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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 2384/2015 & CM No. 4277/2015

M/S ESPN STAR SPORTS MAURITIUS S.N.C. ET COMPAGNIE
(NOW KNOWN AS ESS ADVERTISING (MAURITIUS) S.N.C ET
COMPAGNIE) Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar and Mr. Divesh
Chawla, Advocates.

versus

THE UNION OF INDIA & ANR. Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC
and Mr. Dev P. Bhardwaj, CGSC with Mr.
Jitendra Tripathi, Advocate for UOI.
Mr. Ashok K. Manchanda, Senior Standing
counsel with Ms. Vibhooti Malhotra, Advocate
for Respondent No.2.

AND

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W.P.(C) 2397/2015 & CM No. 4298/2015

M/S ESS DISTRIBUTION (MAURITIUS) S.N.C ET
COMPAGNIE Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar and Mr. Divesh
Chawla, Advocates.

versus

THE UNION OF INDIA & ANR. Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC
and Mr. Dev P. Bhardwaj, CGSC with Mr.
Jitendra Tripathi, Advocate for UOI.
Mr. Ashok K. Manchanda, Senior Standing
counsel with Ms. Vibhooti Malhotra, Advocate
for Respondent No.2.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER

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23.03.2016

Dr. S. Muralidhar, J.:

1. These two writ petitions demonstrate an extraordinary instance of subversion by an Assessing Officer (AO) of the order of the superior statutory authority i.e. the Dispute Resolution Panel which declared that the AO lacked jurisdiction to deal with an issue. The AO nevertheless proceeded to pass a final assessment order in the teeth of the order of the DRP.

2. In Writ Petition (Civil) No. 2384 of 2015, the Petitioner, M/s. ESPN Star Sports Mauritius S.N.C. ET Compagnie (now known as ESS Advertising (Mauritius) S.N.C et Compagnie) (hereinafter referred to as 'ESPN Star Sports') is a partnership firm established under the laws of Mauritius. It was established by ESPN Mauritius Limited (now known as Worldwide Wickets, Mauritius) having 99.9% share in profit and ESS Asian Network Pvt. Limited (incorporated in Singapore) having 0.1% share. ESPN Star Sports is engaged in the business of allotting advertising time and programme sponsorship ('Ad time') in connection with television programming. It is further stated that ESPN Star Sports has entered into agreements with ESPN Software India Private Limited (now known as Star Sports India Private Limited) for allotting advertisement time to various advertisers and advertising agencies in India.

3. In Writ Petition (Civil) No. 2397 of 2015, the Petitioner, M/s. ESS Distribution (Mauritius) (hereinafter referred to 'ESS Distribution'), is also

a partnership firm established under the laws of Mauritius. It was also established by ESPN Mauritius Limited (now known as Worldwide Wickets, Mauritius and also incorporated in Mauritius) having 99.9% share in profit, and ESS Asia Limited (incorporated in Malaysia) having 0.1% shares. ESS Distribution is engaged in the business of distribution of sports and sports related television programmes broadcast by ESPN Star Sports, Singapore. ESS Distribution has also entered into agreements with ESPN Software India Private Limited (now known as Star Sports India Private Limited) for distribution of the channels.

4. Both ESPN Star Sports as well as ESS Distribution filed their respective returns of income for the Assessment Year ('AY') 2010-11 on 1st October 2010 with the status of a firm. The stand taken by both the Petitioners is that the revenue generated from distribution being business profit was not taxable in India in view of the Article 7 (1) of the India-Mauritius Double Taxation Avoidance Agreement ('hereinafter referred to as the 'Treaty') since there was no permanent establishment (PE) of either Petitioner in India in terms of Article 5 of the said Treaty. It is stated that in the notes to the return of income filed by the Petitioners, it was clearly mentioned that each of them was a partnership firm incorporated on 29th March 2002 under the laws of Mauritius.

5. Both the returns were picked up for scrutiny by the AO. Since both the Petitioners had entered into international transactions during the AY 2010-11, their cases were referred to the Transfer Pricing Officer ('TPO') for determination of the arm's length price ('ALP') of all the international transactions reported in the Form-3CEB filed by the Petitioners.

6. In each of the cases, the TPO has, by an order dated 17th December 2013, accepted the value of the international transactions as reported by the Petitioners. In other words, there was no variation or transfer price adjustment as a result of the order of the TPO. During the course of the assessment proceedings, the AO, i.e., the Additional Director of Income Tax, Range 1 (ADIT), International Taxation specifically asked each of them as to why the status of the firm should not be treated as 'foreign company' and taxed accordingly.

