

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on: 17.10.2016

Judgment pronounced on:08.08.2017

CORAM:

THE HON'BLE MR.JUSTICE NOOTY RAMAMOHANA RAO

&

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Tax Case (Appeal) No.567 of 2016

Commissioner of Income Tax,
Chennai

... Appellant

Versus

M/s. Sanmina SCI India Pvt. Ltd.,
OZ-1, SIPCOT Hi Tech SEZ,
Oragadam, Sriperumbudur Taluk,
Kancheepuram District,
Tamilnadu 602 105.

... Respondent

Appeal against the order of the Income Tax Appellate Tribunal, Madras "D" Bench, dated 24.7.2015, passed in ITA No.1194/Mds/2014 against the order of the Deputy Commissioner of the Income Tax, Company Circle VI(1) Chennai 34 dated 20.02.2014 made in PAN/GIR No.AA FCS 8737E for the assessment year 2009-10 and against the order of Deputy Commissioner of Income Tax, Transfer Processing Officer in Chennai dated 09.01.2013 in CR.Nos.614/TPD-VI/AY 2009-2010

For Appellant : Mr.J. Narayanasamy

For Respondent : Mr. N.V.Balaji

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J U D G M E N T

(Judgment of the Court was delivered by Anita Sumanth, J.)

This appeal is filed challenging the order of the Income tax Appellate tribunal (hereinafter referred to as tribunal) dated 24.7.2015 in relation to the assessment year 2009-10.

2. The substantial questions of law raised are as follows;

" 1. Whether on the facts and in the circumstances of the case the tribunal was right in holding that the assessing officer has no jurisdiction to set off the losses prior to computation of deduction 10A in the order passed u/s.143(3) r/w.144C being the giving effect to order of the DRP proceedings, by relying on the provisions of section 144C (13)?

2. Whether on the facts and in the circumstances of the case the tribunal was right in holding that the assessing officer has no jurisdiction to set off the losses prior to computation of deduction 10A in the order passed under section 143(3) r/w.144C being the giving effect to order of the DRP proceedings on the ground that Assessing officer had not proposed such set off of losses in the draft assessment order without appreciating (hereinafter referred to as 'Act') that the said order had dealt with computation of deduction under section 10A and had also taken note of the losses to be set off."

3. FACTS IN BRIEF:

1. The provisions of the Income tax Act 1961 (hereinafter referred to as 'Act') set out a special scheme for the assessment of an entity engaged in International transactions under Chapter X of the Act, in terms of s.144C(1) to s.144C(14) of the Act. Pursuant to a reference under section 92 C A(1) of the Act, an order of Transfer Pricing determining the Arms Length Price of International transactions was passed by the Transfer Pricing Officer culminating in an order of draft assessment under Section 143(3) r/w. Section 144C(1) of the Act on 31.3.2013. The order of draft assessment effected the following variation:

(i) An adjustment to the arms length price in accordance with the order of the Transfer Pricing Officer

(ii) An adjustment to the computation of relief under s.10A of the Act by excluding insurance and tele-communication expenses only from the export turnover (numerator) while retaining the same in the total turnover (denominator) in the formula prescribed thereunder.

(2) Objections were filed by the Assessee/Respondent before the Dispute Resolution Panel, (hereinafter referred to as 'DRP') which, by order dated 20.12.2013, issued directions in relation to the Transfer Pricing adjustment as well as the issue of claim of relief under section 10 A of the Act. Consequence was given

to the directions of the DRP vide order of final assessment passed under section 143(3) r.w.s.92CA r.w.s.144 C of the Act vide order dated 20.2.2014. While doing so, the Assessing Authority proceeds to also introduce a new disallowance not contemplated in the draft order of assessment being the aggregation of income/loss from variations sources under the same head of income prior to allowance of relief under s.10A. He comes to the conclusion, relying on Circular issued by the Central Board of Direct Taxes No.vii/D/V/2013 dated 16.7.2013 that since the aggregation resulted in a loss of an amount of Rs.16,15,76,717/-, there was no profit, as a result that relief under s.10A of an amount of Rs.2.98 crores was not liable to be allowed. The returned loss of an amount of Rs.19,14,03,268/- was thus reduced to the extent of deduction under s.10A of an amount of Rs.2.98 crores. The final order of assessment dated 20.2.2014 was challenged before the Income tax Appellate Tribunal (hereinafter referred to as Tribunal).

