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By

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Dear Readers,

Greetings for the season!

In this edition, we bring you, an article on various shades of draft assessment orders and issue surrounding them. This is a two part series article. The next part would be in the upcoming editions.

The next article is on certain issues surrounding the job work vis-à-vis manufacture.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S

Founder & Chairman

GST

JOB WORK - CERTAIN ISSUES

Contributed by CA Sri Harsha

One of the main reasons that goods and services tax (for brevity 'GST') laws were introduced is to bring numerous indirect legislations under one single law to the extent possible. By doing this, the service tax law, excise law and value added tax law have repealed and subsumed into GST laws. Everyone was happy, because there is no requirement to understand, what is manufacture, what is goods, what is service, what is negative list, what is positive list and so on. Simply, the GST law promised, if there is a supply, there is a tax. However, that was so in the dream land and not in reality. We continue to face issues in different shapes and that was the only change, one can perceive.

In this article, we tried to write on the issues surrounding the job work. Before deliberating on the issues, we will take a look on the concept of job work under the GST laws. The expression 'job work' is laid down under Section 2(68) of CT Act[1] to mean any treatment or process undertaken by a person on goods belonging to another registered person and the expression 'job worker' shall be construed accordingly. Section 143 details the procedures pertaining to the job work, which we will deal at appropriate place. With the above in mind, let us now proceed to examine certain issues pertaining to job work.

Issue #1 –Can the activity of job work result in manufacture?

The definition of 'job work' as laid down under Section 2(68) states that any treatment or process undertaken by a person on goods belonging to another registered person. The said definition nowhere stated that the said treatment or process should not result in manufacture. Hence, if the treatment or process adopted by job worker on the inputs (goods) result into a different product from the input, the said process should still qualify as job work. The expression 'manufacture' is defined in Section 2(72) states to mean processing of raw materials or inputs in a manner that results in emergence of a new product having a distinct name, character and use and the term 'manufacturer' shall be construed accordingly.

Though the term 'manufacture' is defined to specifically mean a process which results in emergence of a new product and absence of similar language in the definition of 'job work' should not indicate that job work cannot include manufacture. In other words, manufacture is sub-set of job work. Hence, any activity or treatment, whether it results in a new product or not, shall fall under the ambit of job work.

If that was this easy, why did we frame it is an issue, would be the question. The journey to reach the above conclusion was a tiresome one. The issue came up before the Maharashtra AAR[2] in the matter of JSW Energy Limited[3] . In the facts of the matter, JSW Energy Limited (for brevity JEL) has entered an agreement with JSW Steel Limited (for brevity JSL) for conversion of coal into electricity, which can be used by later for their manufacturing of steel. By virtue of an agreement, JSL procures and supplies coal on free of cost basis to JEL, for the later to convert the said coal by using certain other items into electricity

[1]Central Goods and Services Tax Act, 2017
[2]Authority for Advance Ruling
[3]2018 (5) TMI 763 – Maha AAR

and supply back to JSL. For the said process, JEL will raise an invoice with tax. The question that came up before the Maharashtra AAR is, whether any tax is applicable on supply of coal or any other inputs on a job work basis by JSL to JEL, whether any tax is applicable on supply of power by JEL to JSL and tax implications on job work charges payable to JEL by JSL. The Maharashtra AAR without answering all the above questions has held that since the coal is converted to electricity and the said process emerging into a new product, would not fall under the definition of 'job work'. The AAR has held that the 'treatment or process' used in the definition of 'job work' does not include the activity of manufacture and once a treatment or process results into a new product distinct from the inputs, the same would be manufacture and cannot be held as job work. The AAR stated that since the instant case, the coal is converted into electricity, which is altogether a distinct product, the said activity cannot be called as job work. The AAR continued to state that since the expression 'manufacture' is also laid down in CT Act, the ambit of job work cannot be extended to include the former. Finally, the AAR held that said activity carried on by JEL cannot be said to be job work and the supply of electricity is stated to be supply of goods.

