

IN THE INCOME-TAX APPELLATE TRIBUNAL “E” BENCH,
MUMBAI
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
&
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER

ITA No. 1302/MUM/2024
(A.Y. 2020-21)

ITA No. 1303/MUM/2024
(A.Y. 2013-14)

ITA No. 1304/MUM/2024
(A.Y. 2019-20)

ITA No. 1305/MUM/2024
(A.Y. 2017-18)

ITA No. 1306/MUM/2024
(A.Y. 2014-15)

ITA No. 1307/MUM/2024
(A.Y. 2018-19)

ITA No. 1308/MUM/2024
(A.Y. 2016-17)

ITA No. 1309/MUM/2024
(A.Y. 2015-16)

Hasmukh Dipchand Gardi, 3 Usha Kiran ML Dahanukar Marg, Peddar Road, Mumbai - 400 026, Maharashtra	v/s. बनाम	Assistant Commissioner of Income Tax, Central Circle – 5(2), Air India Building, Nariman Point, Mumbai – 400 021, Maharashtra
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AANPG4068K		
Appellant/अपीलार्थी	..	Respondent/प्रतिवादी

Appellant by :	Smt. Aarti Vissanji,AR
Respondent by :	Sri Biswanath Das, CIT(DR)

Date of Hearing	25.11.2024
Date of Pronouncement	29.11.2024

आदेश / ORDER

PER BENCH:-

All the above captioned appeals have been filed by the assessee against the orders passed by the Learned Commissioner of Income-tax

(Appeals)-53, Mumbai [hereinafter referred to as “CIT(A)”] pertaining to assessment order passed u/s. 153A/143(3) of the Income-tax Act, 1961 [hereinafter referred to as “Act”] for the Assessment Years (8 Years) 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20, 2020-21. Since the issues are common and interlinked, these appeals are taken up together for adjudication. Appeal for the AY 2013-14 is being taken up as a lead case for the sake of convenience and brevity.

ITA No. 1303/MUM/2024

2. The grounds of appeal are as under:

A) Non-passing Draft Assessment order u/s 144C

1. *The Commissioner of Income Tax (Appeal) ("Ld. CIT (A)) has erred in not quashing the final assessment order passed by the Assessing Officer ("AO") without passing the draft assessment order as required u/s 144C of the Act as the appellant is a non-resident and falls under the definition of an "eligible assessee". On the facts and in circumstances of the case and in law, assessment order passed by the AO is without jurisdiction, bad in law and CIT(A) ought to have quashed the assessment order.*

B) No incriminating material

2. *The Ld. CIT(A) erred in not quashing the assessment order passed by the AO in the absence of any incriminating material for the assessment year under reference which is pre-requisite for issue of notice under section 153A. On the facts and in circumstances of the*



case and in law, CIT(A) ought to have quashed the assessment order in the absence of any incriminating material for the assessment year under reference.

The below grounds are without prejudice to ground No. 1 and 2

C) Re-computing Long Term Capital Gain

3. Ld. CIT (A) has erred directing the AO to assess the Long-Term Capital Gain on sale of property at Rs.1,01,48,320/- as against Rs. 70,30,000/- offered by the appellant. On the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have assessed long term capital gain at Rs. 70,30,000/-.

D) Disallowance of Deduction u/s 35AC of the Act

4. The Ld. CIT (A) has erred in confirming the action of Ld. AO in disallowing the deduction of Rs. 20,00,000/- claimed by the appellant u/s 35AC of the Act. On the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have allowed deduction of Rs. 20,00,000/- u/s 35AC of the Act.

E) Ad-hoc addition of cash in hand

5. The Ld. CIT (A) erred in disallowing Rs. 1,00,000/- on ad-hoc basis. On the facts and circumstances of the case and in law, ad-hoc addition made the Ld. CIT ought to be deleted.

F) Assessing rental income under the head "Income from Other sources"

6. The Ld. CIT (A) erred in directing the AO to assess rental Rs. 1,30,360/- under the head "income from Other sources" as against "income from House Property" offered by the appellant. On the facts and circumstances of the case and in law, rental income ought to be assessed under the head "income from House Property".



7. *The Ld. CIT (A) has also erred is not applying Article 22'Other Income of the DTAA between India and UAE for the determination of the Country in which the income is taxable. On the facts and circumstances of the case and in law, Article 22-'Other Income' of the DTAA between India and UAE ought to have been applied and consequently, income ought to have not taxed in India, as the same has not been expressly dealt with in any of the Article of the DTAA.*

3. Factual matrix of the cases as culled from the records reveal that the assessee an individual residing in the UK since 1973 and moved to Dubai in 1991. His residential status in India is that of 'non-resident'. Pursuant to search proceedings u/s 132 of the Act, income has been assessed u/s 153A/143(3) for the relevant assessment years vide assessment orders by making certain additions.

