(2011) 02 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 41 of 2011

Pankaj Extrusion Ltd. APPELLANT

Vs

Assistant Commissioner of Income Tax (OSD) RESPONDENT

Date of Decision : 21-02-2011

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 144C, 144C(15), 153, 92B

Citation : (2011) 241 CTR 390 : (2011) 198 TAXMAN 6

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.K. Patel, for the Appellant; Bhatt, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J.—Heard learned advocates for the parties for final disposal. Petitioner has challenged a communication dated 30-12-2010 which reads as under:--

Please find enclosed herewith a draft assessment order u/s 143(3) read with section 92CA(3) of the income tax Act in your case for the assessment year 2007-08. Please acknowledge the receipt thereof.

Along with the communication, the Assessing Officer had forwarded to the petitioner an order titled as "Assessment Order".

2. Main challenge of the petitioner to the said communication is that he not being an "eligible assessee" as defined in section 144C(15) of the income tax Act, 1961, procedure for issuance of draft order and inviting objections from the petitioner would not apply. Counsel for the petitioner drew our attention to the provisions contained in section 92C as well as under different clauses of section 144C of the Act to contend that instant case is not covered u/s 144C and, hence, issuance of notice and draft order itself is without jurisdiction.

3. Counsel for the department however, vehemently contended that in response

to the impugned communication, the petitioner raised no objection. He could have raised all objections including that he is not an eligible assessee and, therefore, procedure u/s 144C would not apply. He further contended that opportunity available u/s 144C is an additional opportunity of making representation against a draft order. If an assessee is not inclined to avail of such an opportunity on any ground, it may be open for him to do so, however, impugned communication should not be interfered with.

4. Short question that calls for consideration in the present petition is whether the petitioner is an "eligible assessee".

5. Section 144C provides for a detailed procedure to be followed in cases where any variation in income or loss returned which is prejudicial to the interest of an assessee occurs on account of reference made in section 92CA of the Act. Relevant portion of section 144C is reproduced here-in-below:

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 in the income or loss returned which is prejudicial to the interest of such assessee.

15. For the purposes of this section,-

(b) "eligible assessee" means,-

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

(ii) any foreign company.

6. Plain reading of clause (b) of sub-section (15) of section 144C would show that an assessee can be stated to be an eligible assessee as referred to in sub-section (1) of section 144C in whose case variation referred to in the said sub-section arises as a consequence of order of Transfer Pricing Officer passed under sub-section (3) of section 92CA. We have been taken through the order passed by the Assistant Commissioner of income tax dated 29-9-2010, wherein it is held as under:

3. The assessee is engaged in the business of manufacture of Aluminium Profiles. The details of international transactions in terms of section 92B of the Act between the assessee and its Associate Enterprise are given in Form 3CEB. Relevant details regarding international transactions were produced by the assessee and are kept on record. After discussion and based on records produced, no adjustment is being made to the arm''s length price of the transactions."

(Emphasis supplied)

7. From the above, it is clear that for assessment year relevant for our purpose, on account of procedure undertaken in section 92CA of the Act, there was no variation in the income by virtue of order of Transfer Pricing Officer. That being the position, the petitioner cannot be stated to be an eligible assessee as defined in clause (b) of sub-section (15) of section 144C of the Act. Procedure for issuance of draft order calling for his objection and taking further steps as laid down u/s 144C therefore, would not apply.

8. We are of the opinion that with above declaration, petition can be closed.

9. Counsel for the petitioner, however, submitted, that even the extended time-limit provided in section 153 of cases u/s 92CA would not apply by virtue of above conclusion. On the other hand, counsel for the department contended that if the petitioner does not wish to raise any objections to the draft order, it would be open for the Assessing Officer to treat the assessment order accompanying impugned communication as final order of assessment.

10. We propose to decide neither of these two contentions leaving it open for the parties to take recourse to the remedy as may be available under the law. With above observations, petition is disposed of.