4. The main contention of the Assessee was to the effect that the variation relating to reduction of losses on the basis of CBDT circular No.vii/D/V/2013 dated 16.7.2013 was illegal in so far as it neither emanated from the order of draft assessment nor from the directions of the DRP and was thus not in line with the statutory mandate of section 144(C)(13) of the act. The Tribunal, after due consideration of the issue, accepted the contention of the Assessee, setting aside the adjustment effected by the Assessing Officer in relation to treatment of brought forward losses prior to allowance of deduction under section 10 A of the Act. The department was directed to grant deduction first prior to effecting adjustment of brought forward losses. It is against the aforesaid order that the Income tax Department has filed the present appeal.

5. The thrust of the submissions of Mr.Narayanasamy learned Senior Standing Counsel appearing for the Appellant was to the effect that the provisions of section 144C(13) have been duly complied with since the issue of relief u/s.10A formed part and parcel of the order of draft assessment. Our attention was drawn to the order of draft assessment to point out that an adjustment has indeed been effected to the computation of relief under s.10A even at the first instance though admittedly the issue dealt with was different and did not concern priority in the set off of losses.

6. Per contra, Sri N.V.Balaji, learned counsel appearing for the Assessee/Respondent would contend that the issues dealt with in the draft order of assessment vis-à-vis those which arose in the final order of assessment were entirely different and as such the mandate of section 144 C(13) stood violated. He drew a comparison between the provisions of section 144C and the provisions of section 144B (since omitted w.e.f. 1.4.1989)

stating that the two were in paramateria with each other. Reliance was placed upon various judgments in the context of erstwhile s.144 B, in support of the submission that the Assessing Officer has no jurisdiction to traverse beyond the variations proposed in the draft order of assessment and the directions issued by the Inspecting Assistant Commissioner (in terms of Section 144B) of the Act.

7. We have heard the submissions of the Learned Counsel appearing on both sides. Section 144C of the Act was inserted vide Finance (2) Act 2009 with retrospective effect from 1.4.2009 to provide for a scheme of assessment in respect of matters that included Transfer Pricing adjustments. It is a self contained code and the sequence of events as contemplated thereunder are as follows;

144C(1) - An order of draft assessment proposing a variation to the income or losses returned by an Assessee is to be forwarded to the assessee by the Assessing Officer.

144C(2) - Upon receipt thereof, an Assessee is given two options to be exercised within thirty (30) days of receipt of the draft order - either to accept the draft order and intimate the assessing officer accordingly or file objections to the proposed variations with the DRP and the Assessing Officer.

144C(3) - If option (1) is exercised by the Assessee or objections not received within the specified period, then the Assessing Officer shall complete the assessment on the basis of the draft order.

144C(4) - A time limit of one month from the end of the month in which acceptance is received or the period for filing of objection expires, is provided for passing of the order of final assessment in terms of Section 144C(3).

144C(5) - Where objections are filed by an assessee, the DRP shall issue such directions as it thinks fit enabling the Assessing Officer to complete and issue the order of final assessment.

Sub Sections (6), (7), (8) and (9) of s.144C set out the procedure to be followed by the DRP in issuance of directions.

144C(10) - This sub-section mandates that every direction issued by the DRP shall be binding on the Assessing Officer.

144C(11) ensures adherence to the principles of natural justice by the DRP, protecting the interests of the Assessee as well as Revenue prior to the issuance of directions.

144C(12) stipulates a time limit of nine (9) months from

the end of the month when the draft order is forwarded to the Assessee for the issuance of directions.

144C(13) - Upon receipt of the directions of the DRP, the Assessing Officer shall pass an order of final assessment in conformity with the directions of the DRP within one month from the end of the month in which the direction is received. The provision specifies that there shall be no requirement for affording an opportunity of being heard to the Assessee prior to passing of an order of final assessment.