7. By a separate letter dated 27th March 2014 each of the Petitioners filed submissions before the AO pointing out the difference between a foreign company and a foreign partnership firm. It was pointed out that neither Petitioner could be considered to be a company, as it was not a body corporate in terms of Section 2 (17) of Act.

8. At this stage reference may be made to the applicable provisions. In terms of the mechanism provided under Section 144C of the Act, where an AO proposes to make, on or after the 1st October 2009, any variation in the income or loss returned which is prejudicial to the interest of an 'eligible assessee', the AO shall, in the first instance, forward a draft of the proposed order of assessment to such 'eligible assessee'.

9. Section 144C (15) (b) defines 'eligible assessee' as:

“(i) any person in whose case the variation referred to in sub-Section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-Section (3) of Section 92CA; and
(ii) any foreign company.”

10. The proceedings envisaged under Section 144C (2) is that the 'eligible assessee' shall, within 30 days of the receipt of the draft order, either file

his acceptance of the variations to the AO or file his objections to such variation with the DRP as well as the AO.

11. Under Section 144C (15) (a) the DRP has been defined as a “collegium comprising of three Principal Commissioners or Commissioners of Income Tax” constituted by the Central Board of Direct Taxes for that purpose. Where objections are filed before the DRP, it is expected that in terms of Section 144C (5), the DRP shall issue directions “as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.” The DRP, under Section 144C (8) of the Act, has the power to confirm, reduce or enhance the variation proposed in the draft assessment order. Section 144C (10) of the Act provides that “every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.”

12. Further Section 144C (13) of the Act provides that the AO shall, upon receipt of the directions issued under Section 144C (5), complete the assessment in conformity with the said directions issued under Section 144C (5) notwithstanding anything to the contrary in Section 153 or Section 153B, without providing any further opportunity of being heard to the Assessee. It is further stipulated under Section 144C (13) that the AO shall complete the assessment within one month from the end of the month in which such direction issued by the DRP is received.

13. In the above context, the Petitioners urged before the AO, i.e., ADIT that neither of them was an ‘eligible assessee’ as defined under Section 144C (15) (b) of the Act. It was pointed out that neither of them were the ‘person’ in whose case the variation arose as the consequence of the order of the TPO passed under Section 92CA (3) of the Act. Further, neither of

them were a 'foreign company'.

14. The AO passed the draft assessment order in the case of each of the Petitioners on 28th March 2014. In para 1.2 of the draft assessment order for ESS Distribution and Para 2 of the draft assessment order for ESPN Star Sports, the AO noted the fact that the Assesseees are partnership firms established under the laws of Mauritius on 29th March 2002. Further it was noted that in the case of ESPN Star Sports, its return had been filed by it disclosing an income of Rs. 91,63,940 and in respect of ESS Distribution, it disclosed an income of Rs. 97,07,350. It was further noted by the AO that in both reports of the TPO, the TPO proposed no adjustment or variation to the ALP in the international transactions filed by the Petitioners. Nevertheless, the AO, i.e., the ADIT, computed the total taxable income as Rs. 406,95,60,867 in the case of ESS Distribution and Rs. 94,93,95,777 in the case of ESPN Star Sports. In the above draft assessment orders, each of the Petitioners was informed that if it intends to file objections with the DRP, it should do so within 30 days of the receipt of the order or file an acceptance of the order within the same period. If no objections are received during that period, the assessment would be completed on the basis of the draft assessment order itself.

15. Aggrieved by the above draft order, both the Petitioners filed their respective objections before the DRP on 9th May 2014. One of the grounds in the objection was that the AO erred in passing a draft assessment order under Section 144C (1) of the Act notwithstanding that neither of the Petitioners was an 'eligible assessee'.

16. The DRP issued notices dated 16th October 2014 under Section 144C (11) of the Act calling upon the Petitioners to represent their case and file

their respective submissions. A copy of the notices were also sent to the AO, i.e, ADIT to represent his case.

17. Pursuant to the above notices, the Petitioners filed their respective written submissions. In each of the case, the DRP passed a separate order dated 26th December 2014 accepting the plea of the Petitioners that neither of them was 'eligible assessee' in terms of Section 144C (15) (b) of the Act. Para 4.2 of both the orders of DRP reads as under:

“4.2 In view of the above, we are of the considered opinion that the Assessee is not an 'eligible assessee' in accordance with Section 144C (15) (b) as neither the TPO proposed any variation in the returned income nor the Assessee is a foreign company. Thus, we do not have the jurisdiction over the case. Consequently, we decline to issue any direction in this case. The proceedings here are, therefore, dismissed in limine in view of the above.”

