IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.118 of 2018

M/s.India Trimmings Pvt. Ltd.,
66/636, Pillaiappan Palayam,
Telughupalayam Post,
Annur, Coimbatore – 641 653. ...Appellant/Respondent

-Vs-

The Deputy Commissioner of Income Tax,
Corporate Circle – 1,
63-A, Race Course Road,
Coimbatore. ...Respondent/Appellant

Prayer: - Tax Case Appeal under Section 260-A of the Income Tax Act, 1961, is directed against the order passed by the Income Tax Appellate Tribunal "D" Bench, Chennai in I.T.A No.476/Mds/2016 dated 31.01.2017 for the assessment year 2011-12 preferred against the Order of the ACIT, Secretary, Dispute Resolution Parcel -2, Bangalore passed in F.No.41/DRP-2/BNG/2015-16, dated : 24.11.2015, against the order passed by the Deputy Commissioner of Income Tax, Corporate Circle- 1, Coimbatore, passed in PAN AAACI 6394N, dated : 25.02.2015.

For appellant : Mr.A.S.Sriraman

For Respondent : Mr.T.R.Senthil Kumar, assisted by Mrs.K.G.Usha Rani

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JUDGEMENT
[Judgement of the Court was made by T.S.Sivagnanam, J.]

This Tax Case Appeal by the Revenue filed under Section 260-A of the Income Tax Act, 1961, ('the Act' for brevity) is directed against the order passed by the Income Tax Appellate Tribunal "D" Bench, Chennai in I.T.A No.476/Mds/2016 dated 31.01.2017 for the assessment year 2011-12.

2.The above Tax Case Appeal has been filed raising the

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following substantial questions of law:-

"(i) Whether the Appellate Tribunal is correct in law in setting aside the order of the Dispute Resolution Panel on the misconstruction of the provisions of sub-sections (5), (7) and (8) of Section 144C of the Act even though the issues before the DRP were decided by them based on the materials furnished for reaching their conclusions in para 3.2.1 and para 3.3.4 of the order dated 24.11.2015?

(ii) Whether the Appellate Tribunal is correct in law in exceeding the grounds canvassed by the Revenue at the time of filing the appeal, at the time of the hearing as well as based on the report furnished by the TPO in the hearing conducted by them whereby the excessive use of jurisdiction by the DRP was not canvassed in so far as the decisions rendered in para 3.2.1 and para 3.3.4 of the order dated 24.11.2015?

(iii) Whether the Appellate Tribunal is correct in law in setting aside the order of the DRP dated 24.11.2015 in misreading para 3.2.1 and para 3.3.4 on the interpretation of the provisions in sub-sections (5), (7) and (8) of Section 144C of the Act proving perversity in recording findings at paras 7 & 8 of the impugned order both on facts and in law?"

3.We have heard Mr.A.S.Sriraman, learned counsel for the appellant/assessee and Mr.T.R.Senthil Kumar, learned Senior Standing Counsel assisted by Mrs.K.G.Usha Rani for the respondent/Revenue.

4. Two issues arise for consideration in this appeal. Firstly, whether the Tribunal in the impugned order could have held that the Dispute Resolution Panel (DRP) has no authority either to direct the Assessing Officer or Transfer Pricing Officer (TPO) to make further enquiry and decide the matter. The second issue is whether the Tribunal was right in not deciding the grounds raised by the Revenue in their grounds of appeal touching upon the merits of the assessment order dated 28.12.2015 which has given effect to the order passed by the DRP dated 24.11.2015.

5. On the first issue, the Tribunal took into consideration sub section 8 of Section 144C and held that DRP has no authority to direct the Assessing Officer or the TPO to make further enquiry and decide the matter and at best can call for remand report from any Income Tax Authority and decide the issue itself by adjudicating the matter. To resolve the

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controversy raised, it may be necessary for us to take note of Section 144C of the Act and the relevant sub sections which are quoted herein below:

> "144C(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, 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 eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.
> (2)......
> (3).....
> (4).....
> (5) The Dispute Resolution Panel shall, in a case where any 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.
> (6).....
> (7) The DRP may, before issuing any directions referred to in sub-section (5), - (a) make such further enquiry, as it thinks fit; or (b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.
> (8)The DRP may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub section (5) for further enquiry and passing of the assessment order.
> (9).....
> (10) Every direction issued by the DRP shall be binding on the Assessing Officer.
> (11)....
> (12)....
> (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, 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.
> (14).....
> (15)....."

6. In the instant case, the draft assessment order was passed by the Assessing Officer under Section 144C(1) r/w Section 143(3) of the Act on 25.02.2015. On receipt of the draft

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order, the appellant/ assessee submitted their objections in terms of sub section 2 of Section 144(C), in terms of sub section 5 of Section 144C. The DRP shall, in a case where any objection is received under sub section 2, issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable them to complete the assessment.

7. In terms of sub section 7, the DRP may, before issuing any directions referred to in sub-section 5 make such further enquiry, as it thinks fit; or cause any further enquiry to be made by any income tax authority and report the result of the same to it.