8. The question posed relates essentially to whether the impugned order of Final Assessment dated 20.2.014 is an excess of jurisdiction by the Assessing Officer or within the powers granted to him in terms of s.144C of the Act. The answer reveals itself on an analysis of the Scheme itself. The tone is set in sub-section (1) thereof wherein the role of an Assessing Officer and the limits of his jurisdiction are demarcated, in that, the order of draft assessment is to set out the proposed variations and forward the same to the Assessee for response. Then again, sub-section (3) of 144C requires the Assessing Officer to complete the assessment on the basis of the draft order. In setting out the scope of the DRP to issue directions, sub-section (6) restricts the DRP to consideration of the draft order and the objections filed by the Assessee along with connected evidence, report, records, and enquiries.

9. It is only in sub-section (8) where the power of enhancement is granted to the DRP, that the scope of the variations as proposed under section 144C(1) stand expanded. The interests of both the Assessee and the Revenue to respond to the proposed variations has been protected and an opportunity to be heard has been specifically provided for under sub-section (11). Thus where Legislature provided for any variation in assessment over and above that proposed in the order of draft assessment, it has specifically provided for an opportunity of hearing prior thereto. Thereafter in terms of sub-section (13), the Assessing Officer is bound to conform to the directions given by the DRP and give effect to the same. Contrary to the mandate in sub-section (11), it has been thought unnecessary to grant an opportunity to the assessee prior to the passing of the final order. This leads to the inescapable conclusion that the Assessing Officer is not expected to, and shall not venture to raise any issue except the variations specified by him in 144C (1) in the order of draft assessment or any issue raised by the DRP by way of enhancement in terms of sub-section (8) of 144C. The scheme of s.144C would thus be wholly violated if the Assessing Officer takes it upon himself to include in the final order of assessment such additions/disallowance/variations that do not form part of the order of draft assessment.

10. Further, we do not agree with the submission of the Learned Counsel for the Appellant to the effect that since the provisions of s.10A have been dealt with in the order of assessment, albeit in another context, the Assessing Officer is at liberty to consider any and all aspects relating to s.10A including the issue of priority in the set off of losses at the stage of final assessment. The proposition sought to be put forth is too wide to be accepted and would distort the scheme of s.144 C as noted above. We now advert to the provisions of s.144B and the judgments cited at the Bar in support of their respective submissions.

11. Section 144B omitted w.e.f. 1.4.1989, provided for a special scheme of assessment between the period 1.4.1976 and 1.4.1989 where a proposed assessment exceeded the pecuniary limit prescribed. The scheme of Section 144B is as follows;

144B(1) - Where the Assessing Officer proposed a variation in the income or losses returned which would have the effect of being prejudicial to the assessee and where the variation exceeded the amount fixed by the Central Board of Direct Taxes, a draft of the proposed order of the assessment is to be forwarded to the Assessee for response.

144B(2) - Objections to the variations contained in the draft order may be forwarded by the Assessee within 15 days from the receipt thereof or an extended period of time if granted by the Assessing Officer.

144B(3) - Where no objections were received by the Assessing Officer or where the Assessee accepted the variations, the Assessing Officer was bound to complete the assessment on the basis of the draft order.

144B(4) - If objections were filed, the same shall be forwarded along with the draft order to the Inspecting Assistant Commissioner (hereinafter referred to as 'IAC') who, after consideration of the same, would issue directions in respect of the matters covered by the objections to the Assessing Officer to enable him to complete the assessment. The sub-section mandated that no directions prejudicial to the interest of the assessee may be issued without an opportunity of hearing being granted prior thereto.

144B(5) - Sub-section 5 stipulates that the directions issued by the IAC shall be binding upon the Assessing Officer.

144B(6) - Sets out the pecuniary limits for the application of the provision as well as other situations where the section would not be applicable.

12. The argument of the Learned Counsel for the Revenue is to the effect that the scheme of s.144B, which according to him is in parimateria with the scheme of s.144C, is procedural and if at all the impugned action of the Assessing Officer was held to be erroneous, it was not fatal but liable to correction. The Learned Counsel for the Assessee, on the other hand referred to various decisions in support of his submission that there could be no variation in the order of final assessment that had not been proposed in the draft assessment. We now refer to the decisions cited at the instance of the Assessee:

13. The Apex Court in Panchmahal Steel Ltd. Vs. U.A.Joshi, ITO and another (1997) 225 ITR 458 was concerned with the powers of an Assessing Officer pursuant to issuance of Directions by the IAC. The Bench holds in this context, as follows:

'A reading of Section 144B shows that once a draft order is made and the matter is referred to the Inspecting Assistant Commissioner on receiving the objections of the assessee, the function of the Income-tax Officer practically comes to an end. Thereafter, the only remaining thing to do by him is to pass a final order of assessment pursuant to and in accordance with the directions given by the Inspecting Assistant Commissioner. He cannot vary or depart from the directions given by the Inspecting Assistant Commissioner.'

