

Sec. 144C assessment order had to be quashed if AO didn't furnish draft assessment order to assessee: HC

Summary – The High Court of Gujarat in a recent case of C-Sam (India) (P.) Ltd., (the Assessee) held that where upward revision was made in income of assessee on basis of order of TPO and same was done without following mandatory procedure laid down under section 144C, same was unjustified

Facts

- The assessee was subjected to transfer pricing regime on account of its international transactions with associated persons. Against returned income of *Nil*, the Assessing Officer in the order of assessment computed the assessee's income at higher amount by making various additions and deletions as per the order of the Transfer Pricing Officer.
- On appeal, the assessee challenged such additions on the ground that the procedure laid down under section 144C was not followed by the Assessing Officer. The Commissioner (Appeals) deleted the additions made by the Assessing Officer.
- On appeal, the Tribunal confirmed the view of the Commissioner (Appeals).
- In instant appeal, the revenue did not dispute the factual aspects namely that upward revision was made in the income of the assessee on the basis of the order of the TPO and the same was done without following procedure laid down under section 144C. He, however, submitted that this was a mere procedural requirement and, therefore, a curable defect. Therefore, the Tribunal should have placed the matter back before the Assessing Officer for passing a fresh order after following such procedure.

Held

- The statutory provisions of section 144C make it abundantly clear that the procedure laid down under section 144C is of great importance and is mandatory. Before the Assessing Officer can make variations in the returned income of an eligible assessee, as noted, sub-section (1) of section 144C lays down the procedure to be followed notwithstanding anything to the contrary contained in the Act. This *non obstante* clause thus gives an overriding effect to the procedure 'notwithstanding anything to the contrary contained in the Act'. Sub-section (5) of section 144C empowers the DRP to issue directions to the Assessing Officer to enable him to complete the assessment. Sub-section (10) of section 144C makes such directions binding on the Assessing Officer. As per sub-section (13) of section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.
- The procedure laid down under section 144C is thus of great importance. When an Assessing Officer proposes to make variations to the returned income declared by an eligible assessee he has to first pass a draft order, provide a copy thereof to the assessee and only thereupon the assessee could exercise his valuable right to raise objections before the DRP on any of the proposed variations. In

addition to giving such opportunity to an assessee, decision of the DRP is made binding on the Assessing Officer. It is therefore not possible to uphold the revenue's contention that such requirement is merely procedural. The requirement under section 144C is mandatory and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the Assessing Officer but by the DRP and once the DRP gives directions under sub-section (5) of section 144C, the Assessing Officer is expected to pass the order of assessment in terms of such directions without giving any further hearing to the assessee. Thus, at the level of the Assessing Officer, the directions of the DRP under sub-section (5) of section 144C would bind even the assessee. He may of course challenge the order of the Assessing Officer before the Tribunal and take up all contentions. Nevertheless at the stage of assessment, he has no remedy against the directions issued by the DRP under sub-section (5). Provisions of section 144C amply demonstrate that the legislature desired to give an important opportunity to an assessee who is likely to be subjected to upward revision of income on the basis of transfer pricing mechanism and such opportunity could not be taken away by treating it as purely procedural in nature.

- Reference by the revenue to the circulars dated 03-06-2010 and 19-11-2013 in this regard would be of no avail. First of these circulars was an explanatory circular issued by the Finance Ministry in which it was provided that these amendments (which included section 144C of the Act) are made applicable with effect from 01-10-2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. In the latter clarificatory circular dated 19-11-2013, it was provided that in the earlier circular there was an inadvertent error and section 144C would apply to any order which is being passed after 01-10-2009 irrespective of the concerned assessment year. The latter circular was thus merely in the nature of a clarificatory circular and clarified which all along was the correct position in law. Sub-section (1) of section 144C itself in no uncertain terms provides that the Assessing Officer shall forward a draft order to the eligible assessee, if he proposes to make any variation in the income or loss which is prejudicial to the interest of the assessee on or after 01-10-2009. The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the Assessing Officer proposed to make after 01.10.2009. The earlier circular dated 03.06.2010 did not lay down the correct criteria in this regard. The assessee cannot be made to suffer on account of any inadvertent error which runs contrary to the statutory provisions. No question of law arises. Tax appeal is therefore dismissed.