JEL has taken up the matter in appeal[4] before AAAR[5] . The AAAR after going through the submissions of both the parties and the order of AAR, stated that the activity or transaction even it amounts to manufacture would fall under the ambit of job work subject to satisfaction of conditions stated under GST laws. To this extent, the AAAR overruled the ruling of AAR. However, AAAR has not stopped there, it continued to hold that, in the instant case, since the inputs supplied to JEL cannot be brought back by JSL in the same form and so, it would be in contravention to the provisions of Section 143 (which mandates the bringing back of inputs after the job work), Also, the AAAR has stated that JEL adds so much of other materials and hence, the said activity cannot be called as job work. Finally, the AAAR held that since the conversion of coal into electricity is a process, where the coal cannot be brought back to principal, that is JSL, the said activity cannot be said to be job work, specifically for the reason that the provisions of Section 143 are not complied. Though the AAAR has felt that treatment or process which results into manufacture can be covered under the ambit of 'job work', since the conditions stated in Section 143 are not satisfied, they have held that such activity cannot be called as job work.

JEL has challenged the above order for a judicial review before the Bombay High Court[6]. The Bombay High Court stated that though there are no appeal provisions to challenge an order of AAAR in the provisions of the GST laws, the order of AAAR can be scrutinised qua judicial review[7]. Accordingly, the High Court after going through all the facts and orders passed by AAR and AAAR, held that AAAR has not complies with the principles of natural justice by not affording enough time to JEL for production of documents and other information and remanded the matter to AAAR for consideration of the documents and other information and accordingly pass an appropriate order.

In remand order passed by AAAR[8] , the AAAR reversed their earlier view that coal not being an input for manufacture of steel but an input for manufacture of electricity, the said coal cannot be called as input qua JSL. Since the law states that the principal (JSL) has to send inputs to the job worker (JEL) and coal not

[4]2018 (7) TMI 511 – AAAR Maha

[5]Appellate Authority for Advance Ruling

[6]2019 (6) TMI 717 – Bombay High Court

[7]Under judicial review, the Court does not goes into merits of case, but questions whether the process involved to arrive the conclusion by the lower authority is in accordance with the law.

[8]2020 (6) TMI 704 – AAAR Maha

being an input for JSL, the procedure stated under Section 143 does not apply. In the remand order passed, the AAAR stated that in light of the Circular issued by Central Board of Indirect Taxes and Customs (for brevity 'CBIC') in 79/53/2018- GST dated 31.12.2018 [wherein it is clarified that coal being an input used in the production of aluminium, albeit indirectly through the captive generation of electricity, which is directly connected with the business of registered, the input tax of coal cannot be denied] and placing reliance on the judgment of Supreme Court in the matter of Maruti Suzuki Limited [9] [wherein it was held that power generation is a captive arrangement and requirements carrying out the manufacturing activity, power generation forms part of the manufacturing activity and 'inputs' used in the power generation would be treated as inputs used in the manufacture of final products] reversed their earlier view and allowed that the coal is an input qua JSL.

The AAAR also reversed their earlier view that since coal is converted into electricity and not received by JSL in the same form as sent to JEL, the same does not amount to job work, since the condition that the inputs should brought back by principal was not satisfied. The AAAR by placing reliance on judgment of Bombay High Court in the matter of Indorama Textiles Limited, subsequently upheld by Supreme Court [10], wherein it was established as electricity can be generated on job work basis, hence, it is not necessary that inputs going to job worker should be received in same manner, reversed the earlier order and accordingly held that said activity undertaken by JEL would qualify as job work though it amounts to manufacture.

From the above, we can conclude that the 'job work' and 'manufacture' are not mutually exclusive. A manufacture can be forming part as sub-set to 'job work' and such process still will be called as 'job work', despite of the fact the inputs lose their shape and form. Further, Explanation to Section 143 in clear terms state that for the purposes of job work, input includes intermediate goods arising from any treatment or process carried out on the inputs by the principal or job worker. In light of the above, an irresistible conclusion is that the activity or treatment can still be a job work for the purposes of GST law, though such activity or treatment results in emergence of new product.

Issue #2 Should the activity be a manufacture, a must for job work?

In some instances, another question that arises is, whether the activity or treatment should definitely amount to manufacture to be qualified as job work. This arises mainly for the purposes of availment of concessional rate that is normally available for job work. Let us take an example to better understand this particular issue.

