



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2387 OF 2020

Undercarriage and Tractor Parts Pvt. Ltd.)
 Plot No.D-4, Five Star Industrial Estate,)
 MIDC Kagal, Kolhapur – 416 236)Petitioner
 PAN No.AAACU8974A)

V/s.

1. Dispute Resolution Panel – 3, (WZ))
 Mumbai, Through Assistant Commissioner of)
 Income Tax (HQ) to DRP-3, Mumbai,)
 28th Floor, Centre One Building World Trade)
 Centre, Cuffe Parade, Mumbai – 400 005)
2. The Dy. Commissioner of Income Tax)
 Circle -1, Kolhapur, Aayakar Bhavan, Tarabai)
 Park, Kolhapur – 416 005)
3. The Pr. Commissioner of Income Tax – 1,)
 Aayakar Bhavan, Tarabai Park, Kolhapur –)
 416 005)
4. Union of India through the Secretary,)
 Ministry of Finance, North Block, New Delhi)
 – 110 001)Respondents

Mr. Riyaz Padvekar a/w. Mr. Tanzil Padvekar and Ms. Tejal Kharkar for petitioner.

Mr. Suresh Kumar for respondents.

**CORAM : K. R. SHRIRAM &
DR. N. K. GOKHALE, JJ.**

DATED : 12th SEPTEMBER 2023

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

1 Rule. Rule made returnable forthwith. By consent, the petition is taken up for final hearing at the admission stage.

2 Prayer clause – (a) in this petition reads as under :

(a) issue a Writ of Certiorari or Writ in the nature of Certiorari or any other appropriate writ, directions or order under Article

226 of the Constitution of India, declaring the Orders passed by the Respondent No.1 under Sec. 144C(5) dated 16/09/2019 and the Respondent No.2 under Sec. 143(3) r.w.s. 144C(13) dt. 31/10/2019 as without valid authority of law, illegal and void ab initio and to pass order quashing both the impugned Orders.

3 Petitioner filed its return of income for Assessment Year 2015-2016 under Section 139(1)/(3) of the Income Tax Act, 1961 (the Act) on 30th September 2015 declaring loss of Rs.11,69,32,126/-. Petitioner also filed auditor's report in Form No.3CEB in respect of international and domestic transactions entered into by petitioner with the Associate Enterprises (AE) as defined under Section 92A of the Act.

4 Petitioner's return of income was selected for scrutiny under CASS and respondent no.2 issued notice dated 12th April 2016 under Section 143(2) of the Act. In view of the international transactions and domestic transactions with AE, respondent no.2 referred petitioner's case to the Transfer Pricing Officer (TPO) under Section 92CA(1) of the Act. The TPO passed an order dated 30th October 2018 under Section 92CA(3) of the Act proposing an adjustment of Rs.11,92,16,671/- to the reported international and domestic related parties transactions after working out Arms Length Price (ALP). After receiving the order of TPO, respondent no.2 passed the draft assessment order dated 3rd December 2018 under Section 143(3) read with Section 92CA(3) read with Section 144C(1) of the Act. In the draft assessment order, respondent no.2 assessed income of petitioner at Rs.1,24,01,490/- and also proposed to charge interest under Section

234A/B/C of the Act and also initiate penalty proceedings under Section 271(1)(c) of the Act. Petitioner, by a letter dated 14th December 2018, informed respondent no.2 that petitioner is in the process of filing of an objection before the Dispute Resolution Panel (DRP), i.e., respondent no.1, and requested not to pass an assessment order under Section 143(3) of the Act till the disposal of the objections by the DRP. On 24th December 2018 respondent no.2 passed the final assessment order without waiting for the mandatory period of 30 days provided under Section 144C(2) of the Act confirming the draft assessment order. Petitioner has filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], Kolhapur, under Section 246A of the Act. The assessment order dated 24th December 2018 passed by respondent no.2 was received by petitioner only on 29th December 2018. Unaware of the said order, petitioner filed its objections before the DRP on 28th December 2018. Once petitioner received the assessment order, petitioner informed the DRP that the assessment order albeit illegally has already been passed and, therefore, DRP has no locus to proceed with the objections filed. Petitioner also informed the DRP that petitioner has already filed an appeal before the CIT(A) impugning the assessment order dated 24th December 2018. Notwithstanding this, DRP proceeded to issue the directions dated 16th September 2019 based on which another assessment order dated 31st October 2019 came to be passed. The DRP's directions and this assessment order dated 31st October

2019 is what is impugned in this petition.

