

(2011) 07 KAR CK 0113
In the Karnataka High Court
Case No : Writ Appeal No. 1010 of 2011

GE India Technology Centre Pvt. Ltd.

APPELLANT

Vs

Dispute Resolution Panel and Assistant Commissioner of
Income Tax

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

Income Tax Act, 1961 — Section 143 (2), 144 C (5), 144 C (8), 92 C, 92 CA

Citation : (2011) 243 CTR 451 : (2011) 201 TAXMAN 191

Hon'ble Judges : V.G. Sabhahit, J; Ravi Malimath, J

Bench : Division Bench

Advocate : Aravind Datar for Lawyers Inc. and T.S. Amar Kumar, for the Appellant; M.V. Seshachala, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an appeal filed by the Petitioner in writ petition No. 29389/2010 being aggrieved by the order dated 8-2-2011 wherein the learned Single Judge of this Court has disposed off the writ petition by holding that the direction issued by the Dispute Resolution Panel (hereinafter referred to as DRP for short) is not in violation of Section 144C(5) or (8) of the Act and directing the Petitioner to approach the assessing officer within one month from the date of receipt of copy of this order who inturn to take further action in accordance with law within two months thereafter.

2. The material facts necessary for the disposal of this appeal are as follows:

The Assessee had filed its return for the year ending 2006-07 declaring the income of Rs. 2,12,18,961/-. The return of income was processed u/s 143(1) of the income tax Act (hereinafter referred to as "the Act") on 10-9-2007. Subsequently the case was selected for scrutiny as per the guidelines issued by the Board and notice was issued u/s 143(2) dated 5-10-2007 was served upon the Assessee. In response to the notice the Assessee's authorised representative

appeared before the assessing officer and produced the books of accounts and furnished the details called for. During the relevant financial year it was observed that the Assessee did international transaction exceeding Rs. 15 crores. Therefore, with the prior approval of the Commissioner of Income Tax, Bangalore, a reference was made to the Transfer Pricing Officer, Bangalore, to determine Arms' Length Price as per the provisions of Section 92CA of the Act and the same was determined on 27-10-2009 by the Joint Director, Transfer Pricing-II, Bangalore and received in the office of the assessing officer. The order passed by the Additional TPO had decided that adjustment of Arms Length Price to the extent of Ra. 104,96,20,245/- is required to be made u/s 92CA of the income tax Act, 1961 and the same was brought to the notice of the Assessee on 13-11-2009. In response to the said notice the Assessee submitted his reply. Thereafter the proposed draft order was served upon the Appellant as to why the excess claim of Rs. 44,49,280/- should not be disallowed and Arms Length Price as determined by the TPO should be accepted and since the Appellant filed an appeal the matter was referred to DRP u/s 144C and additional objections to DRP u/s 144C(5) of the Act. The Dispute Resolution Panel by order dated 27-8-2010 came to the conclusion that in the alternative analysis the adjustment of Rs. 29,68,71,593/- is required to be made u/s 92CA read with Section 92C to the Arm's Length Price determined by the Respondent Board in respect of international transactions entered into with its associate Enterprises during the year and hence the original adjustment of Rs. 101,79,03,986/- was reduced to Rs. 29,68,71,593/-. However DRP found that having regard to the material on record and the documents submitted to the DRP for consideration the Assessee was not entitled to any exemption u/s 10A and wherefore the notice was issued to which the Appellant herein has replied and thereafter the DRP has passed the final order:

While examining this issue the panel also noticed that the Assessee is, in fact, not entitled to claim deduction u/s 10A for the reason that the Assessee was working in the area of Research and Development. Accordingly, the notice dated 18/8/2010 was issued to the Assessee giving an opportunity to give reasons as to why deduction u/s 10A be not denied to it. The Assessee was required to make its submissions by 23/08/2010. The Assessee vide its letter dated 23/8/2010 requested to adjourn the matter by three weeks. Since time barring matter was involved, a short adjournment was given and hearing was fixed on 26/8/2010. Sri. Kaushik Mukarjee attended on 26/8/2010. Sri. Kaushik Mukarjee attended on 26/8/2010 and filed return submissions. The matter was discussed with him.

(i) The Assessee has pointed out the limitations on scope of DRP proceedings and referred to Sub-sections

(1), (2), (5) and (8) of Section 144C. It has been stated that the para 3.2 of the order passed by TPO is neither a finding nor was it within the scope of TPO to return any such finding. According to the Assessee the scope of the TPO's.

proceedings was limited to whether or not the comparables selected by GEITC for the purpose of determining ALP were acceptable. It has also been submitted that deduction u/s 10A had been allowed since AY 2002-03 and could not be questioned in the present proceedings.