An exporter is engaged in export of processed prawns. For exporting the said goods, the exporter appoints a job worker for undertaking the entire process to arrive at the export goods. The process adopted by job worker would normally involve, cutting off heads and tails, peeling and deveining, cleaning and freezing. After the said process, the processed prawns are sent to exporter, from where, the same would be exported. The job worker would raise an invoice for his service and charges the concessional rate of 5% as per Entry 26(i)(f) of Notification No 11/2017 – CT (R) dated 28.06.2017.

[9] 2009 (8) TMI – Supreme Court
[10] 2010 (260) ELT 83 (SC)

The question that arises is, whether for adopting the concessional rate of 5%, the services provided by job worker should mandatorily be 'manufacturing'? This is more because for the reason that Entry 26 of NN 11/2017 – CT (R) states 'Manufacturing services on physical inputs (goods) owned by others'. The tax authorities may state that since the process adopted by the job worker does not amount to manufacture, they are not eligible for the concessional rate available under Entry 26, in light of the interpretation that the said entry covers manufacturing services alone.

On a perusal of stand that may be taken by tax authorities, it can be understood that the principal contention of the authorities would be that, the process adopted by job worker does not amount to manufacture and accordingly the rate of tax as stated in Entry 26(i)(f) would not be applicable and the services would fall under the residual category of attracting tax at 18%.

Entry 26 deals with 'manufacturing services on physical inputs (goods) owned by others'. The said entry has 9 main entries and various sub-entries. The main entry (i) has 11 sub-entries. Further, the main entry (i) deals with 'services by way of job work in relation to'. In other words, in order to fall under the Entry 26(i), the services provided should be by way of job work.

From the definition of 'job work' stated earlier, it is evident that, if the following conditions are satisfied the said services would fall under the ambit of the definition of 'job work' as laid down in Section 2(68) and service provider would be construed as job worker. Let us examine, if the conditions are satisfied by the service provider or not:

Condition #	Description of Condition	Remarks
1	A treatment or process should be undertaken by a person	• The said condition states that a treatment or process should be undertaken. • In instant case, service provider is carrying on a treatment or process. Accordingly, it can be concluded that service provider is undertaking a treatment or process and the said condition is satisfied.
2	Such treatment or process should be on goods belonging to another person	• In facts of the instant case, the goods (raw prawns) belong to the exporter and service provider does not have any ownership of the same. Hence, this condition also gets satisfied.
3	Such other person should be registered person	• In facts of the instant case, the exporter is a registered person. Hence, the said condition also gets satisfied.

Hence, all the conditions as specified in the definition of 'job work' are satisfied and accordingly it can be argued that service provider can be construed as job worker and accordingly, service provider can access the sub-entries of Entry 26(i) of NN 11/17 – CT (R). Now, let us examine, whether the services provided by service provider would fall under sub-entry (f) of Entry 26(I).

The said sub-entry deals with 'all food and food products falling under Chapter 1 to 22 in the First Schedule to the Customs Tariff Act, 1975'. Hence, on a combined reading of the main and sub-entry, it would be as under:

Services provided by way of job work in relation to all food and food products falling under Chapter 1 to 22 in the First Schedule to the Customs Tariff Act, 1975

From the above, it is evident that if service provider is providing services by way of job work in relation to food products falling under Chapter 1 to 22 in First Schedule to the Customs Tariff Act, 1975, then it can be concluded that the services would fall under Entry 26(i)(f). Since prawns fall under Chapter 3 of First Schedule, they would fit under the sub-entry (f). Hence, all the conditions mentioned in Entry 26(i)(f) of NN 11/17 – CT (R) gets satisfied.

Since all the conditions mentioned in Entry 26(i)(f) are satisfied by service provider, the rate of tax of 5% is applicable to the services provided by job worker to the exporter. Now, let us examine the force in the allegations of the probable stand that may be taken by tax authorities, that the services provided are not manufacture, accordingly the rate of tax as mentioned Entry 26(i)(f) is not to be applied.