4. **Ground No. 1** is taken up first for adjudication as the entire foundation of the assessment order rests on it. In this ground, the assessee has challenged the action of the AO in passing the assessment order without issuing a draft assessment order. It is stated that the Ld. CIT (A) has erred in not quashing the final assessment order passed by the Assessing Officer without passing the draft assessment order as required u/s 144C of the Act as the appellant is a **non-resident and falls under the definition of an 'eligible assessee'**. It may be stated here that the appeal was filed with Id.CIT(A) originally on 4.11.2021.Later,vide a Writ petition was filed before the Hon'ble Bombay High Court in April 2022 vide WP No. 1890,1891,1893,2233,2252,2258,2280 and 3483 of 2022.The Hon'ble Court vide order dated 23.10.2023 allowed the assessee to file additional grounds of appeal before the CIT(A).Subsequently, the Id.CIT(A) obtained the comments of the AO as also of the assessee while adjudicating the appeal. He has taken into account parawise comments of the AO made in the Writ petitions as also the contents of the assessee



submitted by the assessee in support of this additional ground. The main contentions as made by the assessee before him are reproduced as below:

" The appellant has filed the following additional ground of appeal filed pursuant to the order of Hon' High Court of Bombay against the Writ Petition filed by the appellant against assessment orders passed for AY 2013-14 to 2020-21.

On the facts and circumstances of the case and in law, the Ld. Assessing Officer has erred in passing the assessment order dated 28.09.2021 u/s. 153A of the Act without forwarding a draft of the proposed order of assessment to the Appellant, being an eligible assessee and thereby not following the mandatory procedure laid down in Section 144C of the Act. Under the circumstances, the Appellant submits that the said final assessment order is void, bad-in-law, non-est, one without jurisdiction, non-curable and a nullity/void and hence the said final assessment order ought to be annulled/cancelled including on the principles of stare decisis.

Section 144C of the IT Act, provides as under.

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 which is prejudicial to the interest of such.

We submit that section 144C(1) makes it very clear that the AO has to "in the first instance" pass a draft assessment order in case there is variation which is prejudicial of the assessee. The term in the first instance" under the said section must be understood as the first step the AO has to do in the series of acts that has to be performed under the said section for an eligible assessee. In the context of section 144C(15) an eligible assessee is a separate class of assessee.

The eligible assessee has been defined to include (amended by Finance Act, 2020) the following:



- (a) 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
- (b) any non-resident not being a company, or any foreign company. In the present case there is no dispute that in the appellant case the AO has made various additions, therefore, the AO was, mandatorily required to pass the draft order as per section 144C of the Act, however, the AO did not follow the procedure laid down in the said section for the relevant assessment years. Pursuant to search proceedings income has been assessed u/s 153A/ 143(3) for the relevant assessment years vide assessment orders dated 28.09 2021/30.09.2021 (hereinafter referred to as "the final assessment orders") by making certain additions.

Section 144C of the IT Act, provides as under:

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 which is prejudicial to the interest of such

We submit that section 144C(1) makes it very clear that the AO has to "in the first instance" pass a draft assessment order in case there is variation which is prejudicial of the assessee. The term "in the first instance" under the said section must be understood as the first step the AO has to do in the series of acts that has to be performed under the said section for an eligible assessee. In the context of section 144C(15) an eligible assessee is a separate class of assessee.

In the present case there is no dispute that in the appellant case the AO has made various additions, therefore, the AO was, mandatorily required to pass the draft order as per section 144C of the Act, however, the AD did not follow the procedure laid down in the said section for the relevant assessment years.



Keeping the above facts in mind, appellant submits as under.

Section 144C was introduced by Finance (No. 2) Act, 2009 which provides if the AO proposes to make any variation on or after 1st October 2009 to the income of an eligible assessee, then in the first instance, a draft assessment order has to be forwarded to the eligible assessee. The Finance Act, 2020 has amended the definition of an "eligible assessee" and included any non-resident not being a foreign company or any foreign company as an eligible assessee instead of any foreign company.

The relevant extract of the Memorandum explaining the bill of 2020 (with respect to amendment in section 144C) is reproduced as under:-

Amendment in Dispute Resolution Panel (DRP) - clause 70 of the Memorandum

Section 144C of the Act provides that in case of certain eligible assesseees, viz., foreign companies and any person in whose case transfer pricing adjustments have been made under sub-section (3) of section 92CA of the Act, the Assessing Officer (AO) is required to forward a draft assessment order to the eligible assessee, if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Such eligible assessee with respect to such variation may file his objection to the DRP, a collegium of three Principal Commissioners or Commissioners of income-tax. DRP has nine months to pass directions which are binding on the AO.

It is proposed that the provisions of section 144C of the Act may be suitably amended to:-

- (A) include cases, where the AO proposes to make any variation which is prejudicial to the interest of the assessee, within the ambit of section 144C;
- (B) expand the scope of the said section by defining eligible assessee as a non-resident not being a company, or a foreign company
- (C) This amendment will take effect from 1st April, 2020. Thus, if the AO proposes to make any variation after this date, in case of eligible



assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable

It is submitted that the requirement of following the procedure laid down in section 144C has become mandatory to be followed in case of any assessment year in assessing the income of a non-resident. That being so, the final assessment order passed by the Assessing Officer, without at the first instance, forwarding draft assessment order stands vitiated on account of lack of jurisdiction, which is incurable and deserves to be set aside as void ab initio.