(ii) We have considered the submissions made by the Assessee. As per Section 144C Sub-Section 5, the DRP in a case where objection is received, the DRP shall issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. From this it is clear that the DRP is having powers to issue such directions "as it thinks fit". The Sub-Section 6 which immediately follows such Sub-Section 5 states that the direction referred to in Sub-Section 5 shall be issued after considering.

- 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.

(iii) It is therefore clear that the DRP can go through the records of Draft order and issue directions as it thinks fit. The restriction in Sub-Section 8 is only with regard to the directions issued in respect of proposed variation. Sub-Section 8 does not take away the powers given by Sub-Section 5. We are therefore of the considered view that the DRP is competent to consider this issue and give necessary directions.

(iv) So far as the TPO's findings are concerned the same are based on proper appreciation of facts. The findings given regarding its functionality cannot be denied. No mistake can be pointed in such findings. In view of these facts we hold that the Assessee is not entitled to deduction u/s 10A within the meaning of computer software as defined under explanation 2 to Section 10A read with CBDT notification SO 890E dated 26/9/2000.

(v) The alternative plea of Assessee was that it is engaged in providing engineering design services. No details have been given regarding the income earned if any from the segment. The AO may examine this claim if the Assessee submits necessary information showing that it has earned income from engineering design services and the same qualify for deduction u/s 10A. The AO should decide the claim of the Assessee in this regard on merit.

The order passed by the DRP is appealable u/s 251 of the Act. In view of the provisions of Section 140C the findings of the DRP would be binding on the

assessing officer and in so far as it relates to the conclusion arrived at as referred to above regarding the order of TPO which is appealable u/s 253(1)(d) of the income tax Act read with Rule 14 of the DRP Rules.

3. However, being aggrieved by directions issued as per (iv) & (v) referred to above, the Appellant filed Writ Petition No. 29389/2010 contending that the said directions issued by the DRP which is binding upon the assessing officer is wholly without jurisdiction and suffers from lack of inherent jurisdiction and wherefore the same is liable to be set aside. The learned Single Judge negated the contention of the Appellant after considering the contentions of the Learned Counsel appearing for the parties and held that the order passed by the DRP in so far as it relates to direction Nos. (iv) & (v) as referred to above in the order of DRP is not violative of Section 144C(5) or (8) of the Act. However, the learned Single Judge ordered that the Petitioner can approach the assessing officer within one month from the date of receipt of copy of the order who intturn shall take further action in accordance with law within two months thereafter. Being aggrieved by the order of the learned Single Judge dated 8-9-2011 this appeal is filed by the Petitioner in the Writ Petition.

4. We have heard Sri Aravind Datar, the learned Senior Counsel appearing for the Appellant and Sri M.V. Sheshachala, Learned Counsel appearing for the Respondents and reply arguments.

5. The learned Senior Counsel appearing for the Appellant submitted that the provisions of Section 144C(5), (8) & 15 have to be read together and the power of DRP is described in Sub-section (8) of Section 144C and Sub-section (5) cannot enlarge the said powers and in view of Section 144C(1) and (5) the eligible Assessee in respect of whom the proposed draft order passed has been defined in Sub-Section 15(b) which reads as follows:

(b)"eligible Assessee" means-(i) any person in whose case the variation referred to Sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under Sub-section (3) of Section 92CA.

The learned Senior counsel has taken us through the said provisions and submitted that the power of the DRP to pass any order it deems fit must relate to confirmation, rejection or enhancement of the variation proposed in the draft order and since it was not proposed in the draft order that the Appellant is not entitled to claim the benefit u/s 10A of the Act and what was proposed was only the reduction of the benefit claimed u/s 10A at Rs. 44,44,280/-, the finding of the DRP that the Appellant is not entitled to the benefit u/s 10A at ail is wholly without jurisdiction. Similarly, the direction issued as per Clause (5) is contrary to the provisions of Section 144C(8) wherein while defining the power of the DRP it has been clearly stated that it shall not set aside any proposed variation or issue any direction under Sub-section (5) for further enquiry and such assessment order and wherefore direction No. 5 is appealable is wholly without jurisdiction and liable to be Set aside.

