

Failure to pass draft assessment order before passing final order would lead to withdrawal of demand proceedings

Summary – The Hyderabad ITAT in a recent case of Cyient Ltd., (the Assessee) held that In terms of section 144C, even in case of a remand by Tribunal, Assessing Officer has to pass a draft assessment order and not final assessment order and it is only when assessee chooses to prefer an appeal before Commissioner (Appeals), Assessing Officer can pass final assessment order

Facts

- During relevant years, there were international transactions entered into by the assessee with its AEs and the determination of the ALP of such transactions had been referred to the TPO who suggested certain adjustments. The matter reached the Tribunal. The Tribunal set aside two of the issues to the file of the Assessing Officer. The first issue was on the rate of interest to be charged on interest free loan advanced to its AEs and the second issue was corporate guarantee fee given by the assessee to its AEs.
- Consequent to the said order, the TPO passed an order directing that the LIBOR + 2 per cent was to be calculated on the loan advanced and, accordingly, suggested adjustment of the differential amount. As regards the fee on corporate guarantee was concerned, the TPO suggested that the corporate guarantee fee at the rate of 2 per cent was to be retained.
- Pursuant thereto, the Assessing Officer passed consequential order raising a demand. Against said order, the assessee approached the DRP. The DRP opined that the order passed consequent to the directions issued by the Tribunal was not an order at the first instance and therefore, the DRP did not have jurisdiction and, accordingly, was not empowered to issue the direction on the issues arising from the said order. The DRP also noticed that the assessee had filed an appeal before the Commissioner (Appeals) also which indicated that the assessee was pursuing the same remedy before different authorities and, therefore, the objections were not sustainable.
- The assessee filed instant appeal contending that even while passing the consequential order, the Assessing Officer had to pass only a draft assessment order against which the assessee could raise its objections before the DRP or choose to file an appeal before the Commissioner (Appeals) and only after the assessee exercised its options, could the Assessing Officer pass the final assessment order and, therefore, the said order was not sustainable.

Held

- The impugned order is the order passed by the Assessing Officer consequent to the directions of the Tribunal. The Tribunal has set aside the issue to the file of the TPO with a direction to reconsider the issue in accordance with its directions. As is evident from the consequential order, wherein the report of the TPO is reproduced, the TPO has applied his mind, has verified various facts before

proposing the adjustments. The Assessing Officer has passed the consequential order incorporating the adjustments proposed by the TPO. When the issues were set aside by the Tribunal, it is not merely for correcting mathematical errors in the calculations, but it is for reconsidering the issue in accordance with the directions of the Tribunal. Wherever, the Assessing Officer/TPO exercise their discretion after verification, and pass an order, it is incumbent upon them to give the assessee an opportunity to present its case or to appeal against such orders. It is for this reason that the statutes provide that the Assessing Officer shall pass a draft assessment order against which the assessee can either choose to file its objection before the DRP or choose to file an appeal before the Commissioner (Appeals) and after the assessee exercises its option, the Assessing Officer can pass the final assessment order in accordance with the directions of the DRP or the assessee can file an appeal before the Commissioner (Appeals).

- As per section 144C of the Act, the Assessing Officer first has to pass the draft assessment order and the choice is with the assessee either to approach the DRP or the Commissioner (Appeals). Only if the assessee chooses to prefer an appeal before the Commissioner (Appeals), can the Assessing Officer pass the final assessment order. Similar facts had arisen in the case of *JCB India Ltd. v. Dy. CIT [2017] 398 ITR 189/251 Taxman 143/85 taxmann.com 155* before the Delhi High Court and the High Court has held that even in the case of a remand by the Tribunal, the Assessing Officer has to pass a draft assessment order and not the final assessment order.
- In view of the same, the consequential orders for both the assessment years are set aside and the Assessing Officer/TPO is directed to pass the draft assessment order in accordance with the directions of the Tribunal.