Your Honour will appreciate that there is no dispute that the appellant is a non-resident. For this, reference is drawn to the final assessment orders for the relevant assessment years wherein the appellant's status is stated as that of 'non-resident'. Hence, the appellant is an eligible assessee' in terms of section 144C of the IT Act [emphasis added] That being so, the AO ought to have in the first instance forward a draft assessment order for the relevant assessment years as there is variation vis-a-vis returned income, which is tabulated hereunder:

AY	Return income	Variation	Income after variation
2013-14	1,29,90,190	22,71,08,375	24,00,98,565
2014-15	48,46,20	1,12,08,174	1,61,44,374
2015-16	1,09,95,680	52,58,78,116	53,68,73,796
2016-17	39,12,010	11,79,36,591	12,18,48,601
2017-18	25,23,660	2,82,14,027	3,07,37,687
2018-19	2,60,90,320	4,35,07,396	6,95,97,716
2019-20	1,28,18,480	5,45,52,966	6,73,71,446
2020-21	1,26,23,515	24,17,68,478	25,43,91,993

Section 144C is applicable to any assessment year if the AO proposes to make a variation on or after 1st October 2009 in assessing the income of any non-resident, being an eligible assessee. In the case of the appellant, the notices u/s. 153A were issued on 26.03.2021 and u/s 143(2) on 25.12.2020. The assessment for the relevant assessment years has been completed vide assessment orders dated 28.09.2021/30.09.2021. Hence, on the date of issuance of notice as well as passing the assessment order, the definition of eligible assessee included 'any non-resident, as the same was amended w.e.f 01.04.2020 by the Finance Act, 2020 for any order passed after 01.04.2020. The proposition that the provisions of section 144C will apply to any assessment year in the case of an eligible assessee if a variation is proposed by the AO on or after 1st October 2009 is no more res-integra.

Reference is drawn to the following judgements:

Andhra Pradesh High Court in the case Zuari Cement Ltd v. Asstt. CIT WP No. 5557 of 2012 (Andhra Pradesh) held as under:

"A reading of the above section shows that if the Assessing Officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forward it to the assessee and after the assessee files his objections, if any, the Assessing Officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.

In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs.52.14 crores u/s 92CA of the Act on 20.09.2011 and forwarded it to the Assessing Officer and to the assessee under sub-section (3) thereof. The Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 01.10.2009, the cut-off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his



objections and then complete assessment. Admittedly this has not been done and the respondent has passed a final assessment order dt. 23.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void.

SLP of the department has been dismissed by the Apex Court vide order dated 27.09.2013.

Gujarat High Court in the case of C-SAM(INDIA) PVT. LTD (Gujarat HC)- Tax Appeal No. 542 of 2017 held as under:
"Sub-section (1) of Section 1440 itself in no uncertain terms provides that the Assessing Officer shall forward a draft order to the eligible assessee, if he proposes to make any variation in the income or loss which prejudicial to the interest of the assessee on or after 01st day of October 2009. The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the Assessing Officer proposed to make after 01.10.2009.

Pune Tribunal in the case of Mr. Abrar Fakirmohammad Shaikh [TS-615-ITAT-2023(PUN)-TP) held as under.

"Therefore, since in this case, admittedly, the assessment proceedings were conducted after the amended provisions came into effect i.e. w.e.t 1.4.2020, the Assessing Officer was justified in adhering to the provisions prescribed u/s 144C of the Act. Therefore, the contentions of the appellant are being devoid of any merit and dismissed. Thus, we do not find any merits in the contention raised by the assessee. Accordingly, this ground of appeal no.2 stands dismissed.

This case relates to reassessment proceedings of AY 2014-15 & the order was passed after 01.04.2020 hence ITAT held that AO has correctly passed the draft assessment order.

In the appellant case, the AO has failed to follow the mandatory procedure laid down in section 144C in assessing the income of the appellant, whereby the final assessment orders are void, bad-in-law, non-est, one without jurisdiction, non-



assessment order section, 144C(1) of the Act has rendered the assessment as one without jurisdiction and quashed the assessment order.

*The Hon' Bombay High Court in the matter of **SHL (India) (P.) Ltd. v. DCIT, Writ Petition (L) No 11293 OF 2021** held as under. Applying the aforesaid principles to the facts of this case, we are of the view that the failure on the part of the Assessing Officer to follow the procedure under section 144C(1) is not a merely procedural or inadvertent error, but a breach of a mandatory provision. We are also not impressed with the arguments of the Revenue that the Assessing Officer was under pressure of two charges, as there were timelines to adhere to, since the said from time to time have been extended, the most recent one being to 30 September, 2021 The Revenue ought to have appreciated that the requirement under section 144C (1) to first pass a draft Assessment order and to provides copy thereof to the assessee is a mandatory requirement which gave substantive right to the assessee to object to any variation, that is prejudicial to it. In this case, the order under section 92CA (3) of the IT Act, proposed to make an adjustment to be arm's length price considered as Nil by Petitioner and to that extent the said adjustment was evidently prejudicial to the interest of Petitioner. Depriving Petitioner of this right to raise objection before DRP would be denial of substantive rights to the assessee, for which, in our view the Assessing Officer has no power under the statute, as the provision dearly mandates the Assessing Officer to pass and furnish a draft Assessment Order in the first instance in such a case The legislature, in our view, has intended to give an important opportunity to Petitioner, who is an eligible assessee, which in our view, has been taken away in our view, failure to follow the procedure under section 144C(1) would be a jurisdictional error and not merely procedural error or a mere irregularity. The Assessment Order has not been passed in accordance with the provisions of section 144C of the IT Act This is not an issue, which involves a mistake in the sad order, but it involves the power of the Assessing Officer to pass the order. By not following the procedure laid down in section 144C(1) to pass and furnish a draft Assessment Order to Petitioner and directly passing a final Assessment Order and without giving Petitioner an opportunity to raise objections before the DRP, there is a complete contravention of section 144C, the Assessing Officer*