5 It is petitioner's case that the directions dated 16th September 2019 passed by respondent no.1 – DRP was in gross violation of the provisions of the Act in as much as the DRP can hear and pass directions only in pending assessment proceedings. When the Assessing Officer has passed an assessment order dated 24th December 2018 albeit illegally, without waiting for the mandatory period of 30 days specified in sub-section 2 of Section 144C of the Act, the DRP has no role to play and should not have passed the directions dated 16th September 2019.

6 Mr. Padvekar submitted that :

(a) Section 144C(2) of the Act provides that on receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order, either file his acceptance of the variations to the Assessing Officer or file his objections, if any, to such variation with the DRP and the Assessing Officer. The time to file the objections was until 2nd January 2019;

(b) Section 144C(3) of the Act provides that the Assessing Officer shall complete the assessment on the basis of the draft order, if the assessee intimates to the Assessing Officer the acceptance of the variation or no objections are received within the period specified in sub-section 2, i.e., if no objections are received by 2nd January 2019. The Assessing Officer without waiting till 2nd January 2019 proceeds to pass the assessment order

on 24th December 2018 which *ex-facie* is illegal;

(c) Sub-section 4 of Section 144C of the Act provides for the Assessing Officer to pass the assessment order under sub-section 3 within one month from the end of the month in which the acceptance is received or the period of filing of objections under sub-section 2 expires. Since the time for filing objections would have expired on 2nd January 2019, the Assessing Officer had time till 28th February 2019. Notwithstanding this, the Assessing Officer proceeds to pass an invalid order on 24th December 2018;

(d) Section 144C(5) of the Act provides that 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 him to complete the assessment. Since the Section uses the words “..... to enable him to complete the assessment”, it presupposes that there is pending assessment proceedings. Therefore, when the assessment order has already been passed, there can be no pending assessment proceedings and, therefore, DRP could not have issued the directions dated 16th September 2019 under Section 144C(5) of the Act. In the circumstances, the directions of the DRP and the consequent assessment order dated 31st October 2019 have to go.

7 Mr. Suresh Kumar submitted, relying on the affidavit in reply filed through one Prajakta P. Thakur affirmed on 26th August 2021, that the assessment order dated 24th December 2018 was an incorrect order and the

Assessing Officer should not have passed the said assessment order. Mr. Suresh Kumar, however, submitted that since the reference had already been made to DRP and the intimation was given to the Assessing Officer of the proposed objections to be filed to DRP vide a communication dated 14th December 2018, the DRP was well within its jurisdiction to pass the directions on 16th September 2019. Therefore, the assessment order passed on 31st October 2019 was correct order.

8 We are unable to accept this second limb of Mr. Suresh Kumar's submissions that the second assessment order dated 31st October 2019 or the directions given by DRP on 16th September 2019 under Section 144C(5) of the Act are valid.

9 Section 144C of the Act reads as under :

144C. Reference to dispute resolution panel. -

(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 which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order, -

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) 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 the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153[or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which, -

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(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) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely -

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel 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 Dispute Resolution Panel 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.

[Explanation – For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the

assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee].

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(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.

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(15) For the purposes of this section, -

(a) "Dispute Resolution Panel" means a collegium comprising of three [Principal Commissioners or] Commissioners of Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means, -

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

[(ii) any non-resident not being a company, or any foreign company.]

10 Section 144C(5) of the Act provides “*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 him to complete the assessment". Therefore, it is quite obvious, when it says "*..... to enable him to complete the assessment*", it presupposes pending assessment proceedings.

Sub-section 6 of Section 144C of the Act provides "*the DRP shall issue the directions referred to in sub-section 5, after considering the following*". The directions referred to in sub-section 5 are those directions for the guidance of the Assessing Officer to enable him to complete the assessment. Therefore, this also presupposes pending assessment proceedings.

Sub-section 7 of Section 144C of the Act provides "*the DRP may, before issuing any directions referred to in sub-section 5*". These directions are for the guidance of the Assessing Officer to enable him to complete the assessment, which also presupposes pending assessment proceedings.

Sub-section 8 of Section 144C of the Act provides "*the DRP may confirm, reduce or enhance the variations proposed in the draft order*" which means the assessment proceedings are still pending.