In this connection, it is important to note that the allegation of tax authorities that the activity or process should satisfy the definition of 'manufacture' appears to be only based on the heading of Entry 26 'manufacturing services on physical inputs (goods) owned by others'. In other words, since the said entry deals with manufacturing services, the tax authorities are of the opinion that only such process or treatment undertaken by job worker which result in manufacture are only covered under the said entry. However, on a detailed perusal of the various sub-entries post a different view. The list of sub-entries is as under:

a. Printing of newspapers
b. Textiles and Textile products falling under Chapter 50 to 63 in First Schedule to CTA[11]
c. All products, other than diamonds falling under Chapter 71 in First Schedule to CTA
d. Printing of Books (including Braille books), journals and periodicals
da. Printing of all goods falling under Chapter 48 or 49, which attract tax at 2.5% or nil
e. Processing of hides, skins and leather falling under Chapter 41 in First Schedule to CTA
ea. **Manufacture of leather goods or foot wear falling under Chapter 42 or 64 in First Schedule to CTA**
f. All food and food products falling under Chapter 1 to 22 in First Schedule to CTA
g. All products falling under Chapter 23 in First Schedule to CTA except dog and cat food put up for retail
h. **Manufacture of clay bricks falling under Tariff 69010010 in First Schedule to CTA**
I. **Manufacture of handicraft goods**

[11]Customs Tariff Act, 1975

From the above, it is evident that the sub-entries ea, f and i, specifically have a mention of 'manufacture' and other entries do not have. Hence, it can be understood, wherever the legislature intends to give a concessional rate for the process or treatment which should amount to manufacture, the same was explicitly mentioned. In other words, the sub-entry (f) does not have mention of 'manufacture' to it. Hence, even though the treatment or process does not amount to manufacture, still the said services would qualify for concessional rate of 5%. Hence, the allegation of the tax authorities that the said process should be manufacture for being eligible for concessional rate may not be in accordance with the law. The said view is also supported by the explanatory notes to scheme of classification of services [12], at Page 92. From the above, it is evident that the process or treatment need not be manufacturing activity and also the entry covers the portions of manufacturing process. Since, the treatment of conversion of raw prawns and shrimps is part of the manufacturing process, the services supplied by ABC would be eligible under Entry 26(i)(f) and be taxable at 5%.

Hence, from the above, it can be understood that the certain activities or process need not be amounting to 'manufacture' to be adopting the concessional rate.

[12] Explanatory_notes.pdf (gstcouncil.gov.in)

DIRECT TAX

VARIOUS HUES OF DRAFT ASSESSMENT ORDERS – SECTION 144B AND SECTION 144C

Contributed by CA Sri Harsha & CA Narendra

The concept of draft assessment order and final assessment order is an interesting concept to study under the Transfer Pricing (for brevity 'TP') Regulations. Under the old provisions of the Income Tax Act, 1961 (for brevity 'ITA'), the concept of passing of draft assessment order was limited to transfer pricing matters and adjustment made in respect of a non-residents. Section 144C of ITA mandates the assessing officer to pass a draft of the assessment order in respect of an eligible assessee before passing the final assessment order. The objective of insertion of Section 14CC is to speedy redressal of the issue by a three-member forum called 'dispute resolution panel' (for brevity 'DRP') instead of single member forum of Commissioner of Income Tax (Appeals). Even though Section 144C was effective from October 01, 2009, the concept of draft assessment order is still a contentious issue at appellate fora.

While the issue surrounding the concept of draft assessment order under Section 144C is settling down, a new concept of draft 'assessment order', 'final draft assessment order' or 'revised draft assessment order' under Section 144B has come up with litigation at the judicial fora. In this article, the concept of draft assessment order under 144C and 144B has been dealt with in detail.

Draft Assessment Order under Section 144C:

Section 144C states that *'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.'*

Applicability of Draft Assessment Order:

While reading the above section, it can be understood that passing of draft assessment order is mandatory as it contains non-obstante clause. Further, Section 144C states that such draft assessment order is mandatory, if the assessing officer (for brevity 'AO') proposes to make any variation on or after the 1st day of October 2009. The section does not provide that these provisions are applicable only in respect of Assessment Year (for brevity 'AY') 2009-10 but applies to every order passed or after such date.

