



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1784 OF 2022

WITH

WRIT PETITION NO. 1791 OF 2022

M/s. CWT India Private Limited
Ground floor, Unit-2, Raheja Centre,
Free Press Journal Road, Nariman Point,
Mumbai 400021 (Maharashtra)
PAN: AAACI7084H

...Petitioner

Versus

Assistant Commissioner of Income Tax Circle-
1(2)(1),
Room No.535, 5th floor
Aaykar Bhawan, M.K.Road,
Mumbai 400 020 (Maharashtra)

...Respondent

Mr. Vishal Kalra a/w Ms. Rajnandini Shukla i/b Mr. Harsh Rajesh
Shah for Petitioner.
Mr. Suresh Kumar for Respondent.

CORAM K. R. SHRIRAM &
 DR. N. K. Gokhale, JJ.
DATED: 4th September 2023

ORAL JUDGMENT: (Per K.R.Shriram, J.)

1. Writ Petition No.1784 of 2022 and Writ Petition No.1791 of 2022 pertain to Assessment Years 2010-11 and 2009-10, respectively. The facts are identical and therefore, we decided to dispose both the matters together by this common order. With the consent of the Parties, the Petitions are taken up for hearing at this stage itself. Rule.

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Rule made returnable forthwith.

2. Petitioner filed its return of income for the respective years and the return of income was processed under Section 143(1) of the Income-tax Act, 1961 ("**Act**"). Subsequently, the case was selected for scrutiny and statutory notices were issued in both. As there were international transactions, a reference was made by the Assessing Officer ("**AO**") to the Transfer Pricing Officer ("**TPO**") under Sub-section (2) of Section 92CA of the Act. The TPO passed an order under Section 92CA(3) of the Act making upward adjustment. On the basis of the said order of the TPO, the AO passed draft assessment order. The draft assessment order which contained additions was objected to by Petitioner before the Dispute Resolution Panel ("**DRP**") under Sub-section 5 of Section 144C of the Act. The DRP rejected the contentions of Petitioner and upheld the additions made. Consequently, a final assessment order came to be passed under Section 143(3) read with Section 144C(13) of the Act. The assessment order was challenged by Petitioner before the Income Tax Appellate Tribunal ("**ITAT**"). The ITAT vide its common order dated 1st May 2019 disposed Petitioner's appeals by setting aside the transfer pricing adjustments made and remanded the matter to the AO/TPO for *de-novo* consideration. The AO/TPO was also directed to consider Petitioner's additional submissions. Accordingly, the matter

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was referred by the AO to the TPO under Section 92CA(2) of the Act. The TPO passed an order under Section 92CA(3) of the Act wherein the TPO made certain adjustments to the arms length price. This adjustment was a variation prejudicial to the interest of Petitioner. The AO, on receipt of the order from the TPO, proceeded to issue a final assessment order under Section 143(3) read with Section 92CA and Section 254 of the Act. This order contained additions proposed in the TPO's order but was passed without passing a draft assessment order under Section 144C(1) of the Act. Petitioner has impugned this assessment order in these Petitions.

3. It is Petitioner's case that Section 144C(1) mandates that the AO shall notwithstanding anything contained to the contrary in the Act, in the first instance, forward a draft of the proposed order of assessment called a draft assessment order to the eligible assessee if he proposes to make any variation which is prejudicial to the interest of such assessee. It is not disputed that Petitioner was an eligible assessee.

4. Mr. Kalra submitted that failure to pass this draft assessment order would render the assessment order itself as null and void. He relied upon two judgments of this Court one in *Principal Commissioner of Income-tax v. Andrew Telecommunications (P) Ltd.*¹

¹ [2018] 96 taxmann.com 613 (Bombay)

and another *ExxonMobil Company Private Limited v. The Deputy Commissioner of Income Tax 6(1)(1), Mumbai & Anr.*²

5. We are in agreement with Mr. Kalra.
6. Section 144C of the Act reads as under:

"144C. Reference to dispute resolution panel.—(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 1st 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.*

² Writ Petition No.451 of 2022 (Bombay) dated 18.4.2022 (Unreported)

(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) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner as provided in sub-section (12) of section 144BA.

(15) For the purposes of this section,—

(a) “Dispute Resolution Panel” means a collegium comprising of three Principal Commissioner or Commissioners of Income-tax constituted by the Board for this purpose;

(b) “eligible assessee” means,—

(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."

Section 144(15)(b)(i) defines 'Eligible Assessee'

7. It is clear that the AO shall, in the first instance, forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation is prejudicial to the interest of such assessee. Certainly there is a variation in the assessment order different from what was filed in the return of income and since it is by way of an addition made, the variation is prejudicial to the interest of Petitioner. In *Andrew Telecommunications Private Limited (Supra)* also the facts were identical. The Court relying on the judgments in the case of *International Air Transport Association v. Deputy Commissioner of Income-tax*³ of this Court and in the case of *Zuari Cement Ltd v ACIT*⁴ of the Division Bench of the Hon'ble Andhra Pradesh High Court has held that *'the failure to pass a draft assessment order under Section 144C(1) of the Act would result in rendering the final assessment as one without jurisdiction.'* Paragraphs 9,14,17 and 20 of *Andrew Telecommunications (Supra)* read as under:

"9. The matter was sent back to the Transfer Pricing Officer who gave hearing to the Assessee and passed a fresh order on 30th January 2014. Thereafter, the Assessing Officer, without

³ [2016] 68 taxmann.com 246 (Bombay)

⁴ WP(C) No.5557 of 2012, dated 21.2.2013

issuing any draft assessment order, proceeded to pass an order on 2nd February 2015. The Assessee challenged the said order before the Commissioner of Income Tax (Appeals) and the appeal was partly allowed by the commissioner of Income Tax (Appeals) by order dated 13th March 2015. As against this order, the Revenue filed the Income Tax Appeal No. 271/2015 before the Income Tax Appellate Tribunal and the Assessee filed a Cross Objection No. 62/2015.

