

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8179 of 2010

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AIA ENGINEERING LTD - Petitioner(s)

Versus

DISPUTE RESOLUTION PANEL THROUGH SECRETARY -DRP & 1 - Respondent(s)

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Appearance:

MR MIHIR H JOSHI, SR.ADVOCATE WITH MR KEYUR GANDHI FOR M/S.NANAVATI ASSOCIATES for Petitioner(s): 1, MR MR BHATT, SR.ADVOCATE WITH MRS MAUNA M BHATT for Respondent(s): 1 - 2.

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CORAM : **HONOURABLE MS.JUSTICE H.N.DEVANI**
and
HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date: 31/08/2010

ORAL ORDER

(Per: HONOURABLE MS.JUSTICE H.N.DEVANI)

1. The amendment tendered on 30.08.2010 is allowed in terms of the Draft. The same shall be carried out forthwith.
2. Rule. Mrs. Mauna M. Bhatt, learned advocate appearing on behalf of the respondents, is directed to waive service of Rule on behalf of the respondents.
3. This petition under Article 226 of the Constitution of India had initially been filed with the following substantive prayers:

[A] Your Lordships be pleased to issue:

i. A writ of, or in the nature of, certiorari quashing and setting aside the Directions issued by the respondent No.1 DRP dated 8.7.2010 at Annexure-G hereto;

ii. Be further pleased to issue a writ of mandamus directing the respondent No.1 to hear and decide the objections submitted by the petitioner to the Draft assessment order dated 29.12.2009 on merits; and

iii. Be further pleased to issue a writ of mandamus restraining the respondent No.2 from finalizing the Draft assessment order dated 29.12.2009 and/or from initiating any further steps in respect thereof....

4. Subsequently, during the pendency of the petition, the Assessing Officer had passed assessment order dated 23.08.2010. Hence, the petitioner had sought permission to amend the petition. Accordingly, the prayer clause 16[A](iii) came to be substituted by the following prayer clause: -

A writ of, or in the nature of, certiorari quashing and setting aside the assessment order dated 23.08.2010 passed by respondent no.2 at Annexure-H hereto.

5. The facts as appearing in the petition are that the petitioner is a Public Limited Company engaged principally in the manufacture of grinding media, liners, vertical spindle mill spares, etc. For the assessment year 2006-07, the petitioner filed its return on 12.12.2006 declaring a total income of Rs.54,70,98,922/- which came to be processed under section 143(1) of the Income Tax Act, 1961 (the Act) on 07.03.2008. Subsequently, notice came to be issued under section 143(2) of the Act on 09.10.2007 pursuant to which the petitioner submitted various details including report under section 92E of the Act relating to international transactions in Form No.3 CEB.
6. During the course of assessment, a reference under section 92CA of the Act for computation of arms length price in relation to international transaction was made with the approval of the Commissioner of Income Tax, Ahmedabad-I on 12.02.2008 to the Transfer Pricing Officer-I, Mumbai. The Transfer Pricing Officer-I, Ahmedabad, vide order dated 29.10.2009 made under section 92CA(3) of the Act, made downward adjustment of Rs.95,56,360/- on account of commission payment to Vega UK and Rs.4,32,70,240/- on account of upward adjustment of sale price to Vega UAE totalling to an addition of Rs.5,28,26,600/-.
7. The respondent No.2 Assessing Officer made an addition for downward adjustment referred to hereinabove, on the ground that Vega Industries (Middle East), FZE, was being treated as a proprietary concern of the petitioner, which was carrying on business from Ajman Free Zone and the whole of the income earned by Vega Industries (Middle East), FZE, was being taxed in India. The Assessing Officer accordingly framed the draft assessment order under section 144C of the Act on 29.12.2009 and forwarded the same to the petitioner under section 144C (1) of the Act. The petitioner upon being served with the draft assessment order submitted its objections to the Dispute Resolution Panel as contemplated under section 144C(2) of the Act. Subsequently, the petitioner came to know that a clarification had been issued by the Central Board of Direct Taxes regarding objections before the Dispute Resolution Panel which clarified that a choice had been given to the assessee to go before the Dispute Resolution Panel or prefer the normal appellate channel. The petitioner, at this stage, decided to exercise the option available to it and filed an appeal before Commissioner of Income Tax (Appeals) against the assessment order, as may be finalized by the Assessing Officer. Pursuant to the first notice of hearing issued by the Dispute Resolution Panel on 11.03.2010, the petitioner, at the time of the first hearing on 22.04.2010, submitted a letter of the same date requesting consent of the Dispute Resolution Panel to approach the Assessing Officer and pursue the normal appellate channel thereafter.
8. Vide the impugned order dated 08.07.2010, the Dispute Resolution Panel observed that the petitioner-assessee had chosen to withdraw the objections filed before the Dispute Resolution Panel, hence, draft assessment order passed by the Assessing Officer is held

