

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.649/PUN/2013 & 1726/PUN/2014  
निर्धारण वर्ष / Assessment Years : 2008-09 & 2009-10

DCIT, Circle-8,  
Pune

Vs.

Atlas Copco (India) Limited,  
Sveanagar, Dapodi,  
Pune – 411 012  
PAN : AAACA4074D

(Appellant)

(Respondent)

C.O. Nos.34 & 35/PUN/2019  
(Arising out of ITA Nos. 649/PUN/2013 & 1726/PUN/2014)  
निर्धारण वर्ष / Assessment Years : 2008-09 & 2009-10

Atlas Copco (India)  
Limited,  
Mumbai Pune Road,  
Dapodi, Pune – 411 012  
PAN : AAACA4074D

Vs.

DCIT, Circle-8,  
Pune

(Cross Objector)

(Appellant in the appeal)

|                       |                             |
|-----------------------|-----------------------------|
| Assessee by           | Shri R. Murlidhar, Advocate |
| Revenue by            | Shri M.K. Gautam, CIT-DR    |
| Date of hearing       | 26-08-2019                  |
| Date of pronouncement | 29-08-2019                  |

आदेश / ORDER

PER R.S.SYAL, VP :

The Revenue has filed two appeals in relation to the assessment years 2008-09 and 2009-10 against the orders passed

by the CIT(A)-IT/TP on 18-12-2012 and 30.6.2014 respectively.

The assessee has also filed Cross objections for the said years.

2. The Cross objection for the A.Y. 2008-09 is late by 1965 days. Similar cross objection filed by the assessee for the A.Y. 2009-10 is also late by 1018 days. The assessee has moved an application for condonation of delay. The ld. AR submitted that the assessee was not properly advised by its then counsel for espousing the legal issue now sought to be raised in the Cross objections, which is fundamental in nature. The ld. DR strongly opposed the condonation of delay.

3. It is seen that through the Cross objections, the assessee has raised a legal ground challenging the validity of assessment order passed u/s.143(3) r.w.s. 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act'). The moot point is as to whether such a long delay deserves condonation. At this stage, it is relevant to note the judgment of the Hon'ble Bombay High Court in *Vijay Vishin Meghani Vs. DCIT & Anr (2017) 398 ITR 250 (Bom)* holding that none should be deprived of an adjudication on merits unless it is found that the litigant deliberately delayed the filing of appeal. Similar to the cases under consideration, in that

case too, delay of 2984 days crept in due to improper legal advice. Relying on *Concord of India Ins. Co. Limited VS Nirmala Devi (1979) 118 ITR 507 (SC)*, the Hon'ble jurisdictional High Court condoned the delay.

4. In yet another case in *Anil Kumar Nehru and Another vs. ACIT (2017) 98 CCH 0469 BomHC*, there was a delay of 1662 days in filing the appeal. Such a delay was not condoned by the Hon'ble High Court. In further appeal, condoning the delay, the Hon'ble Supreme Court in *Anil Kumar Nehru vs. ACIT (2018) 103 CCH 0231 ISCC*, held that : 'It is a matter of record that on the identical issue raised by the appellant in respect of earlier assessment, the appeal is pending before the High Court. In these circumstances, the High Court should not have taken such a technical view of dismissing the appeal in the instant case on the ground of delay, *when it has to decide the question of law between the parties in any case* in respect of earlier assessment year. For this reason we set aside the order of the High Court; condone the delay for filing the appeal and direct to decide the appeal on merits.'

5. Turning to the facts of the instant cases, we find that the assessee has raised a legal ground through these Cross objections,

which goes to the root of the matter. It would be seen *infra* that the said legal issue is squarely covered in the assessee's favour by several orders passed by the Tribunal including those by the Pune Benches. Under these circumstances, we condone the delay and take up the Cross objections for disposal on merits.

A.Y. 2008-09 :

6. The first legal issue raised by the assessee in its cross objection is as under:

“Validity of the Order passed u/s. 143(3) r.w.s 144C of the Income-tax Act, 1961:

1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer (Ld. AO) erred in passing the draft assessment order dated December 29, 2011 without following the mandate as laid down under section 144C of the Income-tax Act, 1961 (the Act).

The Respondent prays that the said draft assessment order be held as void-ab-initio, bad in law and illegal and consequently the entire assessment ought to be quashed.

2. On the facts and in the circumstances of the case and in law, the Ld. AO erred in issuing a notice of demand under section 156 and a notice under section 274 read with section 271(1)(c) of the Act along with the said draft assessment order, thereby not following the mandate as laid down under section 144C of the Act.

