

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER  
AND  
SH. J.S.REDDY, ACCOUNTANT MEMBER**

**I.T.A .Nos.-1570 & 1571/Del/2014  
ALONGWITH SA.No.-201 & 202/Del/2014  
(ASSESSMENT YEARS- 2008-09 & 2010-11)**

M/s PGS Geophysical as (Successor of PGS Exploration (Norway) AS], C/o-BMR & Associates, Tower A, DLF Cyber City, DLF Phase-III, Gurgaon <b>PAN-AAECP4328F</b> <b>(APPELLANT)</b>	vs	Addl. DIT, Range-2 (International Taxation), New Delhi.  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. Ajay Vohra, Adv. &amp; Sh. Rohit Garg, Adv.</b>
<b>Respondent by</b>	<b>Sh. Sanjeev Sharma &amp; Sh. Vivek Kumar, Sr. DR</b>

**ORDER**

**PER DIVA SINGH, JM**

The present appeals have been filed by the assessee against the separate orders dated 30.01.2014 passed by the AO u/s 144C(13)/ 143(3) read with section 254 of the Income Tax Act, 1961 pertaining to 2008-09 and 2010-11 assessment years pursuant to the directions of the DRP-II, New Delhi dated 24.12.2013 and 26.12.2013 respectively. The Ld. AR right at the outset submitted that the sole grievance in the present appeals which the assessee would want to address is the action of the DRP in remanding the issue to the AO instead of deciding the objections of the assessee raised before it. The said decision it was stated is in violation of the mandate of Section 144C(8) of the Income Tax Act, 1961.

2. In the light of the above submissions our attention was invited to the following grounds which ventilate the above grievance. The grounds read as under:-

1.2. *“That on the facts and circumstances of the case and in law, the “impugned assessment order is bad in law, being a non-speaking order passed in complete disregard of the factual details and submissions filed by the Appellant during the course of the set aside proceedings.*

2. *Directions issued by the Dispute Resolution Panel (“DRP”) are ultra-vires the provisions of the Act and bad in law.*

2.1. *That on the facts and circumstances of the case and in law, the directions issued by the DRP are ultra-vires the provisions of section 144C(5) read with section 144C(8) of the Act.*

2.2. *That on the facts and circumstances of the case and in law, the impugned assessment order is bad in law, to the extent it has been passed in pursuance of directions issued by the DRP which are in violation of the provisions of the Act.*

2.1. It was a common stand of the parties that the arguments advanced in ITA No-1570/Del/2014 would also address the grievance in ITA No-1571/Del/2014 as the submissions of the parties on facts and circumstances qua the issue raised would remain the same.

3. A perusal of the record shows that the assessee is a company incorporated in Norway. In 2008-09 assessment year it returned an income of Rs.26,87,46,256/- (In 2010-11 the income returned was Rs.17,82,75,002/-). During the year under consideration, the assessee has earned income from providing services in relation to 3D seismic data acquisition and processing in terms of contract with BG Exploration and Production India Ltd. (BGEPIIL) and Reliance Industries Ltd. (RIL). The assessee had shown total income of Rs.26,87,46,256/- in respect of revenue earned from the above two contracts in its return of income after applying the deemed profit rate of 10% u/s 44BB of the Act. The AO in the original draft assessment order denied the applicability of section 44BB to the assessee on the ground that the services rendered by the assessee were in

the nature of FTS. The AO accordingly brought the gross revenue of Rs.268,74,62,563/- to tax u/s 9(1)(vii) read with section 115A of the Act. Against this draft assessment order, the assessee is found to have filed Objections before the DRP however the DRP, confirmed the action of the AO. The AO, thereafter, passed the final assessment order. Against this order the assessee filed appeal before the ITAT. A perusal of the order of the DRP shows that the Co-ordinate Bench vide their order dated 20.04.2012 remitted the issue back to the file of the AO with the following directions:-

- i) Determine whether assessee has a PE or not; and*
- ii) Thereafter determine the taxable income of the assessee in accordance with the law by taking into consideration the order of ITAT also in the case of CGG Verotas Services SA.*

3.1. The DRP order sums up the order of the Co-ordinate Bench further and after addressing the facts comes to the following conclusions:-

*Hon. ITAT further held that after examining the existence of PE, income has to be determined on the basis of following four categories:*

- i) "Fees for Technical Services" rendered in connection with prospecting for or extraction or production of mineral oil having business PE or fixed place of profession [Sec. 44DA)*
- ii) "Fees for Technical Services" rendered in connection with prospecting for or extraction or production of mineral oil without business E or fixed place of profession (Sec. 115A)*
- Hi) Other fee for technical services having business PE or fixed place of profession (Sec. 44DA)*
- iv) Other fee for technical services without business PE or fixed place of profession ( Sec. 115A)*

