K.R.RAMAMANI MEMORIAL NATIONAL TAXATION MOOT PROBLEM 2024-25

The Income Tax Department filed a SLP before the Hon'ble Supreme Court of India against the Order of the Hon'ble Madras High Court passed in M/s. Vulcan TV Pvt. Ltd.vs CIT in WA 777 of 2024 for the AY 2014-15. Leave was granted by the Hon'ble SC and the case is posted for final hearing on the following legal question raised by the Department:

"***Whether the High Court grossly erred in holding that the Assessment Order dated 25.03.2024 passed by the Department read with Corrigendum passed on 01.04.2024 suffers from incurable illegality and violated principles of natural justice in not issuing a Draft Assessment Order u/S 144C of the Act and thus ought to be quashed***"

Annexure: Impugned HC Writ Appeal Order.
Note: There is no dispute on facts. This is only on a question of law not facts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
W.A. No. 777 of 2024

M/s.Vulcan TV Pvt. Ltd .... Petitioner
vs
1. The Income Tax Officer,
Company Ward - 6(1),
7th Floor, Aayakar Bhawan, New Block
121, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034 …..

2. The Deputy Commissioner of Income Tax,
Transfer Pricing Officer- 3(1),
Tower - I, BSNL Building,
No. 16, Greams Road, Chennai 600 006. …. Respondents

For Appellant :Mr.Vikram Vijayaraghavan, Senior Advocate
For Respondent: Mr.AzizAlam, Senior Standing Counsel

Judgment:

1. The present appeals have been directed against the order of the learned single Judge, whereunder, learned single Judge, had dismissed the writ petitions filed by the Petitioner/Assessee.

2. The main question involved in this Writ Appeal is "***Whether the assessment order dated 25.03.2024 passed by the 1st Respondent read with Corrigendum passed on 01.04.2024 suffers incurable illegality and violated principles of natural justice in not issuing the draft assessment order under Section 144C of the Act which would have enable the Petitioner to file objections before DRP and hence ought to have quashed?"***

3. In short, the crux of the issue is whether the assessment order passed (along with demand and penalty notice) without passing a draft assessment order is an incurable defect or in passing a corrigendum has the AO cured said defect making the impugned order a draft assessment Order u/S 144C of the Indian Income Tax Act, 1961 ("Act").

The facts of the case are not in dispute and are as follows:

4. For the Assessment Year 2014-15, the Petitioner filed the Return of income electronically on 29.11.2014 declaring a total income of Rs. 39,93,91,360/- under

the normal provisions of the Act. The First Respondent referred the case of the Petitioner to the Transfer Pricing Officer (TPO) on 24.11.2016 for determination of arm's length nature of the international transactions of the Petitioner with its AEs. The TPO vide order dated 16.10.2017, rejected the economic analysis undertaken by the Petitioner for the impugned transactions using Transactional Net Margin Method (TNMM) on aggregated basis and undertook a fresh analysis for computing the Arm's Length Price (ALP) of the impugned transactions. Based thereon, the Second Respondent made an upward adjustment of INR 50,36,31,605.

5. Accordingly, the First Respondent issued the draft assessment order on 04.12.2017 under section 143(3) r.w.s 92CA r.w.s 144C(1) of the Act incorporating the above adjustments and imputed a total adjustment of INR 54,03,89,122/- to the total income of the Petitioner which was later revised to INR 49,25,63,436/- vide order dated 23.01.2018.

6. The Petitioner aggrieved by the order, filed its objections with the Dispute Resolution Panel (DRP), wherein DRP upheld the action of the TPO in re-computing ALP of impugned transactions vide its order dated 07.09.2018.

7. Accordingly, the final assessment order was passed by the First Respondent under Section 143(3) read with section 92CA(4) read with section 144C(13) of the Act on 29.10.2018 with adjustment amounting to INR 49,25,63,436/-

8. Aggrieved by the directions of DRP, the Petitioner preferred further appeal against the final assessment Order before the Income-tax Appellate Tribunal, Chennai.