The Respondent prays that the said draft assessment order be held as void-ab-initio, bad in law and illegal and consequently the entire assessment ought to be quashed.”

7. Briefly stated, the facts of the case are that the assessee filed its return declaring income of Rs.1,44,59,01,250/-. Certain

international transactions were reported by the assessee. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The TPO passed the order u/s. 92CA(3) of the Act proposing transfer pricing adjustments. Then, the AO passed the order u/s.143(3) of the Act on 29-12-2011 marking it as "Assessment order". At the end of this order, the AO remarked that: 'This is the proposed order of assessment passed u/s.143(3) r.w.s.144C(1) of the Income Tax Act, 1961' determining the total income at Rs.1,56,72,76,785/-. The assessee was also made aware that: 'within 30 days of the receipt of this *draft order*', it should either file acceptance to the variations or file objections to such variations before the Dispute Resolution Panel. Thereafter, the AO proceeded to calculate tax in the same order directing to "*Issue demand notice and challan accordingly after giving credit to prepaid taxes, if any*" and further directing to '*Issue notice u/s.274 r.w.s. 271(1)(c) of the I.T. Act, 1961*". A demand notice dated 29-12-2011 was also simultaneously issued, a copy of which has been placed on record by the Id. AR. Then, the AO issued penalty notice u/s.274 r.w.s. 271(1)(c) of the Act, again, on 29-12-2012, whose copy has also been placed on record. Thereafter, the AO

passed the final assessment order dated 27-02-2012 u/s.143(3) r.w.s. 144C of the Act determining total income at Rs.156.73 crore.

8. From the above factual matrix, it is seen that the AO passed the draft order by designating it as the “Assessment order” u/s 143(3) of the Act on 29-12-2011 and also issued notice of demand u/s.156 along with initiation of the penalty proceedings. Thereafter, he passed the final assessment order again characterizing it as ‘Assessment order’ on 27-2-2012. Under such circumstances, the assessee has raised the issue that the final assessment order lacked validity and hence should be quashed as the AO/TPO failed to follow the statutorily prescribed procedure u/s.144C of the Act.

9. Section 144C of the Act with the marginal note “Reference to Dispute Resolution Panel” provides through sub-section (1) of section 144C that: “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.’ Sub-section (2) of section 144C states that the assessee shall either file his acceptance to the AO on the variations proposed in the draft order or file his objections, if any, with the DRP. In case, the assessee accepts the variation in the draft order or no objections are received within 30 days, then sub-section (3) states that: ‘The Assessing Officer shall complete the assessment on the basis of the draft order’. In case, the assessee does not agree with the draft order, it can, *inter alia*, raise objections before the DRP, which shall issue directions under sub-section (5) of section 144C. Upon receipt of the directions from the DRP, the AO completes the assessment under sub-section (13) in conformity with the directions given by the DRP.

10. An overview of section 144C of the Act deciphers that a draft order passed under sub-section (1) is only a tentative order which does not fasten any tax liability on the assessee. In case variations to the income in the draft order are accepted by the assessee or no objections are received within 30 days, the AO completes the assessment under section 144C(3) on the basis of draft order and the matter ends. In case the assessee objects to the variations in the income as proposed in the draft order and approaches the DRP, the final assessment order is passed by the AO u/s.144C (13) giving

effect to the directions given by the DRP under sub-section (5). In case the assessee seeks to take the route of seeking redressal of its grievances through the channel of the CIT(A), in that case, again the AO has to pass a separate assessment order, which is obviously distinct from the draft order. So, it is only on the finalization of the variation in the income as per the draft order, to the extent specified in the provision, that the AO is obliged to pass an assessment order, either under sub-section (3) or (13) of section 144C of the Act, determining the tax liability, pursuant to which a notice of demand is issued. Thus it follows that, irrespective of the course of action followed by the assessee, whether or not accepting the variation in the draft order or choosing the route of the DRP or the CIT(A), a draft order has to be necessarily followed by an assessment order on the basis of which a notice of demand is issued and it is then that the assessment is said to have come to an end.