A Division Bench of this Hon'ble Court in the case of Express Newspapers Ltd. Vs. Commissioner of Income-Tax (2002) 254 ITR 472 (MAD) at page 474 states as follows;

'Having regard to the effect of the order of approval given by the Inspecting Assistant Commissioner under section 144B of the Act, it is clear that the Assessing Officer is not to meddle with the draft assessment, except to the extent required for the purpose of complying with the directions, if any, given by the Inspecting Assistant Commissioner.'

The judgment of Bombay High Court reported in (1999) 239 ITR 726 (Bom) (Commissioner of Income Tax Vs. Hade Navigation (P) Ltd) reiterates the aforesaid position as follows;

'It is clear from the expression "the income-tax Officer shall complete the assessment on the basis of the draft order" contained in sub-section (3) of section 144B of the act that even where objections are received by the Income-tax Officer, the only function left for him is to forward the objections along with the draft order to the Inspecting Assistant Commissioner and to finalise the assessment in terms of the directions of the

Inspecting Assistant Commissioner which are binding on him. Once the draft assessment is prepared and the variation in the returned income being more than Rs.1,00,000/- the draft order is forwarded to the assessee as required by section 144B, the quasi-judicial function of the Income-tax Officer comes to an end.'

Reliance was placed on the decision of the Division Bench of the Madhya Pradesh High Court in the matter of Banarsidas Bhanot and sons vs. Commissioner of Income Tax, Madhya Pradesh - II, (1981) (129 ITR 488) (MP). The Learned Senior Standing Counsel however, stressed on the fact that the assessment, in this matter, was ultimately remanded to the file of the Assessing Officer and thus supported his submission. We will return to the aforesaid decisions presently.

14. The decisions relied on by the Learned Standing Counsel for the proposition that the provisions of s.144B are only procedural are as follows:

- (i) Madras High Court in the matter of Chennai Murasu (P.) Ltd., Vs. Commissioner of Income-tax (1999) 107 TAXMAN 44
- (ii) Kerala High Court in the matter of A.M.Zainalabdeen Musaliar Vs. Commissioner of Income Tax (1994) 207 ITR 143 and Joseph Kuruvilla Vs Commissioner of Income Tax 179 ITR 139
- (iii) Allahabad High Court, in the matter of Bhagwat Prasad V. Commissioner of Income Tax (147 CTR 155)

15. The question for determination in the present appeal can be decided on the language of s.144C and does not call for any comparison with s.144B. However, in so far as the comparison has been made, we proceed to address the same. While the scheme of assessment set out in s.144B and s.144C appear to be similar upto a point, there is a material and substantive difference therein that is brought about by the presence of sub-section (13) in s.144C. Both provisions remain similar upto the stage of disposal of objections by IAC/DRP, i.e., the proposal of specific variations in a draft order, grant of opportunity to the Assessee to respond, acceptance thereof or objections thereto raised by the Assessee, completion of assessment on the basis of draft order or forwarding to the IAC/DRP the draft order along with objections, consideration of the proposed variations along with the objections and connected records by the IAC/DRP and the mandate to grant an opportunity of hearing by the IAC/DRP. Thus there is a commonality of strategy that flows through s.144 B(1) to (4) and 144 C (1) to (9). The minor differences in the approach inter se are not relevant and are thus not adverted to. Sub-section (5) of Section 144 B

emphasizes the binding nature of the directions issued by the IAC upon the Assessing Officer and is mirrored by the provisions of sub-section (10) of s.144C which mandates that every direction issued by the DRP be binding upon the Assessing Officer. There the comparison ends. S.144 B proceeds thereafter to deal with other incidental matters in sub-sections (6) and (7) thereof and s.144 C proceeds, in sub-section (12) to set a time limit for the issuance of the directions by the DRP.