Now, it is settled position that issue of draft assessment order is mandatory before passing the final assessment order. The same view has been upheld by many judicial fora[1] and special leave petition (for brevity 'SLP') filed by the revenue has also been dismissed by the Hon'ble Supreme Court[2] .The reason behind said judicial precedents is that the assessee shall not be denied the legal benefit provided under the statute to approach DRP in relation to any variation which is prejudicial to the interest of the assessee.

[1][W.P. No. 5557 of 2012]
[2]CC 16694 of 2013

Issue of 'Corrigendum' to Final Assessment Order to cure the mistake:

In some of the cases, the revenue has passed the final assessment order without passing the draft assessment order. Thereafter, the AO has issued a corrigendum to such final assessment order to treat the assessment order passed as draft assessment order.

In this regard, the Madras High Court in the case of Vijay Television (P.) Ltd[3] has held that the AO has no right to pass the final assessment order pursuant to the Transfer Pricing Officer's(for brevity 'TPO') Order. The High Court has found that the corrigendum issued by the AO makes it clear that AO has passed the final assessment order in the first instance and a corrigendum is issued to consider such order as draft assessment order. The assessment order passed by the AO has been accompanied by demand notice and penalty notice which can be issued only after the completion of assessment and upon passing of final assessment order. By noting the above, the High Court has held that when there is a statutory violation in not following the procedure prescribed, such an order cannot be cured by merely issuing a corrigendum.

The Mumbai High Court in the case of Lionbridge Technologies (P.) Ltd[4] has held that AO can pass the final assessment order only after the disposal of the representations by the DRP. The Court has further rejected the claim of the revenue which has argued that the assessee has approached the DRP against the order passed by the AO which indicates such assessee has accepted the order of AO. In this regard, the court has held that mere consent of parties does not bestow jurisdiction, if the order is beyond jurisdiction and doctrine of estoppel cannot be applied against the assessee.

The Delhi Tribunal in the case of Capsugel Healthcare Limited[5] has held that a show cause notice issued by the AO cannot be equated with draft assessment order and rejected the plea of the revenue which has argued that this lapse on the part of the AO is at best a procedural lapse and hence, the matter to be restored the file to the file AO. This view has been upheld by the Jaipur Tribunal in the cases of Jaipur Rugs Company (P) Ltd[6] and Century Infra Power (P) Ltd[7] .

Upon reading of the above judicial precedents, it can be understood that passing of the draft assessment order is mandatory in law and mistake of passing of final assessment order cannot be cured by merely issuing a corrigendum by the AO even such order is objected before the DRP.

[3][2014] 46 taxmann.com 100 (Madras)
[4][2018] 100 taxmann.com 413 (Bombay)
[5]TS-317-ITAT-2014(DEL)-TP
[6]TS-415-ITAT-2018(JPR)-TP
[7][2019] 111 taxmann.com 384 (Jaipur - Trib.)

Revisionary powers under Section 263vis-à-vis Draft Assessment Order:

Section 263 of the ITA provides that PCCIT[8] , CCIT[9] , PCIT[10] or CIT[11] may call and examine the records of any proceedings under the ITA. And, if he so considers that any order passed by therein by the AO is erroneous in so for as it is prejudicial to the interest of the revenue, he may, after giving an opportunity of being heard to the assessee, pass the order including enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

The question arises is, whether CIT can revise the assessment order, passed by the AO wherein the AO has issued assessment order without passing the draft assessment order. In order to invoke Section 263, it has to be substantiated that order passed by AO is erroneous and such order is prejudicial to the interest of the revenue. However, in case of passing the final assessment order without passing the draft assessment order, many High Courts have held that final assessment order passed by the AO is null and void and when such order is null and void, the question of revision of order under Section 263 should not arise.