9. The Hon'ble Tribunal vide its order (IT (TP) A No. 777/Chny/2018) dated 04.02.2022, the Hon'ble Tribunal remitted the case back *de novo* to the Second Respondent to verify and re-address all the TP grounds properly raised by the Petitioner.

10. The TPO passed order giving effect to the order of the Hon'ble Tribunal, dated 19.01.2023 under section 92CA (3) of the Act for Assessment Year 2014-15.

11. Subsequently incorporating the TPO's Order dated 19.01.2023, **the First Respondent passed the final Assessment Order dated 25.03.2024**. This Order did not refer to S.144C at all but only S.143(3) r.w S.254 ; it did not say anything about filing Objections to the DRP or appeal to the CIT(A). More importantly, the amount of tax payable and related workings is captured as part of the final assessment order. A show cause notice dated 29.03.2024 under Section 274 read with Section 271(1)(c) as to why penalty should not be imposed is also issued by the First Respondent. (emphasis added)

12. The First Respondent passed a "Corrigendum" one week late dated 01.04.2024 signed by him which simply states that the Assessment Order dated 25.03.2024 should be read as "Draft Assessment Order".

13. The Petitioner filed a Writ against the impugned Order dated 25.3.2024 challenging it as invalid and void ab initio. The Hon'ble Single Judge in a short Order simply followed a single Bench of this Court in *Enfinty Solar Solutions P Ltd Vs DCIT in WP NO 31165 of 2018* and dismissed the Writ petition and hence the Petitioner filed this Writ Appeal.

14. With these facts, we turn to the contentions of the Parties.

15. The Petitioner's contentions are succinctly summarized as follows:-

a) The impugned Order passed by the 1st Respondent dated 25.03.2024 is a final assessment order and deprives the Petitioner from going to the DRP as mandated u/s.144C of the Act.

b) The Petitioner always, as enshrined in the Act, has the right to either appeal before CIT(A) or file objections before DRP. This is the entire purpose of Section 144C. In passing a final order, instead of a draft assessment order as mandated u/s.144C i.e., in short, the Petitioner can only go to CIT(A) and hence the principles of natural justice are violated.

c) Mostly important, the impugned order dated 25.03.2024 cannot be cured i.e., it is an incurable defect as the Assessment has been finalized, demand has been crystalized , penalty notice has been issued and the AO has effectively become *functus officio* after the impugned order is passed.

d) Further, the Corrigendum dated 01.04.2024 is useless and without merit; First Respondent cannot simply use a corrigendum to change the language of the impugned order dated 25.03.2024 thereby rectifying the fundamental jurisdictional incurable defect made by Respondent.

e) Towards this the Appellant relies on the Jurisdictional High Court in ***Vijay Television (P) Ltd Vs Dispute Resolution Panel Chennai (46 taxmann.com 100)*** as well as Bombay High Court in ***Dimension Data Asia Pacific Pte ltd vs. DCIT (2018) 96 taxmann.com 182 (Bombay)***

and Delhi High Court in ***Nokia India Pvt. Ltd.vs. ACIT WP(C) No. 3692/2017 & CM APPL 15963/2017 Delhi HC*** and ***DCIT vs. Control Risks India Private Limited WP(C) No. 5722/2017 & CM No. 23860/2017 Delhi HC*** and ***GE Oil & Gas India P Ltd Vs ACIT – WP No 1575 of 2020 – WP No 1575 of 2020 – Madras High Court Dated 05.01.2021***

f) Further, the 1st round of proceeding and 2nd round of proceedings are immaterial with respect to the requirement of a Draft Assessment Order having to be passed as per Section 144C of the Act and the phrase *" in the first instance"* in S.144C(1) merely refers to the act of the draft

assessment order having to be first forwarded to the eligible assessee ie., Petitioner. Towards this the Petitioner relies on the decision of the Delhi High Court in ***PCIT Vs Headstrong Services India P Ltd (ITA 77/2019 dated 24.12.2020)***