having wrongly assumed jurisdiction to straight away pass the final order This is not a mere irregularity but an incurable illegality. Even the provisions of section 2128 of the IT Act would not protect such an order as section 778 of the IT Act cannot be read to confer jurisdiction on the Assessing Officer, where none exists. The Supreme Court decision in the case of *ITO v M. Pirai Chori* [2012] 20 *tarmann.com* 733/2011] 334 ITR 262, referred to in the Revenue's reply is also not applicable to the issue at hand as that was a case where the assessee was not given an opportunity to cross-examine the concerned witness and which assessee also had a statutory appellate remedy which the assesses had failed to avail of whereas there is no such right available to Petitioner in this case. In fact, Petitioner has lost a substantive right due to the failure of the Respondents to pass and forward a draft assessment order in the first instance on a variance, prejudicial to the interest of Petitioner in our view, this is clearly a case of jurisdictional error. The final assessment order passed by the Assessing Officer stands vitiated on account of lack of jurisdiction, which is incurable and deserves to be set aside as void ab initio.

Other case laws

***PCIT v. Andrew Telecommunication Private Ltd* 423 ITR 503
Exxon Mobil Company (P) Ltd v. DCIT WP No 451 of 2022
International Air Transport Association v DCIT (WP(L) No. 351 of 2016)
*Dimension Data Asia Pacific Pvt. Ltd v DCIT WP No 921 of 2018***

Other High Courts

CV. Ramalah v CIT 365 ITR 646/37 (Madras),
CIT v. Tumer International India (P) Ltd 82 *taxmann.com* 125 (Delhi), *CIT v. Citi Financial Consumer Finance India (P.) Ltd* IT Appeal No. 275 (Delhi) *ESPN Star Sports Mauritius S.N.C. ET Companies vs. Union of India* 388 ITR 383 (Delhi)

CIT v. C-Sam (India) Pvt Ltd Tax Appeal No 542 of 2017 (Gujarat) *Nokia India Pvt Ltd v. ACIT WP(C) No 3692 of 2019 (Delhi)* (*) *Control Risks India Pvt. Ltd v. DCIT WP(C) No 5722 of 2017 (Delhi)* (*) *PCIT v. Andrew Telecommunication Pty. Ltd* Tax Appeal No 144 of 2017 (Bombay) *Dimension Data Asia Pacific Pvt.*



Ltd v. DCIT WP No 921 of 2018 (Bombay) Vijay Television Private Limited v. The Dispute Resolution Panel 46 taxmann.com 100 (Madras HC) Principal Commissioner of Income Tax-4 vs Headstrong Services India Pvt Ltd CIT WP No 5557 of 2012 (Delhi HC) JCB India Ltd. Vs DCIT (Delhi HC)

(*) the Hon Supreme Court has dismissed SLP's in the case of ACIT v. Nokia India Pvt. Ltd SLP Diary No 7302/2018 dated 14-5-2018 as well as DCIT v. Control Risks India Pvt. Ltd 7090/2018 dated 16-3-2018

ITAT

Brightstar Infrastructure Private Limited ITA No. 746/Mum/2022 Deawon Kang UP Co. Ltd vs Deputy Director of Income-tax (International Taxation-1), Chennai

Thus, the position of AO to pass a draft assessment order first for an eligible assessee has no legal ambiguity.

It is a settled position in law that the decision of the High Court is binding on the Tribunal and the Income Tax Authorities situated in the area over which the High Court has Jurisdiction. The Hon Bombay High Court has also upheld the position that if an assessee is an eligible assessee in terms of the provisions of Section 1440, then, the AO must, at the first instance, forward a draft assessment order. Failure to provide the draft assessment order, being a mandatory requirement, is an incurable defect. The decisions of Hon' Bombay High Court have binding effect

In view of the foregoing, it is submitted that: Section 144C(1) of the Act is a non-obstante provision, which requires its compliance, irrespective of the other provisions that may be contained in the Act. The procedure prescribed under section 144C of the Act needs to be mandatorily followed and is not merely directory.

Failure to follow the procedure leads to a jurisdictional error and not merely a



procedural error or irregularity, as it was not a case of mistake in the order but beyond the power of the AO to issue an order.

***Section 292B** of the Act cannot save an order passed in breach of the provisions of section 144C of the Act, the same being incurable illegality.*

Non-issuance of a draft assessment order in case of an eligible assessee' leads to denial of substantive right, as the legislature intends to grant an opportunity to raise an objection before the DRP.

It is therefore submitted that the final assessment orders for the relevant assessment years should be annulled/cancelled."