18. A copy of each of the orders was marked to the Commissioner of Income Tax-I, International Tax, New Delhi as well as the Additional Commissioner of Income Tax, Range-I, International Transactions, New Delhi and the Assessee. The above orders were binding on the AO under Section 144C (10) of the Act. He, therefore, ought to have, consistent with the said orders, not proceeded to pass final assessment orders on the basis of the draft assessment orders passed by him. However, the AO proceeded to pass final assessment orders on 28th January 2015 on the basis of the draft assessment orders. The AO proceeded to further notice Section 144C (10) of the Act and then concluded in para 4.2 as under:

“4.2 Thus, even if the Assessee filed seven objections before the DRP, DRP has examined only first objection, came to the conclusion that the Assessee is not an eligible assessee and declined to consider objections of the Assessee for giving directions to the AO. The DRP has not acted in accordance with the provisions of the Act while passing this order which is

grossly illegal, against the intent of legislature, without following the basic principles of natural justice and adopting very narrow interpretation of the provisions of the Act. Learned DRP has held that the Assessee is not an eligible assessee as per Act.”

19. It was further stated in the final assessment orders passed by the AO that the DRP did not give the AO any opportunity prior to deciding to dismiss the proceedings ‘*in limine*’. The AO proceeded to analyse the scope of the powers of the DRP. It was observed *inter alia* by the AO in the final assessment order, as under:

“4.5..... The scope of DRP, therefore, being limited only to any variation in income/loss proposed by the AO, the above objection relating to the action of AO passing the Draft Assessment Order treating it as ‘eligible assessee’ is outside the mandate of the DRP.”

20. The AO, i.e., ACIT thereafter proceeded to pass the final assessment order confirming the transfer pricing adjustment to the income in the case of each of the Petitioners.

21. In these circumstances, the Petitioners have approached this Court under Article 226 of the Constitution of India challenging the final assessment order passed by the AO, i.e., ACIT.

22. At the first hearing of the writ petitions, i.e., on 11th March 2015 this Court, while directing notice to issue in these writ petitions, stayed the operation of the final assessment order dated 28th January 2015 issued by the AO.

23. At the subsequent hearing on 15th July 2015, this Court also stayed the penalty proceedings initiated by virtue of the notice dated 7th July 2015.

24. In response to the notice, the Respondent has filed its counter affidavit.

25. Mr. Porus Kaka, learned Senior counsel appearing for the Petitioners, contended that the final assessment order passed by the AO in each case on 28th January 2015 was in violation of Section 144C (10) of the Act inasmuch as it was contrary to the determination by the DRP by its order dated 26th December 2014 accepting the plea of the Petitioners that neither of them was an 'eligible assessee' within the meaning of Section 144C (15) of the Act. Mr. Kaka submitted that under Section 144C (13) of the Act, the AO was bound to issue an order in conformity with the order of the DRP. Mr. Kaka further submitted that although the DRP declined to issue any direction, its finding that neither of the Petitioners was 'eligible assessee' was binding on the AO and he could not have proceeded to pass the final assessment order contrary to the above finding.

26. In support of the plea that the final assessment order was without 'jurisdiction' and therefore, this order should be set aside by the Court, reliance was placed by Mr. Kaka on the decision of the Andhra Pradesh High Court in ***Zuari Cement Limited v. Assistant Commissioner of Income Tax, Circle- 2(1), Tirupathi*** (decision dated 21st February 2013 in W.P. (C) No. 5557 of 2012), decision of the Bombay High Court in ***International Air Transport Association v. Deputy Commissioner of Income Tax*** (decision dated 18th February 2016 in W.P. (L) No. 351 of 2016) and decision of this Court dated 17th February 2016 in W.P. (C) No. 4262 of 2015 [***Honda Cars India Limited (Formerly – M/s. Honda***

***Siel Cars India Limited) v. Deputy Commissioner of Income Tax]* .**

27. Mr. Kaka drew attention to the deliberate disobedience by the AO of the order of the DRP and also questioned the validity and legality of the said order. According to Mr. Kaka, this course of action was not available to the AO particularly in view of the clear mandate of Section 144C (13) of the Act. In this context, Mr. Kaka referred to the decision in ***Union of India v. Kamlakshi Finance Corporation Limited 1992 Supp (1) SCC 443*** and ***Nav Bharat Impex v. Union of India 2010 (255) ELT 324 (Del)***. Mr. Kaka further submitted that notice has been issued to the Petitioner for reopening of the assessment of each of the Petitioners for AY 2010-11 under Section 147/148 of the Act.

