

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 6503/DEL/2019 [A.Y. 2011-12]

M/s Travelport LP
300, Galleria Parkway, NW
United States of America
30339-3196

Vs.

The Dy. C.I.T
International Taxation
Central Circle- 3(1)(1)
New Delhi

PAN: AAAPW 8525 C

(Applicant)

(Respondent)

Assessee By : Shri Ravi Sharma, Adv
Shri Rishab Malhotra, AR

Department By : Shri Jitender Kumar - CIT-DR

Date of Hearing : 06.02.2023

Date of Pronouncement : 09.02.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 21.06.2019 framed u/s 144C(13) r.w.s 147 r.w.s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2011-12.

2. The grievances of the assessee read as under:

“1. That on the facts and circumstances of the case & in law, the order dated June 21, 2019 framed under Section 1440(13) read with Sections 147 and 143(3) of the Income Tax Act, 1961 (“the Act”) (“assessment order”) passed by the Learned Deputy Commissioner of Income Tax, Circle 3(i)(i), International Taxation (‘Ld. AO’) pursuant to the directions of the Learned Dispute Resolution Panel (‘Ld. DRP’) is beyond jurisdiction, bad in law and void ab initio.

2. That on the facts and in the circumstances of the case & in law, the draft assessment order dated December 03, 2018 passed by the Ld. AO under Section i44C(i) read with Sections 147 and 143(3) °f the Act is invalid as the Appellant is not an ‘eligible assessee’ under Section i44C(is)(b) of the Act.

2.1 That on the facts and in the circumstances of the case & in law, the Ld. DRP erred in confirming the actions of the Ld. AO and holding that the Appellant is a foreign company and thereby is an ‘eligible assessee’ as per Section i44C(i5)(b) of the Act without appreciating that the Appellant is a limited partnership based in United States of America (“USA”).

3. That on the facts and circumstances of the case and in law, the notice issued under section 148 dated March 29, 2018 is without jurisdiction as there is no allegation or whisper of any failure on the part of the Appellant to disclose fully and truly all material facts in the said notice, a condition precedent and a sine qua non for initiation of valid proceeding under section 148 of the Act.

3.1 That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating and completing proceedings under section 147 of the Act in absence of any fresh material or facts on record and thus, the proceedings under Section 147 of the Act is liable to be quashed.

4. *That on the facts and in the circumstances of the case & in law, the Ld. AO/Ld. DRP erred in mechanically and arbitrarily following the assessment order for earlier years and concluding that the Appellant has a fixed place permanent establishment (“PE”) and a dependent agent PE in India as per the India-USA Double Taxation Avoidance Agreement (“DTAA”).*

4.1 *That on the facts and in the circumstances of the case & in law, the Ld. AO/Ld. DRP erred in not appreciating that the Appellant has discontinued its business operations in the relevant AY and accordingly, does not have any business connection/PE in India.*

5. *That on the facts and in the circumstances of the case & in law, the Ld. AO pursuant to the directions of Ld. DRP erred in computing the total income of the Appellant at INR 4,97,37,942 as against returned income of Nil without appreciating that the amounts reflected in Form 26AS does not belong to the Appellant.*

6. *Without prejudice to the aforementioned grounds, the Ld. DRP erred in making an arbitrary addition of INR 4,97,37,942 to the income of the Appellant taking a notional profit rate of 75% without any basis.*

7. *That on the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234A & 234B of the Act which is consequential in nature.*

8. *That on the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234C of the Act.*

The above grounds are without prejudice to each other. The Appellant craves leave to add, alter, amend, rescind, modify or withdraw any ground(s) herein above or produce further documents either before or at the time of hearing of this appeal.”

3. Referring to the issues vide Ground No. 2, the ld. counsel for the assessee vehemently stated that the assessment order dated 21.06.2019 is void ab initio. It is the say of the ld. counsel for the assessee that the Assessing Officer has grossly erred in framing a draft assessment order dated 03.12.2018 when the same was not at all required on the facts of the case. Therefore, the assessment order dated 21.06.2019 deserves to be annulled.

4. On the other hand, the ld. DR strongly supported the orders of the authorities below.

5. We have given thoughtful consideration to the orders of the authorities below.

6. Briefly stated, the facts of the case are that as per the information received through non-filers monitoring system, the Assessing Officer came to know that the assessee has received a sum of Rs. 6,63,17,256/- from different Airlines operating in India. The Assessing Officer found that the assessee has not filed its return of income for the F.Y. 2010-11 relevant to Assessment Year 2011-12.