to be correct. The Dispute Resolution Panel further directed the Assessing Officer under section 144C (5) of the Act to pass assessment order in consonance with the draft assessment order already passed by him. Being aggrieved, the petitioner has moved the present petition seeking the reliefs noted hereinabove.

9. Subsequently, during the pendency of the petition, the Assessing Officer has framed assessment pursuant to the direction issued by the Dispute Resolution Panel vide order dated 23.08.2010, which is also subject-matter of challenge in the present petition.
10. Mr. Mihir H. Joshi learned Senior Advocate, appearing on behalf of the petitioner, vehemently assailed the impugned order made by the Dispute Resolution Panel. Attention was invited to the draft assessment order and more particularly, the endorsement below the order, which indicates that a copy of the order was forwarded to the assessee as per the provisions of section 144C (1) of the Act. It is stated therein that the assessee, as per the provisions of section 144C (2) of the Act may file his acceptance of the variations to the Assessing Officer within thirty days of the receipt of the order or may file his objections, if any, to such variation with the Dispute Resolution Panel within thirty days of the receipt of the order. The learned Counsel submitted that at the relevant time, it was not certain as to whether it was permissible for the petitioner to avail of the normal appellate channel against the assessment order instead of approaching the Dispute Resolution Panel. According to the learned Counsel, though the Central Board of Direct Taxes had issued the clarification on 20.01.2010, the same had not been brought to the notice of the taxpayers and, therefore, the petitioner was not aware of the same. Upon the petitioner coming to know of the fact that it was permissible for the petitioner either to go before the Dispute Resolution Panel or to prefer the normal appellate channel, the petitioner, on the first date of hearing itself, had addressed a communication dated 22.04.2010 to the Dispute Resolution Panel requesting for its consent to allow the petitioner to approach the Assessing Officer and request him to issue the final order to enable the petitioner to file an appeal before Commissioner (Appeals). Attention was invited to the impugned order and more particularly, to paragraph-4 thereof, to indicate that the hearing was fixed on 08.07.2010 to discuss with regard to the application dated 22.04.2010 made by the petitioner. It was submitted that despite the aforesaid fact, the Dispute Resolution Panel had, in paragraph-6 of its order, held that the assessee had a choice either to file objections before the Dispute Resolution Panel or to prefer normal appellate channel. That the choice was required to be exercised before the objection is filed before the Dispute Resolution Panel against the draft assessment order. As the assessee had already exercised the option of filing the objections, the directions were required to be issued under section 144C (5) of the Act by the Dispute Resolution Panel. It was submitted that insofar as the observations made by the Dispute Resolution Panel on the merits of the application that once the petitioner had availed of the remedy before Dispute Resolution Panel, it was not permissible for the petitioner to file appeal before Commissioner (Appeals), are concerned, it was well within the jurisdiction of the Disputes Resolution Panel, however, what is objectionable is the observation of the Dispute Resolution Panel that the petitioner had chosen to withdraw objections filed before the Dispute Resolution Panel. It was submitted that nowhere in the letter dated 22.04.2010 has the petitioner chosen to withdraw its objections filed before the Dispute Resolution Panel. The petitioner had only requested the consent of the Dispute Resolution Panel to allow the petitioner to approach the Assessing Officer with a request to issue final order so as to enable the petitioner to file appeal before Commissioner of Income Tax (Appeals). However, the Dispute Resolution Panel, while turning down the request to permit the petitioner to avail of the appellate channel, has not even considered