Sub-section 11 of Section 144C of the Act provides "*no direction under sub-section 5 shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the*

revenue, respectively” which also presupposes pending assessment proceedings.

Similarly under sub-section 12 of Section 144C of the Act which says “*no direction under sub-section 5 shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee*”; and

Under sub-section 13 of Section 144C of the Act which says “*upon receipt of the directions issued under sub-section 5, the Assessing Officer shall, in conformity with the directions, complete,..... the assessment*”.

Therefore, the DRP could give directions only in pending assessment proceedings. Once assessment order is passed, rightly or wrongly, the assessment proceedings come to an end. Therefore, the DRP would have no power to pass any directions contemplated under sub-section 5 of Section 144C of the Act.

11 While concluding, Mr. Suresh Kumar submitted that in view of what is stated in the affidavit in reply where respondents have admitted that the assessment order dated 24th December 2018 could not have been passed, the appeal pending before the CIT (A) will naturally get allowed/the assessment order would get set aside. That would result in the Revenue not able to pass assessment order under Section 143(3) of the Act or even under Section 147 of the Act.

The Rajasthan High Court in ***Sudesh Taneja V/s. ITO***¹ held that

(a) taxing statute must be interpreted strictly. Equity has no place in taxation. Nor while interpreting taxing statute intendment would have any place. (b) There is nothing unjust in the tax payer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly. (c) It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. (d) In the matter of interpretation of charging section of a taxation statute, strict Rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied. Paragraph 31(i) of *Sudesh Taneja* (Supra) reads as under :

31. We may now attempt to answer these questions ourselves with the aid of statutory provisions and law laid down in various decisions cited before us we may summarise certain principles applicable in the field of taxation and which principles would be invoked in the course of the judgment :-

(i) A taxing statute must be interpreted strictly. Equity has no place in taxation nor while interpreting taxing statute intendment would have any place. In case of State of W.B. Vs. Kesoram Industries Ltd. And Ors., (2004) 10 SCC 201, referring to Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law, it was observed that in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted by any presumption or assumption. A taxing statute has to be interpreted in light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency. Before taxing any person it must be shown that he falls within the ambit of charging section by clear words used in the section and if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the tax payer escaping if the

1. 442 ITR 289

letter of the law fails to catch him on account of the legislature's failure to express itself clearly.

A Constitution Bench in the case of Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar And Company And Ors., (2018) 9 SCC 1, had reiterated these principles. It was a case where on a reference to the Larger Bench the Supreme Court was considering a question whether an ambiguity in a tax exemption provision or notification, the same must be interpreted so as to favour the assessee. Making a clear distinction between a charging provision of a taxing statute and exemption notification which waives a tax or a levy normally imposed, the Supreme Court observed as under :-

14. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption (98 of 113) [CW-969/2022] notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills Case, in the matter of interpretation of charging Section of a taxation statute, strict Rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the Assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore.

24. In construing penal statutes and taxation statutes, the Court has to apply strict Rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.

12 We should also note that factually, as recorded in its directions dated 16th September 2019, the DRP has stated as under :

During the course of proceedings before the DRP, the assessee has filed a letter dated 26.08.2019 intimating that the AO after

passing draft order on 03.12.2018 has passed final order on 24.12.2018, which was served on the assessee by email on 29.12.2018. Meanwhile, the assessee had already filed application before the DRP on 28.12.2018 which were in time. The assessee has also intimated that the assessee has already filed appeal before the CIT(A) against the aforesaid final order of the AO. The assessee has requested that in view of the final order already passed by the AO, the application before the DRP has been infructuous and therefore, it wishes to withdraw the application filled before the DRP. We have considered the above letter dated 26.08.2019 filed by the assessee. Since, the objections filed by the assessee are in time as prescribed under the Act and AO's draft order is as per the Act, we, therefore proceed to issue directions to the AO/TPO as per the Act. Discussion and Direction of the DRP are as under.

Notwithstanding this, the DRP has proceeded to issue the directions which it should not have done.

13 In the circumstances, we hereby quash and set aside the directions issued by DRP on 16th September 2019 and the consequent assessment order dated 31st October 2019.

14 Petition disposed. No order as to costs.

(DR. N. K. GOKHALE, J.)

(K. R. SHRIRAM, J.)