16. The Respondent's contentions are succinctly summarized as follows:-

a) A mere technicality is being used to collapse the entire assessment proceedings.

b) It is a well-established principle that **Section 292B** of the Act is to be applied wherein merely for the reasons of mistake, defect or omission, the proceedings cannot be considered invalid.

c) Impugned assessment order dated 25.03.2024, ought to be read as a Draft Assessment Order and the Petitioner ought to have approached the DRP within 30 days as per Section 144C. The Corrigendum is valid

in that it was passed in a week and within the 30-day deadline of S.144C and thus the Petitioner is not aggrieved at all in the fundamental issue of not being able to approach DRP which they very well could have post corrigendum. Hence the entire excuse of natural justice violation falls flat.

d) Ruling in ***Vijay Television*** cited supra will not directly applicable as this the 2nd round of proceedings. The Section 144C states in the first instance and hence it is not requiring for the department to pass the draft assessment order in the 2nd round.

e) The Department relies on the ***Enfinty Solar Solutions P Ltd Vs DCIT*** **which clearly held against the Petitioner** ***in WP NO 31165 of 2018 of Madras HC dated 21.06.2021 and Durr India P Ltd Vs ACIT (WP 32751 of 2017 dated 27.5.2021).***

f) The Department also relies on the rationale of the Hon'ble Supreme Court in Section 144B in the matter of ***NFAC Vs Automotive Manufacturers Private Limited in Civil Appeal No.1839 of 2023*** where though Section mandate the SC has held such a defect is curable.

g) The Department also relies on the Hon'ble Jurisdictional High Court in the case of ***K Ramalingam Vs NFAC in WP No.10158 of 2022***. h) Thus, for the interests of justice, and not to collapse an entire assessment in its second round on mere technicalities and language, it is prayed that the matter may be remanded back to the Assessing Officer for fresh consideration thereby resetting the clock and allowing the AO to pass the draft Assessment Order and thereby providing Petitioner opportunity to avail the DRP, thereby no party is aggrieved then.

17. We have heard both the parties in details & find ourselves with the agreement with the Petitioner on the following basis: -

a. The Draft Assessment Order has to be passed whatever the case may be as it allows the Petitioner to go with the DRP. This was shut out by the Respondent passing the impugned final assessment order dated 25.03.2024.

b. Thus, Section 144C is clearly violated and it is noted that the demand computation u/s.156 as well as penalty notice u/s.274 has been issued. Thus, the Respondent has effectively *completed* the assessment.

c. The key point is whether the mistake by the respondent can be rectified or cured. We find that this is not a case to fall u/s.92B as it is a mere omission but a complete assessment leading to a demand and penalty initiation.

d. This cannot be merely wiped away by change of English in the impugned order or a Corrigendum. This is the exact argument made in *Vijay TV supra* and we find considerable force in it.

e. The other arguments are only the first-round proceeding requiring a draft assessment order is wholly without merit. S.144C merely says at the first instance the draft assessment order must be forwarded to the petitioner / Assessee, and it would be incongruous for the Petitioner to be able to go DRP in the first and not in the 2nd round.

f. The decision of *Enfinity Solar Solutions* according to this Court is bad in law and it does not follow the established Division bench order; this is why status quo has been ordered by the Division Bench in ***WA 2006 of 2022 dated 02.09.2022***. Further, in the decision of *Durr India* as well as *K Ramalingam (supra)*, interestingly and peculiarly, it is accepted by the Court that the impugned order is indeed invalid, but the matter is being set aside allowing it to be rectified / cured. But as we have noted above, we find that it is an incurable defect and hence we disagree with the aforesaid two decisions in this regard.

18. From the above it is clear that the Assessing Officer is duty bound to adhere to the mandatory requirement of Section 144-C (1) of the Act by first passing a draft assessment order, the failure of which would invalidate the final assessment order and the consequent demand notices and penalty proceedings.

19. Hence, we find in favour of the Appellant and allow the Writ Appeal.

Sd/-

Per Bench

Date: 1st October 2024.

-x-