In the case of Gigabyte Technology (India) (P.) Ltd.[12] , AO has passed the final assessment order without passing the draft assessment order. However, assessee has not made any appeal in respect of final assessment order. Thereafter, CIT has invoked the revisionary powers under Section 263 and passed an order to set aside the assessment order and ordered the AO to pass draft assessment order. In respect of this revisionary powers, the ITAT has held that as the assessee has not filed any appeal in respect of original assessment order, the same would be treated as in existence and cannot be called as null and void and upheld the revisionary powers under section 263.The Hon'ble High court has observed that no satisfaction is recorded by the CIT on the aspect of assessment being prejudicial to the interest of revenue. Without going to the merits of the case, the High Court has held that at the absence of such recording, revisionary provisions cannot be invoked under section 263.

The High court has further observed that ITAT has virtually permitted the CIT to not only assume the revisional jurisdiction, in absence of satisfaction of one of the twin conditions, it further permitted the CIT to even extend the period for completion of the assessment in terms of sections 143 and 144C of the ITA. In respect of assessment order, the High Court has opined that ITAT cannot ignore the judicial precedents of various courts merely because the assessee has not filed writ petition against the same.

The Pune Tribunal in the case of Agfa India (P.)[13] Ltd has held that CIT cannot invoke revisionary powers under Section 263 in respect of final assessment order passed by the AO. Before the ITAT, the revenue has contested that the order passed by the AO is not declared as null and void by any competent authority as the appeal is pending before the CIT (A). When the appeal is pending before the CIT (A), the CIT on its own motion has revised the order under Section 263. However, the Tribunal has rejected the contentions of

[8]Principal Chief Commissioner of Income Tax
[9]Chief Commissioner of Income Tax
[10]Principal Commissioner of Income Tax
[11]Commissioner of Income Tax
[12][2020] 121 taxmann.com 301 (Bombay)
[13][2016] 64 taxmann.com 429 (Pune - Trib.)

the revenue and held that the original order is null and void and when such original order null and void, CIT cannot invoke revisionary provisions under Section 263. The Tribunal further agreed with the argument of the assessee that there is no change in the adjustment by CIT revisionary order when compared to assessment order hence, question of revision should not arise.

Applicability of Draft Assessment Order for 'Remanded Back' matters:

While reading of Section 144C, the question, that arises is, whether passing of draft assessment order is mandatory in remanded back matters, whether or not draft assessment order is applicable at the time of passing the first assessment order.

The Delhi High Court in the case of Turner International India Pvt Ltd1[4] has held that even for remanded back matters, AO shall adhere to the provisions contained in Section 144C and shall pass draft assessment order before passing the final assessment order.

The divisional bench of the Delhi High Court in the case of JCB India Ltd[15] has held that AO shall pass draft assessment order in remanded back matters. The revenue has argued that the ITAT has not set aside the total proceeding to the file of AO and it has set aside the order only with respect to TP adjustment and that too with specific direction to the AO. However, the High Court has disagreed with the revenue arguments and held that Section 144C is unambiguous and it requires that AO to pass draft assessment order as there is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT. However, the revenue has went on and argued that the order passed by the AO can by curable under Section 292B of ITA. In respect of revenue arguments, the High Court has stated that the issue involved is not about a mistake in the said order but the power of the AO to pass the order and accordingly, the High Court has dismissed the plea of the revenue.

The Delhi Tribunal in the case of Nikon India Pvt Ltd [16] has observed that the AO has merely captioned the final assessment order as draft assessment order along with issuance of notices of demand under Section 156 and penalty notice under Section 274 read with Section 271 (1)(c) of ITA which means a final assessment order was passed without passing the draft assessment order. Accordingly, the Tribunal has quashed the final assessment order passed by the AO.

Further, the Delhi High Court in the case of Headstrong Services India (P.) Ltd[17] has held that in complete contravention of Section 144C, the Assessing Officer wrongfully assumed the jurisdiction and passed the final assessment order without passing a draft assessment order and without giving the respondent/assessee an opportunity to raise objections before the DRP. The Court further held that till the Income-tax Department ensures that the Assessing Officers follow the mandate of law, in particular, binding provisions like Section 144C and eschew filing of unnecessary appeals rather than in nearly all matters where the Assessing Officer has taken a view against the assessee, the assessments will not achieve finality for a number of years like in the present case. Further, SLP filed by the revenue against the

[14]TS-400-HC-2017(DEL)-TP
[15]TS-706-HC-2017(DEL)-TP
[16]TS-296-ITAT-2020(DEL)-TP
[17][2021] 125 taxmann.com 262 (Delhi)

order of the High Court quashing the assessment order has been dismissed by the Hon'ble Supreme Court in the cases of Control Risks India P Ltd[18] and Nokia India Pvt Ltd[19].