8. Sub Section 8 of Section 144C empowers the DRP to confirm, reduce or enhance the variations proposed in the draft assessment order, however, it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

9. In terms of sub section (10) of Section 144C, every direction issued by the DRP shall be binding on the Assessing Officer.

10. In terms of sub section 13 of Section 144C, upon receipt of directions under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in Section 153, the assessment without providing any further opportunity being heard to the assessee, within one month from the end of the month in which such direction is received.

11. The Tribunal has faulted the DRP by holding that it has exceeded its jurisdiction as circumscribed under Section 144C. To be noted, that the appeal filed by the Revenue before the Tribunal was not against the order of DRP but challenged the assessment order dated 28.12.2015 under Section 144C(13) r/w Section 143(3) of the Act.

12. We have perused the grounds of appeal raised by the Revenue which are extracted herein

> “2.The Hon'ble DRP erred in allowing the claim of the assessee for inclusion of M/s.Ashnoor Textiles Mills Ltd., as a comparable and adjustment on account of personnel cost and also holding that there was no basis for the TPO to reject M/s.Ashnoor Textiles Mills Ltd., holding it as loss making.
>
> 3. The Hon'ble DRP erred in holding that the assessee has furnished the details of break-up of employee cost for itself as well as for comparables and directing that appropriate adjustment should be allowed to the assessee.

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> 4. The Hon'ble DRP failed to note that the assessee while calculating the PLI of M/s.Ashnoor Textiles Mills Ltd., has not included other operational expenditure of the industry amounting to Rs.4.17 crores thereby ending with a positive operating profit, whereas the TPO has included this operational expenditure and arrived at a negative OP/OC at (-) 5.13%"

13. On a perusal of the above grounds, it is seen that the Revenue was aggrieved by the assessment order dated 28.12.2015. On merits we find that the Revenue has not questioned the jurisdiction of the DRP which order had worked itself out and culminated in an assessment order dated 28.12.2015. Thus, the Tribunal should have considered the correctness of the final assessment order dated 28.12.2015.

14. Next we examine as to whether the DRP has exceeded its jurisdiction than what has been circumscribed under sub section 8 of Section 144C in passing its order dated 24.11.2015. The assessee pleaded adjustment on account of the personnel cost and risk adjustment. The objection raised by the assessee was considered by the DRP and ruled in favour of the assessee holding that the assessee is entitled for appropriate adjustment. This is evident from the finding in paragraph No.3.3.4 of the order passed by the DRP dated 24.11.2015 which is quoted hereunder for better appreciation.

> "3.3.4.........The contention of the assessee that there was gross underutilization of the assets employed due to lack of turnover, was also under consideration before the DRP for AY 2009-10. However, the claim of the assessee was not allowed as no further detail regarding break-up of employee cost for itself as well as for the comparables at page 97 of the Paper Book. Considering the issue in its entirety, this Panel is of the opinion that appropriate adjustment should be allowed to the assessee. Hence, the TPO is directed to decide the percentage of risk adjustment to be calculated in this issue after taking into account all the relevant facts and details."

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15. Thus, the order dated 24.11.2015 passed by the DRP is an order reducing the variation proposed in the draft assessment order dated 25.02.2015. Thus, in our considered view, the Tribunal was not right in holding that the DRP exceeded its jurisdiction in passing the order. In any event, the order passed by the DRP was not impugned before the Tribunal rather what was impugned was the assessment order dated 28.12.2015 passed under Section 144C(13) r/w Section 143(3) of the Act.

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Therefore, the Tribunal was required to consider on merits whether the said assessment order was justified or not.

16. The learned counsel for the Revenue as well as the other senior standing counsel for the Revenue namely Mr.Swaminathan and Mr.Karthick Ranganathan submitted that the above judgement rendered by us is likely to be misinterpreted with regard to the powers of the DRP as circumscribed under sub section 8 of Section 144C. To be noted, that on facts, we held that the DRP has reduced the variation than what was granted to the assessee in the draft assessment order. The Revenue was clear in their mind in the challenge before the Tribunal which was an final order of assessment passed under Section 144C(13) and therefore, on facts we found that the DRP has granted relief to the assessee and the correctness of relief granted to the assessee which has translated into a final assessment order which was questioned by the Revenue before the Tribunal on merits. Therefore, on facts we have held as above.

17. In the light of the above, we hold that the Tribunal should decide the matter rather than allowing the appeal filed by the Revenue in its entirety.

18. For the above reasons, this tax case appeal is allowed and the substantial questions of law are answered in favour of the assessee, consequently, the order passed by the Tribunal is set aside and the matter is remanded back to the Tribunal to decide the appeal filed by the Revenue on merits, on the grounds raised by it in the appeal memorandum as referred above and such other grounds that may be adduced at the time of hearing.

19. With the above directions, this tax case appeal is allowed. No costs.
mrm

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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

2.The ACIT & Secretary,
Dispute Resolution Parcel - 2,
Bangalore.

3. The Deputy Commissioner of Income Tax,
Corporate Circle - 1,
Coimbatore.

+1cc to Mr.S.Sridhar, Advocate, SR.No.47112
+1cc to Mr.T.R.Senthil Kumar, Advocate, SR.No.46841

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Kak(25/07/2019)

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