"11. Vide letter dt. 16.1.2024 to the ld CIT(A), the assessee has further submitted as under:-

"A) W.r.t. the additional ground no. 1 ie. Non-passing of draft order, hence, assessment order is bad in law"

*At the outset, it is mentioned that the **Ld. AO has relied upon the Affidavit-in- reply filed before the Hon' High Court of Bombay** for all the years, for the sake of easy reference we have reproduced for AY 2013-14 here under: In this connection, kindly find enclosed herewith a copy of the Affidavit-in-Reply re. Para wise Comment for A.Y. 2013-14 filed by the then DCIT(CC)-5(2), Mumbai before the Hon'ble Bombay High court on 16.12.2022 during the appellate proceedings in respect of Wit Petition. The then AO vide the said Affidavit-in-Reply from Para no. 4.7 to 4.10 contested and denied the contention of the assessee with regard to eligible assessee as per the provision of section 144C(15)(b) and requirement of forwarding a draft of the assessment order before passing final assessment order. I request your good-self to consider the said reply as comments of this office in respect of the additional ground no. 1 raised by the assessee and may decide the issue as per the provisions of the Income Tax Act, 1961 applicable in this case.*

2. In response to the aforesaid affidavit, the appellant had filed a rejoinder before the Hon' High Court of Bombay, which is enclosed herewith as Annexure



"A", on which the appellant also places reliance as its rebuttal against the Ld. AO's comments.

3 Primary, the Ld. AO comments are:

- (a) The provisions of Sec 153A prevail over Sec 144C of the Act.
- (b) The amendment to Sec 144C rendering all non-resident individuals as 'eligible assessee' with the meaning of the said section has been brought into effect from 01.04.2020 and is not applicable in respect of earlier assessment years (the AO has not objected the same for AY 2020-21).

4. The appellant's rebuttal against the comments of the AO are as under:

5. Comment No 1 of the AO is as under:

The assessing officer had stated that since the case of the assessee was dealt with u/s 153A of the Act as search & seizure action was conducted on 22.10.2019 u/s 132 of the Act at the residence of the Petitioner, the provisions of Sec 144C are not applicable to the Petitioner and Sec 153A of the Act prevails over Sec 144C of the Act.

5.1 Appellant's rebuttal

5.1.1 On perusal of it a above comment, Your Honour will appreciate that the Ld AO has not disputed that the draft order was not passed in the case of the appellant The Ld AO has also not disputed that provision of section 144C is applicable; however, contended the case of the appellant is covered u/s 153A and section 153A overrides section 144C.

5.1.2 It is submitted that assessment proceedings for the relevant assessment year under section 153A of the Act were initiated on 02.02.2021 and the impugned assessment order was passed under sec. 153A on 28.09.2021.

The order was passed after the amendment introduced in sec. 144C(15)(b)(i) extending the definition of 'eligible assessee to non-resident individuals effective from 01.04.2020.

5.1.4 As the amended provisions of sec. 144C were in force when the assessment proceedings in the appellant's case were initiated and completed,



the impugned assessment of the appellant under sec. 153A of the Act was bad in law.

5.1.5 Both sections, sec. 153A which lays down the procedure in search cases and sec. 144C applicable to all 'eligible assessee' contain non-obstante classes

non-obstante clause

5.1.6 It is submitted that the non-obstante in sec 153A excludes specific provisions viz. sec 148, sec. 149, sec. 151 and sec. 153, whereas the non-obstante clause in sec 144C is wider and excludes anything to the contrary contained in the Act. In the circumstances, the provisions of sec. 144C would prevail over sec. 153A of the Act and as the appellant was admittedly a non-resident covered by the definition of an eligible assessee in sec. 144C(15)(b)(ii) when the assessment proceedings under sec. 153A were initiated on 02.02.2021 and completed on 28.09.2021, sec. 144C was the only applicable provision under which the appellant could have been assessed.

6 Comment No 2 of the assessing officer.

The amendment to Sec 144C rendering all non-resident individuals as 'eligible assessee with the meaning of the said section has been brought into effect from 01.04.2020 and is not applicable in respect of earlier assessment year.

6.1 Appellant's rebuttal:

6.1.1 It is submitted that the legal position that sec. 144C would apply to any order passed after it was introduced irrespective of the assessment year involved. For this, Your Honour's attention is drawn to Memorandum Explaining the Bill of 2020 (with respect to amendment in section 144C), relevant extract of the same is reproduced as under:-

Amendment in Dispute Resolution Panel (DRP)-clause 70 of the Memorandum Section 144C of the Act provides that in case of certain eligible assessee, viz., foreign companies and any person in whose case transfer pricing adjustments have been made under sub-section (3) of section 92CA of the Act, the Assessing Officer (AO) is required to forward a draft assessment order to the eligible



assessee, if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Such eligible assessee with respect to such variation may file his objection to the DRP, a collegium of three Principal Commissioners or Commissioners of Income-tax. DRP has nine months to pass directions which are binding on the Ld. Assessing Officer.

It is proposed that the provisions of section 144C of the Act may be suitably amended to:-

- (A) include cases, where the AO proposes to make any variation which is prejudicial to the interest of the assessee, within the ambit of section 144C;
- (B) expand the scope of the said section by defining eligible assessee as a non- resident not being a company, or a foreign company.

This amendment will take effect from 1st April, 2020. Thus, if the AO proposes to make any variation after this date, in case of eligible assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable.

6.1.2 From the above, it is clear that that the amended provision of section 144C is applicable to any order passed after 01st April, 2020 irrespective of the assessment year involved.