the objections filed by the petitioner and has observed that the petitioner has withdrawn objections and the Assessing Officer has held that in the circumstances, the draft assessment order made by the assessing Officer is correct and has directed the Assessing Officer under section 144C(5) of the Act to pass the assessment order in consonance with the draft assessment order already passed by him. It was submitted that the impugned order of the Dispute Resolution Panel is ex-facie irrational and perverse on the face of it. That at no stage of the proceedings had the petitioner withdrawn the objections, but, in the light of the order made by the Dispute Resolution Panel, the petitioner is left with an order which becomes binding on it on its own concession. It was submitted that in the circumstances, even if the petitioner were to avail the alternative remedy of appeal before the Tribunal the same would be an exercise in futility as the observations made by the Disputes Resolution Panel in the impugned order that the petitioner had withdrawn the objections filed before it would come in its way. It was submitted that even otherwise, since the petitioner cannot prefer appeal before the Commissioner (Appeals) and has been non-suited by the Disputes Resolution Panel on the ground that it has withdrawn the appeal, on determination of facts, the petitioner has lost one stage of appeal and is only left with the remedy of approaching the last fact-finding authority, being the Tribunal. It was, accordingly, submitted that the impugned order of the Disputes Resolution Panel causes immense prejudice to the assessee. Assailing the action of the Assessing Officer in framing assessment despite the pendency of the petition, it was submitted that the Assessing Officer had sufficient time to make the order till 31.08.2010, despite which he has proceeded to make the order on 23.08.2010 without waiting for the petition to be heard by the Court. That the passing of the assessment order was wholly unnecessary and the Assessing Officer could have waited at least till 31.08.2010 before issuing the order. It was submitted that in the facts and circumstances of the case, the matter requires to be remitted to the Dispute Resolution Panel for considering the objections submitted by the petitioner on merits and thereafter to issue appropriate directions under the provisions of section 144C of the Act.

11. Opposing the petition, Mr. M. R. Bhatt, learned Senior Advocate appearing on behalf of the respondents placed reliance upon the averments made in the affidavit-in-reply filed on behalf of the respondents. It was submitted that the Circular dated 20th January, 2010 of the Central Board of Direct Taxes had been issued much prior to the date of filing of objections by the petitioner. Moreover the application dated 22.04.2010 has also been filed after a gap of more than 3 months after the issuance of the circular dated 20.01.2010 which indicates that the said application had been filed after due application of mind and proper deliberation of the issue by the petitioner. Attention was invited to the provisions of section 144C of the Act to indicate the scope and ambit of the jurisdiction of the Dispute Resolution Panel. Referring to sub-section (5) of section 144C it was submitted that under the said provision the Dispute Resolution Panel, in a case where any objection is received under sub-section (2) thereof, is required to issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. Under sub-section (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 inquiry and passing of the assessment order. It was submitted that the scope of the powers of the Dispute Resolution Panel are circumscribed by the said provisions and as such upon receipt of objections under sub-section (2) of section 144C the Dispute Resolution Panel can either issue such directions as it thinks fit to, for the guidance of the Assessing Officer to enable him to complete the assessment or confirm, reduce or enhance the variations proposed in the draft order and it had no jurisdiction to give its consent to allow the petitioner to

approach the Assessing Officer and request him to issue final order so as to enable the petitioner to file an appeal before Commissioner (Appeals) as requested by the petitioner. It was accordingly submitted that the request made by the petitioner being beyond the scope of the powers of the Dispute Resolution Panel, coupled with the fact that the petitioner wanted to exercise its option to file appeal later before the Commissioner (Appeals), the Dispute Resolution Panel and made the impugned order. Submitting that the entire situation is one of the petitioner's own making, it was urged that in the circumstances, there was no infirmity in the impugned order of the Tribunal so as to warrant interference. The learned counsel next submitted that in view of the fact that the Assessing Officer has already framed assessment under section 143 read with section 144C (13) of the Act, the petition is not required to be entertained as the petitioner has an efficacious alternative statutory remedy available by way of an appeal before the Tribunal.