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14. Mr. Pardiwala contended that a draft assessment order ought to have been issued and upon failure of the Officer to do so the Assessee has lost a valuable right. Mr. Pardiwala submitted that, when the Dispute Resolution Panel sent the proceedings back to the Transfer Pricing Officer, categorical observations were made that the order was passed in violation of the principles of natural justice and exercise had to be taken afresh. He submitted that therefore the earlier draft assessment order did not exist and a fresh draft order had to be issued and the failure has vitiated the further proceedings and, therefore, there is no error in the order passed by the Tribunal and there is no question of law arises. Mr. Pardiwala relied upon the decisions in the case of the *Dy.CIT v. Control Risks India (P) Ltd.* [SPL(Civil) No.7090 of 2018]; *Control Risks India (P) Ltd. v. Dy. CIT* [WP(C) 5722 of 2017 & CM No.23860 of 2017 (Stay), dated 27-7-2017]; *International Air Transport Association v. Dy. CIT* [2016] 68 taxmann.com 246/241 Taxman 249 (Bom); *JCB India Ltd. v. Dy. CIT* [2017] 85 taxmann.com 155/251 Taxman 143/398 ITR 189 (Delhi) and *Turner International India (P) Ltd. v. Dy. CIT* [2017] 82 taxmann.com 125/398 ITR 177(Delhi).

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17. In the case of *International Air Transport Association (supra)*, the Division Bench of this Court has held that the order passed by the Assessing Officer without their being any draft assessment order is illegal and without jurisdiction. The same view has been reiterated in the case of *Zuari Cement Ltd. v. ACIT* [WP(C) No. 5557 of 2012, dated 21-02-2013] by the Division Bench of Andhra Pradesh High Court which also held that the failure to pass a draft assessment order under Section 144C(1) of the Act would result in rendering the final assessment as one without jurisdiction. This position of law is settled.

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20. In the case of *JCB India Ltd. (supra)* the Division Bench of the Delhi High Court in identical circumstances has held that after the remand on facts, the draft assessment order was necessary.” (emphasis supplied)

8. In *ExxonMobil Company Private Limited (Supra)* where the facts were also similar, Revenue's counsel conceded that under Sub-

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section (1) of Section 144C of the Act, the AO ought to have issued draft assessment order and if such draft assessment order has not been passed before the final assessment order is passed, the order has to be set aside.

9. Mr. Suresh Kumar basically reiterated whatever is submitted in the affidavit-in-reply filed through one Harish Kelkar. In the affidavit-in-reply, reliance has been placed on a judgment of the Hon'ble Madras High Court in the case of *M/s. Enfinity Solar Solutions Private Limited v. The Deputy Commissioner of Income Tax, Corporate Circle-2(1), Chennai*⁵. In fact, in the said judgment also the position as in law as noted above has been re-affirmed. Paragraph 14 of the judgment reads as under:

“14. Careful perusal of the above provision, as rightly pointed out by the Petitioner, the draft order is mandatory under Section 144(C) of the Income Tax Act. An Assessing Officer, at the first instance, forward a draft proposed order of assessment, enabling the assessee to accept the variations to the Assessing Officer or file his objections, if any, with the Disputes Resolution Panel and the Assessing Officer. Thus, the procedure of passing of draft assessment order provides a right to an assessee to file his objections before the Disputes Resolution Panel and the Assessing Officer for vindicating his grievances and redress the same. It is needless to state that the provisions of the Act must be complied with by the executives in its letter and spirit. When the procedure of passing the draft assessment order is contemplated under the Act, the same is to be scrupulously followed by the authorities competent.”
(emphasis supplied)

10. Mr. Suresh Kumar relying on a judgment of the learned Single Judge of the Hon'ble Madras High Court in *M/s Volex Interconnect*

⁵ W.P.No.31165 of 2018 dated 21.06.2021

(India) Private Limited v. The Office of the Assistant Commissioner of Income Tax, Chennai ⁶ requested that the Court may remand the matter for fresh consideration to the AO. We are not inclined to grant such a request because;

(a) in Ms.Volex Interconnect (Supra), it was passed on the facts and circumstances of the case and;

(b) failure to pass draft assessment order Section 144C(1) of the Act has rendered the assessment as one without jurisdiction.

11. Accordingly, Rule made absolute in terms of prayer clause (a) which reads as under:

- Prayer clause (a) of Writ Petition No.1784 of 2022

"(a) issue a writ of and/or order and/or directions in the nature of certiorari, mandamus, prohibition or any other appropriate writ, order or direction for quashing the impugned final assessment order dated 29.09.2021 passed under section 143(3) read with section 92CA read with section 254 of the Act, and the impugned notices dated 29.09.2021 issued under sections 156 and 274 read with 271 of the Act by the Respondent in the case of the petitioner for assessment year 2010-11"

- Prayer clause (a) of Writ Petition No.1791 of 2022

"(a) issue a writ of and/or order and/or directions in the nature of certiorari, mandamus, prohibition or any other appropriate writ, order or direction for quashing the impugned final assessment order dated 28.09.2021 passed under section 143(3) read with section 92CA read with section 254 of the Act, and the impugned notices dated 28.09.2021 issued under sections 156 and 274 read with 271 of the Act by the Respondent in the case of the petitioner for assessment year 2009-10."

⁶ WP No.25583 and 25584 of 2017 pronounced on 27.5.201

12. Petitions disposed. No order as to costs.

(DR. N. K. GOKHALE, J.)

(K. R. SHRIRAM, J.)

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