16. Sub-section 13, the interpretation of which is a subject matter of this appeal contains a substantive mandate cast upon the assessing officer in the following terms as extracted below. It is relevant to mention, at this stage that there is no equivalent in s.144B to sub-section (13) of s.144C.

“(13) Upon receipt of the directions issued under sub-section (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.”

17. Sub-section (13) of s.144 C is specific and mandates that the Assessing Officer shall issue the order of final assessment in conformity with the directions of the DRP without provision of any further opportunity of being heard to the assessee, within one month from the end of the month, in which the directions are received. There is thus a vital distinction in the scheme of assessment as provided under s.144 B vis-a-vis that which is set out in s.144C. While the Assessing Officer in terms of s.144 B is bound by the directions issued by the IAC, the Statute is silent as regards any fetter to his powers otherwise. Contrast this with sub-section (13) of s.144C, the elements of which have been set out in detail above. It reveals a conscious decision by Legislature to limit the independent participation of the Assessing Officer in the process of assessment only to the stage of proposal of variations in terms of s.144C(1) and not thereafter. The express language of sub-section (13) thereof would admit of no other interpretation.

18. Insistences in taxing statutes where the Assessee has been specifically denied an opportunity of hearing are few and far between. On the contrary the principles of natural justice are always enforced in favour of the Assessee and Courts have, even when a provision is silent in regard to the provision of opportunity, read the requirement into the statutory provision. The powers of an Assessing Officer under sub-section (13) of 144 C have clearly been limited to giving consequence to the

directions of DRP and cannot extend any further. Any attempt by the Assessing Officer to delve beyond would result in great prejudice to an Assessee in the light of the express stipulation that no opportunity is to be provided and an interpretation to further such a conclusion would be wholly unacceptable and contrary to law.

19. Sub-section (4) of 144 B does not contain the elements of sub-section (13) of s.144C including the stipulation regarding the non-grant of opportunity to an Assessee and the powers of an Assessing Officer thereunder would consequently be wider. The decisions of the High Courts cited by the Learned Standing Counsel have necessarily to be seen in this context only, and thus are of no assistance to him. The submissions of the Learned Standing Counsel in regard to the decision of the MP High Court in 129 ITR 488 are also rejected in the light of the observations at page 492 of the judgment, extracted below. The Division Bench clarifies the position that the draft order has set out in detail the specific additions and disallowances that had been proposed and had merely lacked the computation of total income. The matter was remanded after noting specifically that the remand was for a reason that would not be prejudicial to the Assessee, In the present case, however, the Department seeks to bring in an entirely different disallowance in the final order of assessment which would certainly cause prejudice to the assessee and for which, admittedly, no opportunity has been granted.

'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.'

20. Acceptance of the proposition advanced by the Department would tantamount to giving leave to the Assessing Officer to pass more than one order of assessment in the course of a single proceeding, which is not envisaged in the scheme of the Act. Subsequent assessments either rectifying, revising or reopening the original assessment are permitted by exercising specified powers under different statutory provisions. The order of draft assessment under section 144C(1) is for all intents and purposes an order of original assessment though in draft form. In this light of the matter, the order of the Tribunal to this effect is

right in law and calls for no interference.

21. The variation in the order of final assessment dated 22.2.2014 relating to the priority of set off of losses is purely misconceived and an excess of jurisdiction by the Assessing Officer in terms of s.144C(13) of the Act. The questions of law are thus answered in favour of the Assessee and against the Department. The Tax Case Appeal is dismissed.

22. Upon conclusion of the hearing, the Senior Standing Counsel sought leave to pursue other remedies available under the Act which we are not inclined to consider in view of the fact that they do not arise from the proceedings impugned before us. It is left for the department to pursue such action as it may deem fit that is strictly in accordance with the provisions of law.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

msr

To

1.The Income Tax Appellate Tribunal,
Madras "D" Bench

2.The Deputy Commissioner of Income Tax
Company Circle-VI(1)

7th floor New Block 121 Mahatma Gandhi Road
Chennai-34

3.The Commissioner of Income Tax,
Chennai-34

+1 cc to M/s.J.Narayanaswamy Advocate sr 57541

+1 cc to M/s.Balaji Advocate sr 57552

Tax Case (Appeal) No.567 of 2016

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