12. This Court has perused the record of the case and has considered the submissions advanced by the learned advocates for the respective parties.
13. The facts emerging on record are that pursuant to the draft assessment order dated 29.12.2009 made by the respondent No.2, the petitioner had filed objections dated 29.01.2010 before the Dispute Resolution Panel. Below the operative part of the order, on the last page of the there is an endorsement to the following effect:

Copy to the assessee-company is forwarded as per the provisions of section 144C(1) of the Income-tax Act, 1961. The assessee as per the provisions of section 144C (2) of the Act, may file his acceptance of the variations to the Assessing Officer within thirty days of the receipt of the order at the address: Additional Commissioner of Income tax, ROOM No.301, Jitendra Chambers, New RBI Lane, Ashram Road, Ahmedabad :380 009 OR may file his objections, if any, to such variation with the Dispute Resolution Panel within thirty days of the receipt of this order, at the following address: Secretary, Dispute Resolution Panel, # 103-A, Annexe- Building, Aaykar Bhavan, Ashram Road, Ahmedabad- 380009 and the Assessing Officer at the above mentioned address. Further proceedings will be as per the provisions of section 144C read with other provisions of the Income-tax Act, 1961.

14. On a plain reading of the endorsement referred to hereinabove, it is apparent that the same states that the assessee has to exercise either of two options, viz., to file his acceptance to the variations or to file his objections to such variation with the Dispute Resolution Panel. In the circumstances, it is apparent that the petitioner-assessee would be justified in entertaining a belief that it was required to either file its acceptance of the variations or to file its objections, if any, to such variation, before the Dispute Resolution Panel. Accordingly, the petitioner had filed its objections dated 29.01.2010 before the Dispute Resolution Panel. Subsequently, it appears that the petitioner came to know about the Clarification dated 20.01.2010 issued by the Central Board of Direct Taxes and decided to avail exercise the option available to it of filing appeal before the Commissioner (Appeals). Since the first hearing was fixed on 22.04.2010, on that day the petitioner submitted its application dated 22.04.2010 to the Dispute Resolution Panel submitting that in the light of the CBDT clarification dated 20.01.2010, it would like to exercise its option and file appeal before Commissioner (Appeals) against the assessment order passed by the Assessing Officer and requested the Dispute Resolution Panel to

allow it to approach the Assessing Officer and request him to issue the final order to enable it to file an appeal before Commissioner (Appeals).

15. As can be seen from the impugned order dated 08.07.2010 of the Dispute Resolution Panel, in the first paragraph .04 thereof the Dispute Resolution Panel has reproduced the contents of the letter/application dated 22.04.2010 filed on behalf of the petitioner. In the second paragraph 04 (two paragraphs have been given the same number), the Dispute Resolution Panel has recorded thus: 04. To discuss the issue with regard to the above application, the case of the assessee was fixed for 08/07/2010. Thus, on the date when the impugned order was passed, the matter was fixed to discuss the issue with regard to the application dated 22.04.2010 filed by the petitioner. However, as is apparent on a bare reading of the impugned order, on the same day, the Dispute Resolution Panel, after considering the contents of the letter dated 22.04.2010 and the Circular of Central Board of Direct Taxes, has held thus:

06. A perusal of the clarification referred to above shows that the choice has been given to the assessee either to file objections before the DRP or to prefer the normal Appellate channel. But, the choice is required to be exercised before an objection is filed before the DRP against the draft assessment order. The assessee has been given a choice not to file any objection before the DRP, but file an appeal before the CIT(A) against the assessment order passed by the Assessing Officer later, if the option regarding submitting itself to the jurisdiction of the DRP was not exercise. As the assessee has exercised the option of filing objections, direction are required to be issued u/s.144C(5) of the Income Tax Act, by the DRP.