28. In reply to the above arguments, Mr. Ashok K. Manchanda, learned Senior counsel appearing for the Revenue, submitted that while the final assessment order cannot be justified in law, the AO ought to have passed the assessment order under Section 143 (3) of the Act against the Petitioners and the appeal could have been filed by the Petitioners before the Commissioner of Income Tax (Appeals) ['CIT (A)']. While he was not aware that the Petitioners have been issued notice under Section 147 of the Act, Mr. Manchanda submitted that directions similar to one have been issued in the case of ***Honda Cars India Limited v. Deputy Commissioner of Income Tax (supra)*** giving liberty to the Revenue to take recourse of such remedy, as may be available to it, in accordance with law.

29. The above submissions have been considered. In the first place the Court would like to observe that this is an instance of blatant disregard by the AO of the order of the DRP notwithstanding that the DRP had

categorically held that the two Petitioners do not satisfy the conditions of an 'eligible assessee' in terms of Section 144 (15) (b) (ii) of the Act. As already noticed under Section 144C (10) of the Act the AO had no option but to comply with the order of the DRP. Even if no direction was issued by the DRP under Section 144C (5) of the Act, the fact that the DRP held that both the Petitioners were not 'eligible Assesseees' could not have been ignored by the AO.

30. It appears to the Court that it is plain that under Section 144C, the AO should have proceeded to pass an order under Section 143 (3) of the Act. Instead the AO confirmed the draft assessment order passed under Section 144C (1) of the Act. This, therefore, vitiated the entire exercise. The Court has no hesitation in holding that the final assessment order dated 28th January 2015 is without jurisdiction and null and void. The draft assessment order dated 28th March 2014, having been passed in respect of entities which were not 'eligible assesseees', is also held to be invalid.

31. It is a matter of concern that the AO has in the present case has chosen to label the order of the DRP to be invalid and that is the justification for not complying with the said order. As already noticed, the DRP, in terms of Section 144C (15) (a) is a collegium of three Principal Commissioners or the Commissioner of Income Tax. The DRP admittedly is the superior authority in relation to an AO who in this case appears to be Additional CIT. Section 144C (10) read with Section 144C (13) makes it abundantly clear that there is no option with an AO but to be bound by orders and subject to review by the DRP. It is bound by the DRP. A reference may also be made to the decision in **Zuari Cement**

Limited (*supra*) where it was held that an order of assessment which is contrary to the mandatory provisions of Section 144C of the Act was declared as “one without jurisdiction, null and void and enforceable.” It is therefore, for this reason, in the said case, the High Court of Andhra Pradesh set aside the impugned order while allowing the writ petition notwithstanding that the Petitioner had a statutory remedy available to it.

32. The situation as far as the present case is concerned is no different. The said order of the Andhra Pradesh High Court was upheld by the order of the Supreme Court when it dismissed Special Leave Appeal (Civil) 16694 of 2013 by its order dated 27th September 2013.

33. Recently the High Court of Bombay has in **International Air Transport Association** (*supra*) held that an assessment order passed by the AO which is contrary to the mandatory requirement of Section 144C of the Act, is entirely without jurisdiction. There, despite the Petitioner being a foreign company, the AO did not record the procedure under Section 144C (1) of the Act and proceeded to pass the final assessment order under Section 143(3) of the Act.

34. In **Vijay Television (P) Ltd v. Dispute Resolution Panel, Chennai (2014) 369 ITR 113 (Mad)** where again the AO passed the final assessment order under Section 143 (3) of the Act instead of passing a draft assessment order under Section 144C (1) of the Act and then sought to issue a Corrigendum modifying the final order of the assessment to be read as a draft assessment order but beyond the period prescribed for limitation for passing such order. The High Court held the entire exercise to be without jurisdiction.

35. In ***Pankaj Extrusion Limited v. Assistant Commissioner of Income Tax (2011) 241 CTR (Guj) 390*** the Division Bench of Gujarat High Court, in interpreting Section 144C of the Act held that where an Assessee was not an 'eligible assessee', the question of passing the draft assessment order under Section 144C of the Act did not arise.

36. As far as the decision of this Court in ***Honda Cars India Limited v. Deputy Commissioner of Income Tax (supra)*** is concerned, the question that arose is whether the AO could have passed the draft assessment order when the Assessee did not satisfy the condition 'eligible assessee' under Section 144C (15) (b) of the Act. Answering the question is in the negative, the Court held that the draft assessment order of the AO is null and void and quashed on that basis. In para 15 of the said decision, it was observed as under:

“15. Since we have quashed the draft assessment order, the question that the assessment has now become time barred as left open and it is open to the parties to take recourse of such remedy, as may be available to them in law.”