After the above decisions of various High Courts and subsequent dismissal of SLP by Supreme Court, the issue surrounding the draft assessment order when remanded back matters seems to be settled down. However, the Madras High Court recently has delivered different views regarding the draft assessment order in two separate matters.

The Single member bench of the Madras High Court in the case of Durr India Private Limited[20] has allowed the writ petition filed by the assessee. However, the court has not quashed the assessment order but set aside the order passed by the AO and remitted the matter to AO to pass draft assessment order within 3 months from the date of receipt of High Court order. On the same day, same single member bench of the Madras High Court in the case of Volex Interconnect (India) (P.) Ltd.[21] has held that the issue related to draft assessment order is no longer res-integraand allowed the plea of the assessee and thereby remitted the matter to AO to pass draft assessment order.

However, another single member bench of the Madras High Court in the case of Enfinity Solar Solutions Private Limited[22] has given contradictory decision. Wherein the High Court has observed that the AO has passed the draft assessment order in the first round and ITAT has not set aside the order of the AO but remitted the matter only with respect of selection of most appropriate method (for brevity 'MAM'). Accordingly, the High Court has opined that following the entire procedure from the begging is not the idea behind the provisions Section 144C and held that in the event of again directing the authorities to follow the procedures right from the beginning, the proceedings would not only be prolonged, it will be protracted, which would provide an undue advantage to the assessee in the matter of payment of income tax. The Court has further held that if at assessee aggrieved by the order of AO subsequent of ITAT remittance, assessee can file appeal before the CIT (A) against such order.

The court has first mentioned that the ITAT has not set aside the matter and remitted the file to the AO for specific purpose. There are many judicial precedents which have held that when ITAT has remitted the file to AO for specific issue, the assessee cannot come back to ITAT after the assessment order and has to follow the procedure prescribed under the law. Interestingly, the High Court has mentioned that assessee can file appeal before the CIT(A) which may be indigestible under the ITA.

After the decision of above Madras High Court, the issue relating to draft assessment order under Section 144C may be re-ignited. However, as the decision was delivered by single member bench, the assessee may rely upon larger bench cases for remedy. In our opinion, even under remanded back matters, an assessee should be given an opportunity to file objections before the DRP as the intention behind it is to decide the matter by larger forum especially in complex matters like transfer pricing adjustments.

[18] TS-170-SC-2018-TP
[19] TS-1027-SC-2018-TP
[20] TS-487-HC-2021(MAD)
[21] [2021] 128 taxmann.com 296 (Madras)
[22] TS-488-HC-2021(MAD)

Revisionary Powers under Section 263 to revise Final Assessment Order&TPO Order:

The next issue is whether a CIT can invoke the provisions of Section 263 and revise the final assessment which is passed pursuant to direction issued by DRP. Section 144C (13) of ITA states, AO shall pass the final assessment order in conformity with the directions issued by the DRP which means that directions issued by the DRP are binding on the AO. DRP is a quasi-judicial authority having three-member forum and assessee approaches DRP before the completion of assessment based on draft assessment order passed by the AO.

On the other hand, Section 263 states that CIT can call and examine records of any proceedings under the Act and pass the order to including order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. Explanation 1 (c) to section 263 states that CIT can exercise the powers under this section to the matters which are not considered and decided in any appeal if filed by the assessee.

In the case of Devas Multimedia (P.) Ltd.[23] , the Karnataka High Court has held that there is no provision in Section 263 to prohibit the CIT to invoke revisionary powers to revise the final assessment order pursuant to DRP directions. The court has further held that CIT cannot sit over the three member DRP however, the subject matter under revision was not related to any objections before the DRP and hence, CIT can revise the final assessment order. The Hon'ble Kolkata Tribunal in the case of Philips India Ltd.[24] has analysed the issue in detail and held that CIT can revise the matters which are not subject matters before the DRP by invoking the provisions of Section 263.

