

## **Failure to pass draft assessment order before passing final order would lead to withdrawal of final order: ITAT**

**Summary – The Pune ITAT in a recent case of Rehau Polymers (P.) Ltd., (the Assessee) held that where Assessing Officer passed final assessment order under section 143(3) making certain adjustment to assessee's ALP without passing draft assessment order, said order being against provisions of section 144C, deserved to be set aside**

### **Facts**

- In the course of assessment, the Assessing Officer had made reference to the TPO in order to determine the arm's length price of international transaction entered into by the assessee with its associate enterprises. The TPO passed an order under section 92CA(3) proposing the adjustment to arm's length price of international transaction.
- The Assessing Officer on receipt of said order passed order under section 143(3) read with sections 92C(4) and 144C. The said order of Assessing Officer was forwarded to the assessee along with letter, wherein the Assessing Officer categorically said that the draft assessment order was being forwarded for necessary action at the end of assessee. It was clearly mentioned in the said letter that on receipt of draft order, the assessee could within 30 days of the receipt of draft order, either file acceptance of variation as proposed in the order or file objections to the variation to the DRP or to the undersigned.
- The Assessing Officer also issued demand notice under section 156 and notice under section 274 read with section 271.
- The assessee on understanding that it was draft assessment order, filed objections before the DRP within the time allowed under the Statute. However, the said objections of assessee were not considered by the DRP and the same were rejected on the surmise that the order passed by the Assessing Officer was final assessment order since the Assessing Officer had also issued demand notice under section 156 and show cause notice under section 274 read with section 271 for levy of penalty. The DRP opined that since the assessment order passed by the Assessing Officer was final assessment order, it did not have any jurisdiction to issue any directions on such final assessment order.
- After receiving the DRP's order, the assessee filed an application before the Assessing Officer for necessary action. The Assessing Officer took a view that the DRP had clearly mentioned that the order passed earlier was final order and not draft order, so he did not have any jurisdiction over the case.
- On appeal:

### **Held**

- The issue which arises in the present appeal is in relation to the draft assessment order passed by the Assessing Officer under section 143(3) read with section 144C(1). After receipt of the order

under section 92CA(3) from the TPO, the Assessing Officer was supposed to issue draft assessment order proposing to make the addition. However, the Assessing Officer called the said order to be draft assessment order but assessed income in the hands of assessee and further issued demand notice along ITNS-150, after charging interest under sections 234A, 234B & 234C, etc. He also initiated penalty proceedings under section 271(1)(c). Undoubtedly, the assessee on understanding that the same was draft assessment order, made objections to the DRP, who gave certain directions and thereafter, the Assessing Officer passed an order under section 143(3) read with section 144C(13).

- It is provided that where the Assessing Officer proposes to make, on or after 1-10-2009, any variation in the income or loss returned, which is prejudicial to the interest of assessee, then the Assessing Officer shall in the first instance forward the draft of the proposed order of assessment to the eligible assessee.
- The Tribunal after noting the facts that the Assessing Officer had passed the order under section 143(3) read with sections 92CA(3) and 144C had also issued demand notice under section 156 and had also issued notice under section 274 read with section 271(1)(c). However, the covering letter said that it was draft assessment order, against which the assessee was either to file objections before the DRP or accept the same. The assessee filed the objections before the DRP, who dismissed the same on the surmise that the order passed by the Assessing Officer was final assessment order, since the Assessing Officer had also issued the demand notice and had also issued show cause notice under section 274 read with section 271(1)(c) for levy of penalty. In view of the said facts, the Tribunal in *Soktas India (P.) Ltd. v. Asstt. CIT* [\[2017\] 77 taxmann.com 19/162 ITD 366 \(Pune. - Trib.\)](#), held that under the provisions of section 144C, it is provided that where the Assessing Officer proposes to make, on or after 1-10-2009, any variation in the income or loss returned, which is prejudicial to the interest of assessee, then the Assessing Officer shall in the first instance forward the draft of the proposed order of assessment to the eligible assessee.
- The facts are similar to the facts before the Tribunal in *Soktas India (P.) Ltd. (supra)*. In the facts of present case also, the demand got crystallized on passing of the draft assessment order, wherein the Assessing Officer had issued demand notice in ITNS-150 and had also initiated penalty proceedings. Undoubtedly, the said assessment was framed as draft assessment but in actual fact, the Assessing Officer had made the assessment in the hands of assessee by not only assessing the income but also determining the demand payable. In the case of draft assessment order, proposed additions are to be made and the assessee is show caused either to accept the same or file the objections before the DRP. However, in the present facts, there was not a proposal for making addition but final assessment order was passed. Undoubtedly, the Assessing Officer said that he is passing draft assessment order and the assessee was also at liberty to file the objections before the DRP or accept the same, but in actual fact, the order passed by the Assessing Officer was complete assessment order which is not envisaged under section 143(3) read with section 144C. Accordingly, it is held that draft assessment order passed in the case is invalid in law.