4.2 *In pursuance of the above order of the Hon'ble ITAT. the AO has passed the impugned draft appeal effect order u/s 144C read with section 254. In the said order, the AO has held that the assessee did not have a PE in India on the ground that no approval was received by the assessee from RBI for setting up Project Office (PO) in India till end of January, 2008 and also the assessee did not furnish any document suggesting that the activities of seismic survey etc as per contract were carried out from the said PO. The AO has accordingly proposed to bring the amount to tax u/s 115A only.*

4.3 During the DRP proceeding, it was argued by the Ld. AR that the AO had had not given adequate opportunity to the assessee before passing the draft appellate order and that it had been brought to the notice of the AO that the assessee had set POs in India for execution of seismic contracts and that the said POs were in operation in India for the duration of the contracts, i.e. 140 days in case of contract with BGEPIIL and 709 days (173 days in the subject year) for RIL and accordingly the assessee had a PE in India during the period under consideration. It is submitted that the establishment of Pos in India is regulated by the FEMA Regulations, 2000 and that the RBI vide Notification no.95/2003-RB had allowed a general permission to all foreign companies to set up PO in India provided the foreign company had secured contract from an Indian company to execute a project in India. Further, the RBI vide AP(DIR) Circular No. 37 dated 15.11.2003 prescribed the details which a foreign company is required to intimate to the RBI for setting up a PO in India. It is submitted that the assessee had in compliance with the above Notifications/circulars dully intimated RBI about setting up of PO in India and copies of the intimation were submitted to the AO vide submission dated 02.07.2012. It is submitted that the AO has grossly erred in assuming that an approval required for setting up PO in India, whereas only an intimation is required to be filed with the RBI in relation to setting up of PO. It is submitted that the above intimation is a conclusive proof of having set up PO in India.

4.3.1 Further, the assessee also filed additional evidence vide letter dated 29.10.2013 filed on 08.11.2013 before the DRP enclosing copy of 'Certificate for Establishment of Place of Business in India issued by ROC on 11.12.2007 and other documents in support of its claim. The above additional evidence was forwarded to the AO vide letter dated 11.11.2013 by the DRP with direction to examine the matter and submit remand report. However, the AO in his report dated 14.11.2013 has merely repeated his old stand with regard to taxability u/s 115A and has stated that the additional evidence is not admissible under Rule 46A of the Income Tax Rules, 1962. In response to the above remand report it is submitted by the Ld. AR vide letter dated 17.12.2013 that there was no additional evidence per se and that the ROC Certificate and other documents were filed only to further establish its earlier claim regarding existence of PO in India and carrying out of the seismic service etc from the said PO.

**4.3.2 On careful consideration of the matter, we are of the opinion that Rule 46A referred to by the AO relates to proceedings before CIT(A) and not before the DRP which is governed by the Income Tax (Dispute Resolution Panel) Rules, 2009. As per Rule 9 of the said Rules, the Panel is specifically empowered to permit the assessee to produce any**

***document to enable it to issue proper directions. In view of the above, the said additional evidence are permitted to be produced by the assessee in the interest of justice. The AO is directed to take into account the submissions and additional evidence filed by the assessee and decide the issue as directed by the Hon'ble ITAT while passing the appeal effect order. In doing so, the AO will provide adequate opportunity of being heard to the assessee. The above grounds of objection are accordingly disposed of."***

***(emphasis provided by the Bench)***

4. Referring to para 4.3.2 of the DRP's order and relying upon IBM India Private Limited vs JCIT (IT(TP)A No.1543/Bang/2012) and Swiber Offshore Construction Pte. Ltd. V. DDIT:ITA No. 7724/Mum/2012 of the order of the Chennai Bench in 140 ITD 171, it was the prayer of the Ld. AR that the issue may be remanded back to the AO with the direction to pass a fresh draft assessment order in accordance with law after providing an opportunity of being heard to the assessee.

4.1. The Ld. CIT DR though placed reliance upon the orders however in the face of the statutory mandate he had no objection to the prayer of the assessee. Ld. AR inviting further attention to ITA No.-1571/Del/2014 pertaining to 2010-11 assessment year, submitted that the DRP vide its order dated 26.12.2013 have given an identical finding herein also in para 4.3.1. In the said appeal also based on similar grounds identical prayer was made. The DRP finding under challenge is reproduced below:-

***4.3.1. "Further, the assessee also filed additional evidence vide letter dated "29.10.2013 filed on 08.11.2013 before the DRP enclosing copy of 'Certificate for Establishment of Place of Business in India' issued by ROC on 11.12.2007 and other documents in support of its claim. It is also submitted by the Ld. ARs that the above documents are not strictly not additional evidence per se and that the ROC Certificate and other documents were filed only to further establish its earlier claim regarding existence of PO in India and carrying out of the seismic service etc from the said PO. In view of the above, the said additional evidence are permitted to be produced by the assessee in the interest of justice under rule 9 of the Income Tax (Dispute***

*Resolution Panel) Rules, 2009. The assessee will file copy of the above additional evidence before the AO who is directed to examine the same after providing adequate opportunity of being heard to the assessee.”*

