

Issuing notice of demand and penalty along with draft assessment order revokes the requirement of law and is not a curable defect

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In brief

In a recent ruling¹, the Pune bench of the Income-tax Appellate Tribunal (Tribunal) held that a draft assessment order passed by the tax officer (TO) along with a notice of demand without providing any direction to taxpayer to either accept the addition or file objections before the Dispute Resolution Panel (DRP) is not in compliance with the provisions of section 144C of the Income-tax Act, 1961 (the Act), and such a defect is not curable under section 292B of the Act.

In detail

Facts

- The TO, while passing the draft assessment order, wherein certain transfer pricing (TP) additions were proposed, gave directions to carry forward and set-off unabsorbed depreciation/business losses, and thereafter, computed the tax demand (along with interests due).
- The TO, consequent to allowing credits for withholding taxes, issued a notice of demand and a notice for initiating penalty proceedings along with the draft assessment order.
- There were no directions in the draft assessment order

to either accept the proposed additions or file objections before the DRP.

- The taxpayer filed objections before the DRP, which upheld the additions on merits. No objection was raised pertaining to the validity of the draft assessment order.
- The taxpayer filed an appeal before the Tribunal against the final assessment order. Further, the taxpayer also challenged the validity of the draft assessment order.

Issue before the Tribunal

Whether the draft assessment order passed by the TO in contravention to the procedure prescribed under section 144C

of the Act was without jurisdiction and invalid in law?

Taxpayer's contentions

- The draft assessment order passed by the TO was in essence the final assessment order.
- Issuing a notice of demand and notice for initiation of penalty proceedings along with the draft assessment order, and with no directions in the draft assessment order to either accept the TP additions or file objections before the DRP is without jurisdiction and makes the entire assessment proceedings unsustainable.
- Reliance was placed on judgements² wherein the

¹ ITA No. 467/ PUN/ 2015

² DCIT v. Rehaui Polymers Private Limited [ITA No. 566/ PUN/2015] (Pune ITAT); JCB India Limited v. DCIT [2017] 398 ITR 189 (Delhi HC) and Turner International India Private Limited v. DCIT [2017] 398 ITR 177 (Delhi HC)

draft assessment order was held to be null and void under a similar fact pattern.

Tribunal's ruling

- The Tribunal observed that the TO assessed the total income and tax liability of the taxpayer and issued a notice of demand along with notice of penalty initiating penalty proceedings.
- The Tribunal observed that either the requirement of the law is to issue a show cause notice to the taxpayer accepting the same or file objections before the DRP, not

following such a requirement of law is not curable under section 292B of the Act.

- The Tribunal observed that the issue had been squarely covered by the judgments² relied by the taxpayer.
- Hence, the Tribunal held that the draft assessment order passed by the TO was in fact a complete assessment order and was invalid in law.

The takeaways

- This ruling recites the position of law that the TO while

issuing the draft assessment order should not assess the total income and tax liability of the taxpayers.

- This decision also reaffirms that passing a draft assessment order violating the procedural requirements of law is not a curable defect as per the provisions of section 292B of the Act.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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