11. The Hon'ble Apex Court in *Kalyan Kumar Ray (1991) 191 ITR 634 (SC)* has held that assessment order involves determination of income and tax. It laid down that: '*Assessment*' is *one integrated process involving not only the assessment of the total income but also the determination of the tax.* The latter is as



crucial for the assessee as the former.’ Again the Hon’ble Summit Court in *Auto and Metal Engineers vs. UOI (1998) 229 ITR 399 (SC)* has held that the process of assessment involves (i) filing of the return of income under s. 139 or under s. 142 in response to a notice issued under s. 142(1) ; (ii) inquiry by the AO in accordance with the provisions of ss. 142 and 143 ; (iii) making of the order of assessment by the AO under s. 143(3) or s. 144; and (iv) *issuing of the notice of demand under s. 156 on the basis of the order of assessment.* The process of assessment thus commences with the filing of the return or where the return is not filed, by the issuance by the AO of notice to file the return under s. 142(1) and it culminates with the issuance of the notice of demand under s. 156. On going through the above precedents, it is manifested that the assessment proceedings come to an end on the issue of notice of demand u/s 156 of the Act. Once a notice of demand is issued, the AO becomes *functus officio* in so far as the completion of assessment is concerned. It consequently follows that issue of notice of demand marks the completion of the assessment.

12. Turning to the facts of the instant case, it turns out that the AO issued notice of demand on 29.12.2011 tantamounting to legally finalizing the assessment, which was just the stage of draft

order. As against that, it was incumbent upon him to statutorily pass the final assessment order after the draft order and then issue notice of demand. Issue of notice of demand brings down the curtain on the process of assessment. Until notice of demand is issued, the assessment cannot be said to have concluded.

13. The Hon'ble Madras High Court in *Vijay Television (P) Ltd. Vs. DRP (2014) 369 ITR 113 (Mad.)* was confronted with a situation in which the AO, pursuant to the order of the TPO, passed a final assessment order instead of a draft order. A question arose as to whether the order so passed could be treated as a valid order. Accepting the contention of the assessee, the Hon'ble High Court set aside the order passed by the AO by observing that: "*where there was omission on the part of the AO to follow the mandatory procedures prescribed in the Act, such omission cannot be termed as a mere procedural irregularity and it cannot be cured*". Resultantly, the assessment order was quashed. Almost similar issue came up for consideration before the Hon'ble jurisdictional High Court in *Pr. CIT Vs. Lionbridge Technologies Pvt. Lt. (2019) 260 Taxman 273 (Bom.)* in which the Tribunal in the first round restored the matter to the AO on the ground that the DRP failed to

deal with the assessee's objections. During the remand proceedings, a reference was made to the TPO. On receipt of the TPO's order, the AO straightaway passed an order u/s.143(3) r.w.s. 144C(13), which action came to be disapproved by the Hon'ble High Court. It, ergo, follows that the statutorily mandated procedure must be adhered to by the authorities, non-observance of which renders the assessment order null and void.

14. Similar issue came up for consideration before the Pune Benches of the Tribunal in *Skoda Auto India Ltd. Vs. ACIT*. In that case also the AO passed the draft order and simultaneously issued notice of demand and initiated penalty proceedings by issuing notice u/s 274 of the Act. It was thereafter that the final assessment order was passed. The assessee challenged the legality of the final assessment order. Vide its order dated 02-07-2019, the Tribunal in ITA No.714/PUN/2011 has held that the demand got crystallised on passing of the draft order pursuant to issue of demand notice which is contrary to the relevant provision of the Act. *Ex Consequenti*, the draft order was held to be invalid in law and the consequential assessment order void *ab-initio*.

15. The Id. DR buttressed his point of view by relying on an order passed by the Hyderabad Benches in *BS Ltd. Vs. ACIT (2018) 94 taxmann.com 346 (Hyderabad-Trib.)* in which it has been held that the issuance of demand notice along with the draft order is only a procedural mistake. In our considered opinion, this case does not advance the Departmental stand. Unlike the assessee in the instant case not raising objections before the DRP and pursuing the appeal straight away before the Id. CIT(A), the assessee in that case adopted the route of the DRP. Be that as it may, it is found that similar issue came up for consideration before the Pune Benches of the Tribunal in series of cases including *Eaton Fluid Power Ltd. Vs. DCIT (2018) 96 taxmann.com 512 (Pune Trib.)*. In that case also, the AO passed the draft order u/s.143(3) r.w.s. 144C(1) of the Act. Thereafter, he issued notice of demand u/s.156 and initiated penalty proceedings u/s.271(1)(c) of the Act. When this infirmity in not following the statutorily mandated procedure was pointed out, the Tribunal declared the assessment order to be without jurisdiction and hence, null and void.