6.1.3 The question whether section 144C is applicable for any order passed after introduction of section irrespective of the assessment year involved is settled by the Hon'ble Andhra Pradesh High Court in the case of **Zuari Cement Limited vs. The Assistant Commissioner of Income Tex, Circle-2(1), Tirupathi in Writ Petition No.5557 of 2012 decided on 21.02.2013 (SLP dismissed on 27.09.2013)**.

6.1.4 The Hon'ble Gujarat High Court in the case of **CIT v C-Sam (India) Pvt. Ltd reported in 398 ITR 182** held as under.

"Sub-section (1) of Section 144C itself in no uncertain terms provides that the Assessing Officer shall forward a draft order to the eligible assessee, if he



proposes to make any variation in the income or loss which prejudicial to the interest of the assessee on or after 01st day of October 2009. The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the Assessing Officer proposed to make after 01.10.2009."

6.1.5 In the above 2 cases, the respective assessee had challenged the assessments made under sec. 143(3) without following the procedure laid down in sec 144C

- The assessment years involved were 2008-09 and 2009-10 respectively prior to the introduction of sec. 144C from 1.10.2009. However, the assessments in both cases were completed after sec. 144C had come into force.

The Hon'ble High Courts held that sec. 144C would apply to any order passed after 1.10.2009 irrespective of the concerned assessment year. Similar, view has also been expressed by the Hon'ble Madras High Court in **Vijay Television P. Ltd 's case, 369 ITR 113.**

6.1.6 Further, this view is supported by the **CBDT Circular No. 9 of 2013 dated 19.11.2013 (2013) 359 ITR (ST) 7)**

6.1.7 On this amended provision of section 1440, recently **Pune Tribunal in the cated Mr. Soru Fakirmohammad Shaikh [TS-615-ITAT-2023(PUN)-TP)** held as

Therefore, since in this case, the reassessment proceedings were conducted after the amended provisions came into effect is w.e.f. 1.4.2020, the Assessing Officer was justified in adhering to the provisions prescribed u/s 144C of the Act. Therefore the contentions of the appellant are being devoid of any merit and dismissed Thus, we do not find any merits in the contention raised by the assessee Accordingly, this ground of appeal no 2 stands dismissed.



This case relates to reassessment proceedings of AY 2014-15 & the order was passed after 01.04 2020 hence, ITAT held that AO has correctly passed the draft assessment order.

6.1.8 In view of above, it is clear that the relevant criterion is the "date on which the assessment order is passed and not the "assessment year involved.

6.1.9 in the appellant case, there is no dispute that assessment order has been passed on 28 09 2021 (e. after 01.04.2020) hence the amended provision is very much applicable.

In view of the stove, it is therefore submitted that the assessment order passed u/s 153A is without jurisdiction since the draft order ought to have been passed before passing the final assessment order as the amendment brought in section 144C was applicable for all the assessment orders passed on or after 01.04.2020."

5. The ld.CIT(A) has also discussed additional ground of appeal first in paras 12 to 12.17 on pages-22 to 28 of the order. He finally dismissed the ground on following reasoning:

1. The decisions of Hon'ble Bombay and other high courts did not apply to the facts of the case where the assessee did not comply and cooperate at any stage of either search or assessment proceedings.
2. It is stated that section 144C was introduced in the statute as an alternate dispute resolution mechanism and not as an infallible assessment procedure per se. Hence when the question is of alternate remedy one cannot say that the procedure adopted by the AO in the case of total silence and non cooperation by the assessee is fatal to the entire proceedings. He further relied on the decision in the case of **State Bank of India v K.Sharma 3 SCC 364** in which hon'ble Supreme Court observed that Justice means justice to both the parties. The courts must ensure a fair hearing and to ensure that there is no failure of justice.



3. He also relied on the decisions in the cases of **Areva T&D India Ltd 294 ITR 233 AND Thakur Hariprasad 32 Taxman 196(AP)** in support of the argument that if there are procedural irregularities, the assessment cannot be annulled and could be cured with a direction to afford opportunity of hearing.
4. He also placed reliance on such curable irregularity on **Home Finders Housing Ltd sv ITO 404 ITR 66(Mad)**, which has been upheld by the hon'ble Suprme Court in 256 Taxman 59.
5. The ld CIT(A) has quoted the provisions of section 292 B of the Act in support of such curable defects. 292B. Return of income, etc., not to be invalid on certain grounds.

“- No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.”

5.1 It is observed by him in para 12.15 that in the appeal before CIT(A), the assessee did not take any ground on violation of section 144C. But it approached Hon'ble Bombay High court later in a writ petition. Thus, it was really not prejudiced by the assessment order dated 28.9.2021. He concluded that as held in several decisions, in case of procedural irregularity, the entire assessment could not be quashed. He dismissed this additional ground accordingly.



6. The Id.AR of the assessee made a detailed arguments before us also on the above lines as made before the IdCIT(A).The Id.AR has reiterated the same contentions which area narrated above.The Id.CIT(DR) has relied on the orders of authorities below.It is also pointed that as per sub-section 16 introduced by the Finance (No.2) Act 2024 has now laid down that the provisions of section 144C shall not apply to any proceedings under Chapter XIV-B.

