Court quashed and set aside the impugned assessment order, demand notice and penalty notice for the relevant assessment year.

¹ [2021] 128 taxmann.com 426 (Bombay) [28-07-2021]

Facts

- The Transfer Pricing Officer directed an arm's length price adjustment in the order passed by him under section 92CA(3) of the Income-tax Act, 1961 ('Act').
- The Assessing Officer ('AO') directly passed the final assessment order under section 143(3) of the Act. No draft order of assessment was passed by him as per the provision of section 144C(1) of the Act and hence, no opportunity was given to the assessee to file objection before the Dispute Resolution Panel ('DRP') as per the provision of section 144C(2)(b) of the Act.
- The assessee filed a writ petition with the Hon'ble High Court of Bombay against the aforesaid action of the AO.

Ruling of the Hon'ble High Court of Bombay

- The section 144C(1) of the Act is a *non-obstante* provision and the failure on the part of the AO to follow the procedure contemplated under section 144C(1) of the Act constitutes breach of a mandatory provision of the Act. In the instant case, the AO failed to forward, in the first instance, a draft order of assessment to the eligible assessee proposing the variance which was evidently prejudicial to the interest of the assessee. The failure on the part of the AO to comply with the procedure contemplated under section 144C of the Act had taken away a lawful right from the petitioner to file objection with the DRP. The Hon'ble Court held that it was a clear case of jurisdictional error.
- The Hon'ble Court further held that the final assessment order passed by the AO stood vitiated on account of lack of jurisdiction, which was an incurable illegality. It was not a curable defect under section 292B of the Act. Hence, the final assessment order passed by the AO deserved to be set aside as void ab initio. The Hon'ble Court quashed and set aside the impugned assessment order, demand notice and penalty notice for the relevant assessment year.

Other relevant decisions

- Similar view was taken by different High Courts of India in the following cases:
 - a) Pr. CIT v. Headstrong Services India Pvt Ltd² (Hon'ble High Court of Delhi)
 - b) Control Risk India (P.) Ltd. v. DCIT³ (Hon'ble High Court of Delhi) (SLP dismissed by Hon'ble Supreme Court)⁴
 - c) Nokia India (P.) Ltd. v. Addl. CIT⁵ (Hon'ble High Court of Delhi) (SLP dismissed by Hon'ble Supreme Court)⁶
 - d) JCB India Ltd v. DCIT⁷ (Hon'ble High Court of Delhi)
 - e) Turner International India Pvt. Ltd v. DCIT⁸ (Hon'ble High Court of Delhi)
 - f) Vijay Television Private Limited⁹ (Hon'ble High Court of Madras)
 - g) CIT v. C-Sam (India) Pvt Ltd.¹⁰ (Hon'ble High Court of Gujarat)
- We further refer to the decision of the Hon'ble Pune Bench of the Income Tax Appellate Tribunal in the matter of DCIT vs. Magma International Inc.¹¹. It was held that as the assessee *suo motu* and in good faith offered additional income to tax at the beginning of assessment proceedings before the AO, the variation made by the AO was not prejudicial to the interest of the assessee. Hence, the AO had rightfully passed the final order under section 143(3) of the Act directly without passing a draft order of assessment under section 144C(1) of the Act.
- Since there is no decision of the Hon'ble High Court of Calcutta on the aforesaid issue till date and there is no contrary decision rendered by any of the High Courts of the country in this regard, the decisions rendered by the above-mentioned High Courts have persuasive value in the tax jurisdiction of Kolkata.

² ITA 77/2019 (Date of decision: 24th December, 2020)

³ [2019] 107 taxmann.com 82 (Delhi)

⁴ [2019] 107 taxmann.com 83 (SC)

⁵ [2018] 98 taxmann.com 373 (Delhi)

⁶ [2018] 98 taxmann.com 374 (SC)

⁷ [2017] 85 taxmann.com 155 (Delhi)

⁸ W.P.(C) 4260/2015 and 4261/2015 (Date: 17th May, 2017)

⁹ Writ Petition Nos. 1526 and 1527 of 2014 (Dated 29th April, 2014)

¹⁰ Tax Appeal No. 542 of 2017 dated 31st July, 2017

¹¹ [2020] 115 taxmann.com 192 (Pune – Trib.)

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