The Hyderabad Tribunal in the case of Agro Tech Foods Ltd[25]. has held that CIT can invoke the provisions of Section 263 to revise the TPO order. The Tribunal has observed that CIT under Section 263 can call and examine records of any proceedings under the Act and can revise such order as the matters in TPO order has not been dealt with by DRP. Hence, the issue related to revision of TPO order, draft assessment order or final assessment order has to be decided only after the analysis facts of each case.

However, the CIT cannot invoke the provisions of section 263 without coming to the conclusion that the order passed by the Ld. AO is prejudicial to the interest of the revenue. The insertion of Explanation 2 to section 263 does not empower the CIT to invoke section 263 without making any enquiry to the order passed by the AO.

The Hon'ble Delhi Tribunal in the case of Amira Pure Foods Pvt Ltd[26] has held that CIT cannot invoke provisions of section 263 merely because the CIT feels that further enquiry should have been made in respect of submission made by the assessee. The Tribunal has concluded that it was incumbent upon CIT to make some minimal independent enquiry to reach the conclusion that the AO order is erroneous and prejudicial to the interest of the Revenue.

[23][2019] 111 taxmann.com 494 (Karnataka)
[24]IT APPEAL NO. 1142 (KOL.) OF 2016
[25][2021] 124 taxmann.com 517 (Hyderabad - Trib.)
[26]TS-1053-ITAT-2017(DEL)-TP

Following the above decision of Delhi Tribunal, the Hon'ble Jodhpur Tribunal in three cases[27] has quashed the revisionary order under section 263 by stating that CIT shall not invoke the revisionary powers merely on presumptions without making any enquiry to the order of the AO. The Tribunal has rejected the contention of the revenue stating that AO is not bound to make refer the matter to TPO by virtue of CBDT instruction No 3/2016.

Power of AO to review its own Draft Assessment Order:

In the case of Galaxy Surfactants Ltd.[28] , the AO has made certain adjustments to the income in addition to the adjustment by TPO and passed draft assessment order. Thereupon, assessee has filed a letter with the AO to confirm that no objection would be filed before the DRP. However, while passing the final assessment order, the AO suo motu has reduced the adjustments other than TP adjustments. Subsequently, the CIT has invoked Section 263 to revise the assessment order as such order is erroneous and prejudicial to the interest of revenue by stating that AO has reduced the adjustment without recording any reasons for doing so.

In this regard, the Mumbai Tribunal has held that AO cannot review its own draft assessment order and make variation to such order except with the directions of the DRP. Accordingly, the Tribunal has upheld the invocation of Section 263 and dismissed the appeal filed by the assessee.

The objective behind the insertion of draft assessment order is to provide an opportunity to the assessee to look into variations if any made by the AO/TPO and to file objections before completing the assessment. In this part of article, we have analysed the concept and certain specific issues related to draft assessment order under Section 144C. In the next parts, we shall discus the recourse available to the assessee upon receipt of final assessment order and thereafter,the concept and emerging issues surrounding the issue of show cause notice and 'Draft Assessment Order, 'Final Draft Assessment Order' and 'Revised Draft Assessment Order' under Section144B of ITA under the 'Faceless Assessment Scheme.'

For further reading:

- Vijay Television (P.) Ltd.[2018] 95 taxmann.com 101 (Madras)
- Yazaki India (P.) Ltd.[2019] 108 taxmann.com 297 (Pune - Trib.)
- Inatech India (P.) Ltd. [2019] 106 taxmann.com 318 (Bangalore - Trib.)
- HSBC Invest Direct Securities (I) (P.) Ltd. [2020] 116 taxmann.com 227 (Mumbai - Trib.).
- Punjab Chemicals & Crop Protection Ltd.[2020] 113 taxmann.com 263 (Chandigarh - Trib.)

[27]Wolkem India Limited [TS-405-ITAT-2021(JODH)-TP], Secure Meters Limited [TS-406-ITAT-2021(JODH)-TP] and PI Industries Limited [TS-407-ITAT-2021(JODH)-TP].

[28][2021] 127 taxmann.com 383 (Mumbai - Trib.)

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