6. The learned Senior counsel Sri Aravind Datar submitted that the very purpose of introducing Transfer Pricing u/s 92C has been observed in the object of appeals as follows: Clause 55 of the Bill seeks to insert a new Section 144C in the income tax Act relating to Dispute Resolution Panel. The subjects of transfer pricing audit and the taxation of foreign company are at nascent stage in India. Often the Assessing Officers and Transfer Pricing Officers tend to take a conservative view. The correction of such view take very long time with the existing appellate structure. With a view to provide speedy disposal, it is proposed to amend the income tax Act so as to create an alternative dispute resolution mechanism within the income tax department and accordingly, Section 144C has been proposed to be inserted so as to provide inter alia the Dispute Resolution Panel as an alternative dispute mechanism.

This amendment will take effect from 1st October 2009.

The learned Senior counsel has taken us through the proposed draft order and also the order of the DRP and submitted that what was challenged in the writ petition was only directions (iv) & (v) as referred to above, as in respect of other findings of the DRP regarding the Arms Length Price the same is binding on the assessing officer and the order passed by the assessing officer is appealable.

7. The Learned Counsel appearing for the Respondents submitted that the order passed by the DRP issuing directions (iv) & (v) is justified and cannot be said to be wholly without jurisdiction. The Learned Counsel submitted that it was to confer rights or enhance the variation including all the powers of the appellate authority as u/s 144C(5) the DRP is entitled to pass any order as it deems fit. In support of his contention he has relied upon the decision of the Bombay High Court in *Narrondas Manordass, Bombay Vs. Commissioner of Income Tax, Central, Bombay*, .

8. The Learned Counsel appearing for the Respondents submitted that direction Nos. (iv) & (v) issued impugned in the Writ Petition and in this appeal falls within the jurisdiction of the DRP u/s 144C(8) and wherefore the order is justified and the learned Single Judge has rightly held that there is no violation of the provisions of Section 144C while issuing directions (iv) & (v).

9. In reply the learned Senior counsel appearing for the Appellant submitted that the proposed draft order did not propose that Section 10A benefit is not at all applicable and therefore the order passed by DRP which is not with reference to the proposed draft order is wholly without jurisdiction and this Court can exercise jurisdiction by setting aside the said Clause.

10. We have given careful attention to the contentions of the Learned Counsel appearing for the parties and scrutinized the material on record.

11. The material on record would clearly show that what was challenged in the writ petition is only directions (iv) & (v) in the order passed by the DRP which reads as follows:

(iv) So far as the TPO's findings are

concerned the same are based on proper appreciation of facts. The findings given regarding its functionality cannot be denied. No mistake can be pointed in such findings. In view these facts we hold that the Assessee is not entitled to deduction under Sections 10A within the meaning of computer software as defined under explanation 2 to Section 10A read with CBDT notification SO 890E dated 26/9/2000.

(v) The alternative plea of Assessee was that it is engaged in providing engineering design services. No details have been given regarding income earned if any from the segment. The AO may examine this claim if the Assessee submits necessary information showing that it has earned income from engineering design services and the same qualify for deduction u/s 10A. The AO should decide the claim of the Assessee in this regard on merit,

In so far as direction No. (v) regarding alternative plea that the assessing officer should decide the claim of the Assessee in regard to the material is wholly without jurisdiction in view of the provisions of Section 144C(6) (a) wherein the power of DRP is not extended to any proposed variation or issue any direction under Sub-section (5) for further enquiry and passing of the assessment order and if such orders and directions are permitted to be allowed the same would defeat the very object with which the alternate dispute resolution is provided and wherefore direction No. (v) is wholly without jurisdiction and is liable to be set aside as the said direction suffers from inherent lack of jurisdiction in exercise of the writ jurisdiction of this Court. So far as direction No. (iv) is concerned, the rival contentions have to be considered in the light of the provisions of Sections 92C and 144C. It is well settled that in view of the decision of the Hon"ble Supreme Court in G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, that while construing the jurisdiction the consequences in the income tax Act every word has to be given meaning. In the said case the Hon"ble Supreme Court was considering the provisions of Section 195 and held that the decision of this Court holding that in respect of every explanation the income has to be deducted unless a certificate has been obtained u/s 145 of the Act would render the word chargeable u/s 95(1) assessable to tax will stand obliterated and observed as follows:

16... While interpreting a section one has to give weight age to every word used in that section. While interpreting the provisions of the income tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated code.

17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in CIT v. Eli Lilly and Company (India) (P) Ltd. the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the Income Tax Act form one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to

those sums which are "chargeable to tax" under the Income Tax Act. It is true that the judgment in *Eli Lilly* was confined to Section 192 of the Income Tax Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head "Salaries" ". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a nonresident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income Tax Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income Tax Act.