08. As the assessee has chosen to withdraw the objections filed before the DRP, the draft assessment order passed by the A.O. is held to be correct. The AO is directed u/s.144C(5) of the Act, to pass the assessment order in consonance with the draft assessment order already passed by him.

16. The main grievance voiced by the petitioner is against the findings recorded and directions issued in paragraph 08 above; hence, it is not necessary to enter into the merits of the findings recorded in paragraph 06 of the impugned order. A perusal of the findings recorded in paragraph 08 and the directions issued by the Dispute Resolution Panel makes it apparent that Dispute Resolution Panel has failed to consider the contents of the letter/application dated 22.04.2010 in proper perspective. A perusal of the application clearly indicates that there is nary a whisper regarding withdrawing the objections. By the said application the petitioner has only requested the Dispute Resolution Panel to give its consent to allow it to approach the assessing officer and request him to issue the final order so as to enable the petitioner to avail of the appellate channel. Thus, if after considering the application if the Dispute Resolution Panel was of the opinion that it did not have the jurisdiction to give such consent or that as observed in paragraph 06 of the impugned order, the assessee already having exercised the option to file objections, directions were required to be issued under section 144C(5) of the Act, the Dispute Resolution Panel could have turned down the request made by the petitioner and rejected the application. However, the Dispute Resolution Panel instead, by observing that as the petitioner has chosen to withdraw the objections, the draft assessment order passed by the Assessing Officer is correct, and directing the Assessing Officer under section 144C(5) to pass assessment order in consonance with the draft assessment order already passed by him, has totally non-suited the petitioner. If the Dispute Resolution Panel was of the opinion that the application dated 22.04.2010 could not have been entertained, it should have considered the objections filed by the petitioner on merits. As a consequence of the

impugned order, firstly the objections raised by the petitioner have not been decided; secondly, in view of the directions issued by the Dispute Resolution Panel the petitioner would not be in a position to avail of the remedy of appeal before Commissioner (Appeals) against the draft assessment order; and thirdly, in the light of the observation made by the Dispute Resolution Panel that the petitioner has chosen to withdraw the objections, preferring any appeal against the impugned order before any forum would be an exercise in futility, as no appeal would be entertained against an order passed on a concession. Thus, the Dispute Resolution Panel has virtually closed all doors for the petitioner. In the circumstances, impugned order of the Dispute Resolution Panel suffers from the vice of being contrary to the record as well as non-application of mind, inasmuch as the petitioner had never sought withdrawal of the objections filed by it. The impugned order also causes immense prejudice to the petitioner as recorded hereinabove. In the circumstances, the impugned order of the Dispute Resolution Panel, therefore, cannot be sustained. Consequently, the assessment order dated 23.08.2010 made pursuant to the order dated 08.07.2010 made by the Dispute Resolution Panel also cannot be sustained.

17. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned orders dated 08.07.2010 made by the Dispute Resolution Panel (Annexure-G to the petition) as well as assessment order dated 23.08.2010 made by respondent No.2 (Annexure-H to the petition) are hereby quashed and set aside. The objections filed by the petitioner before the Dispute Resolution Panel bearing File No.DRP-28/ABD/AIAEL/09-10 are hereby restored to the file of the Dispute Resolution Panel. The Dispute Resolution Panel shall consider the same on merits, in accordance with law, after giving an opportunity of hearing to the petitioner, within a period of three months from the date of receipt of a copy of this order. Rule is made absolute accordingly with no order as to costs.

(Harsha Devani, J.)

(Smt.Abhilasha Kumari, J.)