6.1 We have carefully considered the above facts and the position of law. For better appreciation of the contention of the appellant, the provisions of sub-section (15) of section 144C are extracted below :-

“Reference to dispute resolution panel. 144C. (1) xxxxx xxxxx

*(15) For the purposes of this section,— (a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners 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 non-resident not being a company, or any foreign company.**”*

6.2 On mere perusal of the above provisions, it would be clear that the Assessing Officer is required to issue a draft assessment order in respect of an eligible assessee. There are two categories of eligible assessee:

(a) In a case where there has been a variation on account ,and



(b) Any Non-Resident not being a company or any foreign company.

6.3 In the former case, the Assessing Officer is required to adhere to the special procedure prescribed u/s 144C, only in case, where there is variation to the returned income on account of arm's length price for international transaction or specific domestic transaction has been proposed by the TPO. We find the above that a Non-Resident is made eligible assessee by Finance Act, 2020 w.e.f. 1.4.2020. Even the CBDT Explanatory Memorandum of Finance Bill, 2020 clarifies the amendment took place w.e.f. 1.4.2020, the Explanatory Memorandum of Finance Bill, 2020 is extracted below :- *“Amendment in Dispute Resolution Panel (DRP). Section 144C of the Act provides that in case of certain eligible assesseees, viz., foreign companies and any person in whose case transfer pricing adjustments have been made under sub-section (3) of section 92CA of the Act, the Assessing Officer (AO) is required to forward a draft assessment order to the eligible assessee, if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Such eligible assessee with respect to such variation may file his objection to the DRP, a collegium of three Principal Commissioners or Commissioners of Income-tax. DRP has nine months to pass directions which are binding on the AO. It is proposed that the provisions of section 144C of the Act may be suitably amended to:- (A)*



include cases, where the AO proposes to make any variation which is prejudicial to the interest of the assessee, within the ambit of section 144C; (B) expand the scope of the said section by defining eligible assessee as a non-resident not being a company, or a foreign company. This amendment will take effect from 1st April, 2020. Thus, if the AO proposes to make any variation after this date, in case of eligible assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable. [Clause 70]” .Therefore, all the assessment orders passed subsequently are squarely covered by the above provisions of the Act. There cannot be any dispute on this issue.

6.4 The Ld. CIT(A) has placed reliance on certain decisions of various courts including those of Hon’ble Supreme Court in support of his argument that the omission on part of the AO was merely a technical one which could be cured in terms of section 1292B of the Act, more so in the light of the non-compliant attitude of the assessee during income tax proceedings. However, we do not find any merit in his observations in the light of several decisions including that of jurisdictional High Court taking a specific stand that such a defect could not be cured. The allegation regarding lack of compliance would not make any material difference to the case in which specific provisions contained in the statute in this regard. The Ld. DR’s reference to sub-section 16 of the Section 144C is not also not



found to be of any significance as the said amendment is applicable from 01.9.2024 on prospective basis.

6.5 The assessee has placed reliance on a catena of judicial decisions which are directly applicable to the grounds in this regard i.e. mandatory nature of the provisions relating to NRI assessee and also that any omission on part of the AO is not curable and the provisions of section 292 B cannot come to the rescue of the Revenue. The jurisdictional High Court cited below clinches the issue in favour of the assessee as it is squarely applicable to the facts of the present case as well. In the case of hon'ble Bombay High Court inter alia gave the decision as under-**SHL(India) P.Ltd vs DCIT(2021) 438 ITR 317(Bom):**

“ In our view, the following principles emerge from the above discussion :-

- (i) that the procedure prescribed under [Section 144C](#) of the IT Act is a mandatory procedure and not directory.*
- (ii) failure to follow the procedure under [Section 144C\(1\)](#) would be a jurisdictional error and not merely procedural error or irregularity.*
- (iii) therefore, [Section 292B](#) of the IT Act cannot save an order passed in breach of the provisions of [Section 144C\(1\)](#), the same being an incurable illegality.*

It is important to note that [Section 144C\(1\)](#) is a non- obstante provision, which requires its compliance irrespective of the other provisions that may be contained in the [IT Act](#). There is no dispute that Petitioner is an eligible assessee and also there is no dispute as to the applicability of [Section 144C](#). It is also not in dispute that the final Assessment Order has been passed without the draft Assessment Order as contemplated under [Section 144C \(1\)](#) of the IT Act. The



Assessing Officer ought to have in the first instance forwarded a draft of the proposed order of assessment to Petitioner, as there was a proposed variation prejudicial to the interest of the assessee. This important step has been completely omitted by the Respondent taking away a very necessary right of Petitioner to file objections to the proposed variation with the DRP and the Assessing Officer, which in our view, strikes to the root of the procedure contemplated by [Section 144C](#).