5. In the afore-mentioned peculiar facts and circumstances on considering the material available on record, the provisions of law and the judicial precedents cited, we are of the view that the prayer on behalf of the assessee has to be accepted. Before we address the specific reason for coming to the said conclusion we first deem it appropriate to extract the relevant provisions under consideration:-

*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 (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1<sup>st</sup> day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.*

*(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order-*

- (a) file his acceptance of the variations to the Assessing Officer; or*
- (b) file his objections, if any, to such variation with-*
  - (i) the Dispute Resolution Panel; and*
  - (ii) the Assessing Officer.*

*(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-*

- (a) the assessee intimates to the Assessing Officer the acceptance of the variation; or*
- (b) no objections are received within the period specified in sub-section (2).*

*(4) The Assessing Officer shall, notwithstanding anything contained in section 153 [or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which-*

- (a) the acceptance is received; or*
- (b) the period of filing of objections under sub-section (2) expires.*

*(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.*

*(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:-*

- (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.
- (7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-

- (a) make such further enquiry, as it thinks fit; or
- (b) cause any further enquiry to be made by any income tax authority and report the result of the same to it.

(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.

*[Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]*

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) [\*\*\*].....

(15).....”

5.1. A perusal of the above shows that the provisions of section 144C provides the entire mechanism for making a reference to the DRP; the power of the DRP and also the procedures which have to be followed to issue the direction to the AO are fully set out therein. On a perusal of the statutory provisions it can be seen that **(a)** where the objections have been filed by the assessee **the DRP has to issue directions to the AO for his guidance so as to enable him to complete the assessment;** **(b)** such directions can be given after considering the various factors which have been elaborated in sub-section (6); **(c)** the DRP has also been conferred with the power to make an enquiry and to issue any directions as per sub-section (7); **(d)** sub-section (8) places a limitation on the powers of the DRP to either confirm, reduce or enhance the variation proposed by the AO in the draft assessment order. **The statute does not stop there, it further clarifies that the DRP does not have any power to set aside any proposed variation or issue direction for further enquiry and passing of the assessment order thereby meaning the DRP has to come to a clear cut direction to be given to the AO;** **(e)** sub-section (9) address the procedures where the DRP members differ we are not concerned in the present proceedings with the same; **(f)** sub-section (10) makes the direction given by the DRP binding on the AO; **(g)** sub-section (11) enunciates the rules of fair play and natural justice by ensuring that in the eventuality a direction under sub-section (5) which is pre-judicial to the interests of the assessee or the Revenue has been given in such an eventuality an opportunity of being heard has to be granted to the assessee or the AO by the DRP; **(h)** the sub-section 12 gives the limitation within which the direction under sub-section (5) is to be given effect to by the AO; **(i)** sub-section (13) mandates the AO to pass an order in conformity with the direction of the DRP without providing an opportunity to the assessee.

5.2. Accordingly it is seen that the statute has provided sufficient powers to the DRP for considering all the material placed before it and equipped it with vast powers to conduct enquiry before issuing any direction to the AO. The statute contemplates that after empowering the DRP, with such wide powers the DRP shall give clear and speaking directions to the AO for passing the assessment order and the statute ensures that the said power is not delegated to the AO.

5.3. The above conclusion is evident from a bare perusal of sub-sections (5) and (8) of section 144C extracted hereunder:-

Sub Section (5) of Section 144C

*(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.*

Sub Section (8) of Section 144C

*(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.***

*[Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]”*

5.4. The wide sweeping powers vested in the DRP in order to ensure that remand is not made is evident from sub-section (6), (7) and (11) of section 144C extracted hereunder:-

Sub Section (6) of Section 144C

*(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:-*

- (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.*

Sub Section (7) of Section 144C

(7) *The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-*

- (a) *make such further enquiry, as it thinks fit; or*  
 (b) *cause any further enquiry to be made by any income tax authority and report the result of the same to it.*

Sub Section (6) of Section 144C

(11) *No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively."*

5.5. Considering the scheme of the Act we are of the view that the order of the DRP is in excess of jurisdiction and the challenge posed to the same by the assessee is well founded. The impugned orders as a result thereof are set aside. However, after hearing the submissions of the parties, we direct the AO to pass a speaking draft assessment order considering the fresh evidences admitted by the DRP and calling for whatever evidences the said authority deems fit. Needless to say that a reasonable opportunity of being heard shall be afforded to the assessee.

5.6. Accordingly the above grounds raised are allowed for statistical purposes.

6. In the result the appeals of the assessee are partly allowed for statistical purposes.

7. The stay petitions filed by the assessee accordingly become infructuous.

**The order is pronounced in the open court on 26<sup>th</sup> of September 2014.**

**Sd/-**  
**(J.S.REDDY)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(DIVA SINGH)**  
**JUDICIAL MEMBER**

Dated: 26/09/2014

*\*Amit Kumar\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI