

SATURDAY INTERNATIONAL TAX GYAN !!!



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Cadmatic OY

v.

ACIT (Int Tax) - Circle-2(1)(1)

Ld. DRP cannot pass directions if Ld. AO has already passed final assessment order without waiting for directions and assessee had not informed AO regarding the objections filed before DRP.

ITA no.540/Mum./2023

Date: 16.03.2024

Jain Shrimal & Co.

Facts of the Case

- ❖ The assessee is a non-resident company and is a tax resident of Finland. For the year under consideration assessee file it's return of income as Nil in India.
- ❖ During the year under consideration, the assessee received an amount Rs.3,91,30,966, from the sale of software to its clients who are Indian companies. Client of assessee had deducted TDS on such payment, however assessee did not offer such income to tax and claimed a refund.
- ❖ AO passed draft assessment order on 26.02.2021 and did not agree with submission of assessee during the course of assessment proceedings. Assessee filed detailed objections before DRP against such draft order on 23.03.2021. Even though assessee had filed objections but AO passed final order u/s 143(3) r.w.s. 144C(3) without waiting for the directions of DRP.
- ❖ DRP passed it's directions u/s 144C(5) Dt. 29.11.2021 considering the income as taxable in India and accordingly AO again passed order Dt. 27.12.2021.

Assessee's Contention

- ❖ Assessee challenged the legality and validity of impugned assessment order passed on 27.12.2021 under section 143(3) r.w.s. 144C(13) and relied on the judgement of Hon'ble Jurisdictional High Court in Undercarriage and Tractor Parts Pvt. Ltd. v/s Dispute Resolution Panel-3 (WZ), (2023) 156 taxmann.com 79 (Bom.) dated 12/09/2023.
- ❖ The learned A.R. submitted that in the aforesaid decision, the Hon'ble Jurisdictional High Court held that the learned DRP can give directions only in pending assessment proceedings.
- ❖ Once the assessment order is passed, the learned DRP would have no power to pass any directions as contemplated under section 144C(5) of the Act.
- ❖ Accordingly, it was submitted that since, the A.O. had already passed the final assessment order under section 143(3) r.w.s. 144C(3) of the Act on 15/04/2021, the directions issued by the learned DRP on 29/11/2021 and the consequent final impugned assessment order dated 27/12/2021, are void ab initio.

Revenue's Contention

- ❖ Ld. D.R. objected the grounds raised by assessee, challenging the subsequent order of Ld. AO pursuant to the directions of DRP as such ground was raised by assessee in previous hearing.
- ❖ The learned D.R. further submitted that two final assessment orders are passed in the present case as the assessee did not file any intimation before the A.O. regarding the filing of objections before the learned DRP on 23/03/2021.
- ❖ The learned D.R. submitted that the learned DRP after considering all the subsequent events rightly issued directions resulting in the impugned final assessment order.

Legal provisions

As per section 144C of Income Tax Act, 1961,

144C. (1)

(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).

..

...

(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.

Legal provisions

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned, and*
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and*
- c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.*

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that State.

Ruling

- ❖ During the course of proceedings Ld. A.R. stated that the additional ground raised by him is purely legal and same goes to the root of the matter and it was raised later because of a legal position which came to the notice of Ld. A.R. subsequently.
- ❖ Further, the Hon'ble Jurisdictional High Court in Inventors Industrial Corporation Ltd. v/s CIT, [1992] 194 ITR 548 (Bom.) held that the ground by which the jurisdiction to make the assessment itself is challenged can be urged before any authority for the first time, even in the second round of proceedings.
- ❖ Hence, the additional ground raised by A.R., challenging order passed by DRP is accepted.
- ❖ During the course of assessment proceedings assessee had submitted a letter stating various objections against the draft assessment order. However, in the letter there was no mention that assessee has filed an objection before DRP.

Ruling

- ❖ DRP held that once the objections has been filed by assessee before it against a draft assessment order u/s 144C it is duty bound to pass directions against such objections filed by assessee.
- ❖ Further, every directions passed by DRP is binding on Ld. AO by virtue of Section 144C(10) of the Act and AO has very limited role after passing draft order i.e. to follow directions of DRP.
- ❖ Hon'ble ITAT followed the judgement relied by assessee of Hon'ble Jurisdictional High court in case Undercarriage and Tractor Parts Pvt. Ltd. wherein it was held that once the final order has been passed by Ld. AO, DRP cannot pass any directions as the matter has been closed.

Our Comments

- ❖ Although, the provision of Act mentions that assessee has to inform about the objections filed before DRP to AO, however, there is no procedure laid down as to what needs to be submitted before the AO or whether just writing a letter to AO that objections has been filed before DRP is enough.
- ❖ Further, since both the authorities comes under the same department it would have been easy if Income tax department creates an online portal or integrate filing of objection before DRP in the e-filing portal itself which is visible to Ld. AO as well and it will remove difficulty in such mis-communication.
- ❖ Further, there has been a judgement of Hon'ble Delhi High court wherein the High court has allowed the directions provided by DRP even when assessee forgot to inform AO about filing of objection before DRP.

Pepsico India Holdings (P.) Ltd. v. Assessment Unit Income-tax Department National Faceless Assessment Centre [2023] 157 taxmann.com 143 (Delhi)

Section/Article	144C of the Income Tax Act
DTAA/Country	
Court	Mumbai Tribunal
Date of decision	29.12.2023

Note: Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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