It is clear to consider the contentions of the parties in the present case in the light of the above said principle laid down by the Hon'ble Supreme Court it is necessary to cull out the provisions of Section 144C(1)(5) & (8) and (15) which reads as follows:

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 (hereinafter 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.

(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.

(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.

(15) For the purposes of this section

(a) "Dispute Resolution Panel" means a collegium of three 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 foreign company.

It is clear on a reading of the above said Sub-sections of 144C that the provisions of Section 144C(4) cannot be read de hors the power of the DRP under Sub-section (8) and while considering the power of DRP it is also clear that while considering Section 144C(1) regarding the draft proposal order or draft

order is only applicable to eligible Assessee as defined under Sub-section (15) that is in respect of the variations referred to above Sub-section arising as a consequence of the order of the Transfer Pricing Officer under Sub-section (3) of Section 92CA and even u/s 144C(8). The DRP may confirm, reduce or enhance the variations proposed in the draft order and wherefore the word eligible Assessee in Clause (1) and (15) and the proposed draft order referred to under Clause 144 C(1) and (8) will have to be given full meaning. It cannot lead to the conclusion that the Dispute Resolution Panel can affirm, reduce or enhance the variations proposed in the draft order and cannot go beyond the proposed draft order, failing which if it is held by accepting the contention of the revenue we will be expanding the provisions of the powers of DRP to a regular appeal to the Commissioner of income tax against an order of assessment which is sought to be given up in view of the provisions of Section 92C and Section 144C. The directions issued by the DRP u/s 144C is binding on the assessing officer and against the said order of the assessing officer a direct appeal to the income tax appellate Tribunal. Wherefore we have to look into the proposed draft order in the present case to find out as to whether the direction issued by the DRP as per direction No. (iv) culled out above is valid and binding or not. It is clear from the proposed draft order that the Appellant had claimed exemption of Rs. 32,58,26,375/-. The proposed draft order annexed to the proposed draft referable to excess claimed u/s 10A in a sum of Rs. 44,49,280/- is arrived in the draft proposal order as follows:

ANNEXURE DEDUCTION u/s 10A

PARTICULARS

Rs.

Total turnover of the undertaking (A)

305,31,27,853

Export turnover of the undertaking

305,31,27,853

Less: Communication Expenses

Travel expenses in foreign currency

3,25,98,610

90,92,976

Adjusted Export turnover (B)

304,14,36,267

Profit of the Undertaking (C)

32,58,26,375

Exemption u/s 10A ($D=B/A \times C$)

32,13,77,095

Less: Actually claimed (E)

32,58,26,375

Excess claimed ($F=E-D$)

44,49,280

Therefore it is clear from the proposed draft order that as per the proposed draft order the Arms Length Price fixed by the TPO was accepted and the claim made by the Appellant was reduced by Rs. 44,49,280/- but in the proposed draft order there may be deduction of Rs. 32,13,77,095/-. However, as per the direction issued by DRP it is clear that the DRP has issued a direction to the assessing officer by holding that the Appellant Assessee is not entitled to any reduction u/s 10A it would be binding on the assessing officer in view of the provisions of Section 144C(13) and wherefore having regard to the facts and circumstances of this case that in a proposed draft order there was no proposal to hold that the Assessee is not entitled to any benefit u/s 10A of the Act and what was proposed was only rejection of the excess claim of Rs. 44,49,280/- the direction issued by the DRP is wholly without jurisdiction and suffers from inherent lack of jurisdiction and amenable to judicial review under Article 226 of the Constitution of India.

12. However, it is necessary to make it clear that having regard to the conclusion arrived at on the above said finding and having regard to the facts and circumstances of this case that the proposed draft order did not contain any proposal for holding that the Appellant Assessee is not entitled to claim exemption u/s 10A and therefore it is always open to the Revenue to take action keeping in view the provisions of Section 147(1) and (6) of the Act in accordance with law. If it is of the opinion that the provisions of Section 10A is not applicable to the Appellant it is open to the Appellant to take advantage of the order passed by this Court today holding that the direction issued by the DRP is liable to be set aside only on the ground of jurisdiction and not on merits. Accordingly, we pass the following order:

- 1) The order passed by the learned Single Judge in Writ Petition Nos. 29389/2310 dated 8-2-2011 is set aside.
- 2) The Writ appeal is allowed,
- 3) The direction Nos. (iv) & (v) issued in the order passed by the DRP in para 21 as sought for in the Writ Petition is set aside.
- 4) However, with the above said observations regarding the right of revenue the Writ Petition is allowed.
- 5) The assessing officer shall now pass orders as per the directions issued by the

DRP excluding the directions (iv) & (v) in para 21 of the order, which have been set aside.