Applying the aforesaid principles to the facts of this case, we are of the view that the failure on the part of the Assessing Officer to follow the procedure under [Section 144C\(1\)](#) is not a merely procedural or inadvertent error, but a breach of a mandatory provision. We are also not impressed with the arguments of the Revenue that the Assessing Officer was under-pressure of two charges, as there were timelines to adhere to, since the said timelines from time to time have been extended, the most recent one being to 30th September, 2021. The Revenue ought to have appreciated that the requirement under [Section 144C\(1\)](#) to first pass a draft Assessment Order and to provide a copy thereof to the assessee is a mandatory requirement which gave substantive right to the assessee to object to any variation, that is prejudicial to it. In this case, the order under [Section 92CA \(3\)](#) of the IT Act, proposed to make an adjustment of Rs.107,454,337/- to the arm's length price considered as Nil by Petitioner and to that extent the said adjustment was evidently prejudicial to the interest of Petitioner. Depriving Petitioner of this valuable right to raise objection before DRP would be denial of substantive rights to the assessee, for which, in our view, the Assessing Officer has no power under the statute, as the provision clearly mandates the Assessing Officer to pass and furnish a draft Assessment Order in the first instance in such a case. The legislature, in our view, has intended to give an important opportunity to Petitioner, who is an eligible assessee, which in our view, has been taken away. In our view, failure to follow the procedure under [Section 144C\(1\)](#) would be a jurisdictional error and not merely procedural error or a mere irregularity. The Assessment Order has not been passed in accordance with the provisions of [Section 144C](#) of the IT Act. This is not an issue, which involves a mistake in the said order, but it involves the power of the Assessing Officer to pass the order. **By not following the**



procedure [laid down in Section 144C\(1\)](#) to pass and furnish a draft Assessment Order to Petitioner and directly passing a final Assessment Order and without giving Petitioner an opportunity to raise objections before the DRP, there is a complete contravention of [Section 144C](#), the Assessing Officer having wrongly assumed jurisdiction to straight away pass the final order. This is not a mere irregularity but an incurable illegality. Even the provisions of [Section 292B](#) of the IT Act would not protect such an order as [Section 292B](#) of the IT Act cannot be read to confer jurisdiction on the Assessing Officer, where none exists. The Supreme Court decision in the case of [Income-Tax Officer Vs. M. Pirai Choodi](#); [2011] 334 ITR 262 (SC) referred to in the Revenue's reply is also not applicable to the issue at hand as that was a case where the assessee was not given an opportunity to cross-examine the concerned witness and which assessee also had a statutory appellate remedy which the assessee had failed to avail of, whereas there is no such right available to Petitioner in this case. In fact, Petitioner has lost a substantive right due to the failure of the Respondents to pass and forward a draft assessment order in the first instance on a variance, prejudicial to the interest of Petitioner. In our view, this is clearly a case of jurisdictional error. The final assessment order passed by the Assessing Officer stands vitiated on account of lack of jurisdiction, which is incurable and deserves to be set aside as void ab initio.

We, therefore, quash and set aside the impugned Assessment Order, Demand Notice and Penalty Notice, all dated 6th April, 2021 for the Assessment Year 2017-2018.

6.6 Likewise in the case of Sumitomo Corporation India P.Ltd [TS-378-HC-2024(DEL)-TP], Hon'ble Delhi high Court took a similar view of the matter. The Hon'ble Delhi High Court, in a bunch of writ petitions, led by **Principal Commissioner of Income Tax vs Sumitomo Corporation India (P.) Ltd.** has quashed the final assessment orders passed without a draft order of assessment being passed as per the



provisions of section 144C(1) of the Income-tax Act, 1961 ('the Act'). In these writ petitions, the two principal questions before the Hon'ble Delhi High Court were as follows:

- 1. Whether the Assessing Officer ('AO') was justified in proceeding to frame a Final Assessment Order without passing a Draft Assessment Order as per the provisions of section 144C(1) of the Act; and*
- 2. Since the final assessment order was passed after expiry of time limit prescribed under section 153 of the Act, was liable to be quashed.*

Main observations of the Hon'ble Delhi High Court for question (1) above are as follows:

- Failure to frame an assessment order in draft is clearly violative of the mandatory provisions of section 144C of the Act and any final assessment order framed in violation thereof would be a nullity.
- Relying upon various judgments and comparing section 144C of the Act with erstwhile section 144B of the Act, the contention of the Revenue that a failure to frame a draft assessment order was a mere procedural irregularity which could be remedied by restoring the file to the AO to pass a draft assessment order was rejected.
- It was also stated that a failure to frame a draft order of assessment not only curtails the right of the assessee to adopt corrective measures, but also deprives the assessee of a salutary right to challenge the draft in terms of the salutary mechanism laid in place.

Accordingly, the writ petitions filed by various petitioners (taxpayers) were allowed and the writ petitions filed by the Revenue were dismissed and final assessment orders passed without draft assessment orders being passed were quashed.



6.7 In view of the foregoing, we hold that the assessment order passed u/s 153A/143(3) without complying with the mandatory provision section 144C of the Act could not be cured in any manner and therefore, is *quashed*, thus allowing the appeal.

7. Since the assessment order itself is quashed, rest of the grounds become academic in nature and no purpose would be served in adjudicating on them.

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8. As the ground no.1 adjudicated in preceding paras are common in all the above mentioned, the decision in appeal for AY 2013-14 as above would apply *mutatis mutandis* to all of them which are accordingly allowed.

9. **In the result, all the above appeals are allowed.**

Order pronounced in the open court on 29/11/2024.

Sd/-

SANDEEP GOSAIN

(न्यायिक सदस्य /JUDICIAL MEMBER)

Sd/-

PRABHASH SHANKAR

(लेखाकार सदस्य /ACCOUNTANT MEMBER)

Place: मुंबई/Mumbai

दिनांक /Date 29.11.2024

Lubhna Shaikh / Steno

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.



3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

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आयकर अपीलीय अधिकरण/ ITAT, Bench,
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