37. As regards the conduct of the AO in the present case, the Court would only like to highlight the lead portion of the decision of the Supreme Court in ***Union of India v. Kamlakshi Finance Corporation Limited (supra)***. The facts in that case were that according to the Assistant Collector ('AC'), the electrical insulation tapes manufactured by the Assessee, Kamlakshi Finance Corporation Limited ('KFCL') fell under the Tariff heading 39.19 of the Schedule to the Central Excise Tariff Act, 1985 whereas the Assessee was claiming they fell under Entry 85.47. The impugned order of the AO was set aside by the Collector (Appeals) who issued a direction to the AC to pass a fresh reasoned and speaking order.

However, the AC declined to follow the order of the Collector (Appeals) and reiterated his earlier decision that was set aside by the Collector (Appeals). The writ petition filed by the Assessee was allowed by the Bombay High Court against which the Union of India went before the Supreme Court.

38. The Supreme Court in ***Union of India v. Kamlakshi Finance Corporation Limited*** (*supra*) took exception to the conduct of the AO in overlooking the binding order of the Collector (Appeals) and reiterating the order passed by him earlier. In response to the plea of the Appellant that the Officer who passed the order was not actuated by any malafide, the Supreme Court observed, in this regard, as under:

“6..... we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the Assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellant hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not ‘acceptable’ to the department – in itself an objectionable phrase – and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this

healthy rule is not followed, the result would only be undue harassment to Assesseees and chaos in administration of tax laws.”

39. In ***Nav Bharat Impex v . Union of India*** (*supra*) the Division Bench of this Court dealt with the case where despite the clear directions given by the CIT (Appeals), the delayed refunds were paid to the Petitioner without any element of interest. It was noted that the Assistant Commissioner was merely required to comply with the directions given by the CIT (A) in the appellate order. However, the Assistant Commissioner look it upon himself to examine the case, as per his own understanding and therefore, had “gone to the extent of overreaching the orders of his superior authority, that is, the Commissioner (Appeals).”

40. Relying on the decision in ***Union of India v. Kamlakshi Finance Corporation Limited*** (*supra*) the Court set aside the rejection of claim of interest by the Petitioner in that case and directed the Assistant Commissioner to comply with the orders passed by the Commissioner Appeals).

41. The language used in the present case by the AO while disagreeing with the binding order of the DRP is wholly unacceptable. In the final assessment order dated 28th January 2015, the AO while discussing the order of the DRP observed *inter alia* in para 4.2 that "The DRP has not acted in accordance with the provisions of the Act while passing this order which is grossly illegal, against the intent of legislature, without following the basic principles of natural justice and adopting very narrow interpretation of the provisions of the Act.”

42. In the circumstances, the Court, while setting aside the final assessment order dated 28th January 2015, directs that the draft assessment order, the order of the DRP, the final assessment order as well as this order shall be placed before the concerned Commissioner who is administratively supervising the work of Additional CIT who passed the draft and final assessment order. The Commissioner will thereafter proceed in accordance with law after issuing notice to the concerned AO and affording him an opportunity of being heard.

43. Mr. Manchanda then submitted that this Court should clarify that in terms of Section 153 (3) B of the Act, the Revenue can within a period of 30 days pass the final assessment order under Section 143 (3) of the Act. The Court notes that the Revenue has not been able to contest the submission of the Petitioners that in the present case the Revenue has issued a notice to the Petitioner under Section 147 of the Act seeking to reopen the assessment for the AY 2010-11. The question of the Court issuing any clarification as sought by the Revenue therefore does not arise. In any event in the present case, the AO did pass the final assessment order in continuation of draft assessment order under Section 144C (1) of the Act and the said final assessment order has been held by this Court, for the reasons recorded hereinabove, to be invalid.

44. The other plea of the Revenue that the Petitioners ought to have challenged the final assessment order before the CIT (A) is untenable for the reason that it was contrary to the order of the DRP which held in favour of the Petitioners. The order of the DRP was not challenged by the Revenue. In the circumstances, the final assessment order was without jurisdiction and this constitutes sufficient ground for the Court exercise its

powers under Article 226 of the Constitution.

45. For the above reasons, the draft assessment order dated 28th March 2014 and the final assessment order dated 28th January 2015 passed by the AO are held to be void *ab initio* and quashed on that basis. The orders consequential thereto also do not survive. However, it is clarified that the Court has not expressed any opinion regarding the validity of the proceedings against the Petitioners under Section 147/148 of the Act. The rights and contentions of the parties in those proceedings are left open to be urged and decided by the appropriate authority in accordance with law.

46. The writ petitions are allowed and the pending applications are disposed of in the above terms but, in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 23, 2016

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