16. It is observed that the facts and circumstances of the instant case are similar to those considered by the Pune Benches of the

Tribunal in the case of *Skoda Auto India Ltd. Vs. ACIT (supra) and Eaton Fluid Power Ltd. Vs. DCIT (supra)*. As the AO in the extant case issued notice of demand at the stage of the draft order, which, actually ought to have been done at the stage of passing the final order, thereby assigning the finality to the assessment at the stage of draft order itself, we hold that the resultant final assessment order got vitiated in the eyes of law and hence cannot stand.

17. Before parting, we would like to clarify that for the assessment year 2006-07 also, the assessee took similar argument urging that the assessment order be declared null and void. We have noted above that the assessment proceedings get completed on the issue of notice of demand only. On examination of facts, the Tribunal for such earlier year found that even though penalty notice was issued u/s 274 but no notice of demand was issued u/s 156 of the Act pursuant to the draft order. It was under such circumstances that the Tribunal in ITA No. 1470/Pun/2010 vide its order dated 21.08.2019 did not accept the contention of the assessee to the effect that the assessment got concluded on the passing of the draft order and hence the final assessment order was a nullity. It is an altogether different matter that the initiation of penalty through the draft order carried some infirmity, but that

would not impinge upon the validity of the assessment order.

18. To sum up, we set-aside the assessment order by declaring it to be null and void. Thus, the income offered in the return becomes total income of the assessee.

A.Y. 2009-10 :

19. Here also, the assessee has raised the first issue in its Cross objection challenging the validity of the assessment order passed by the AO on the ground that the AO issued notice of demand u/s.156 and also penalty notice along with draft order.

20. For this year, it is observed that the assessee filed return declaring total income at Rs.128.23 crore. Certain international transactions were reported. The AO made a reference to the TPO for their benchmarking. The TPO proposed transfer pricing adjustment of Rs.6.33 crore in relation to the international transaction of Indenting Commission; Rs.1.25 core in the payment of Royalty; and Rs.1.00 crore on account of difference in price of products sold to Associated Enterprises and Non-Associated Enterprises. The AO passed the "Assessment order" u/s.143(3) r.w.s. 144C(1) of the Act on 28-03-2013. He not only computed

total income, but also computed the amount of interest u/ss 234B to 234D in the assessment order itself. At the end of the assessment order, he directed to issue demand notice for Rs.4.32 crore, which is inclusive of the interest and also simultaneously initiated penalty proceedings u/s.271(1)(c) by means of notice u/s.274. A copy of the demand notice has also been placed on record. The final assessment order came to be passed later on 30-04-2013. Challenge has been laid in the assessee's Cross objection to the validity of the final assessment order on the ground that the AO completed the assessment at the stage of passing of the draft assessment order by not only issuing notice of demand u/s.156 but also initiating penalty u/s.271(1)(c) of the Act.

21. Having heard both the sides, it is observed that the facts and circumstances for this year are *mutatis mutandis* similar to those of the preceding year discussed hereinabove. Following the same view, we declare the assessment order to be null and void. In view of this, the income declared by the assessee in the return of income becomes final.

22. In the light of our decision on the first issue raised in the Cross objections of the assessee for the two years under

consideration in quashing the assessments, there is no need to deal with the grounds raised by the Revenue in its appeals on merits.

23. In the result, the Cross objections are partly allowed in so far as validity of the assessment orders is concerned and the appeals of the Revenue are dismissed.

Order pronounced in the Open Court on 29<sup>th</sup> August, 2019.

Sd/-  
**(PARTHA SARATHI CHAUDHURY)**  
**JUDICIAL MEMBER**

Sd/-  
**(R.S.SYAL)**  
**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 29<sup>th</sup> August, 2019  
सतीश

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-IT/TP, Pune
4. The CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे  
“सी” / DR ‘C’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune



|     |  | Date       |       |
|-----|--|------------|-------|
| 1.  | Draft dictated on                                | 26-08-2019 | Sr.PS |
| 2.  | Draft placed before author                       | 28-08-2019 | Sr.PS |
| 3.  | Draft proposed & placed before the second member |            | JM    |
| 4.  | Draft discussed/approved by Second Member.       |            | JM    |
| 5.  | Approved Draft comes to the Sr.PS/PS             |            | Sr.PS |
| 6.  | Kept for pronouncement on                        |            | Sr.PS |
| 7.  | Date of uploading order                          |            | Sr.PS |
| 8.  | File sent to the Bench Clerk                     |            | Sr.PS |
| 9.  | Date on which file goes to the Head Clerk        |            |       |
| 10. | Date on which file goes to the A.R.              |            |       |
| 11. | Date of dispatch of Order.                       |            |       |

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