7. The Assessing Officer issued notice u/s 148 of the Act, pursuant to which, the assessee filed return of income declaring income at NIL. The assessee is a limited partnership based in the state of Delaware, USA having its principal business at Georgia and is engaged in the business of providing information reservations transaction processing and related services of airlines, travel agencies and other travel related entities. The assessee owns and operates global distribution system located outside India and provides subscribers with access to and use of this GDS.

8. While scrutinizing the return of income, the Assessing Officer noticed that the assessee did not have any receipts in India during the year under consideration though the Revenue appears in Form No. 26AS. The assessee was asked to explain why it did not file its return of income in spite of having receipts during the year as appearing in Form 26AS.

9. In its reply, the assessee stated that it did not have any receipts during the year under consideration and TDS has been deducted by the payer companies inadvertently against the PAN of the assessee company. It was explained that the receipts disclosed in Form 26AS

was of its subsidiary company M/s Travel Port Global Distribution System B.V. Netherlands. To a specific query, the assessee was asked whether the same has been offered to tax by its subsidiary company.

10. Reply of the assessee did not find any favour with the Assessing Officer. Taking a leaf out of the proceedings for Assessment Year 2010-11, the Assessing Officer observed that there is no change in the facts of the case and concluded by holding that the assessee has PE in India and profit of 100% was attributed to the assessee company and addition of Rs. 6,63,17,256/- was made.

11. The assessee carried the matter before the Id. CIT(A) and challenged the validity of the assessment order before the DRP but without any success.

12. It was strongly contended before the DRP that the assessee is not an eligible assessee within the provisions of section 144C of the Act.

13. This plea was dismissed by the DRP who was of the firm belief that since there is no change of facts in the Assessment Year under consideration in regard to the status of the assessee as LLP, therefore,

the objection on the issue of eligible assessee was found to be without any substance and was rejected.

14. Before us, the ld. counsel for the assessee once again took the plea that the assessee cannot be termed as an eligible assessee within the provisions of section 144C of the Act, and therefore, being an eligible assessee, there was no need for framing the draft assessment order and by doing so, the final assessment order dated 21.06.2019 is void ab initio.

15. We have given thoughtful consideration to this plea of the ld. counsel for the assessee. Provisions of section 144C of the Act which relates to reference to Dispute Resolutions Panel were inserted vide Finance Act [No. 2] Act 2009 w.e.f. 01.04.2009. The provisions read 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 (hereinafter 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."

16. The aforesaid section 144C of the Act can only apply prospectively i.e. from A.Y. 2011-12 and is not applicable to the Assessment Year under consideration. The Hon'ble High Court of Madras in the case of M/s Vedanta Limited vs. ACIT Writ Petition No.1729 of 2011 has categorically held that the provisions of Section 144C of the Act can be held to be applicable prospectively, from AY 2011-12 only. The relevant findings read as under:

"26. Thus, where there is a change in the form of assessment itself, such change is not a mere deviation in procedure but a substantive shift in the manner of framing an assessment. A substantive right has enured to the parties by virtue of the introduction of Section 144C, that, bearing in mind the settled position that the law applicable on the first day of assessment year be reckoned as the applicable law for assessment for that year, leads one to the inescapable conclusion that the provisions of Section 144C can be held to be applicable only prospectively, from AY 2011-12 only."

17. In year under challenge is on the proposition that the order is void ab initio. The Assessing Officer has framed draft assessment order when the provisions were not applicable to the assessee.

18. “Eligible Assessee” means, any person in whose case variation referred to in sub-section arises as a consequence of an order passed by the TPO u/ss (3) of section 92CA of the Act.

19. Facts of the case in hand show that no order has been passed by the TPO, therefore, there is no question of any variation arising as a consequence of the order of the TPO and since the assessee is an LLP, therefore, it cannot be termed as a foreign company, which means that provisions of section 144C of the Act with all its sub section do not apply to the assessee, which means that the impugned assessment order dated 21.06.2019 is void ab initio.

20. The co-ordinate bench at Mumbai in ITA No. 2572/Mum/2017 had the occasion to consider a similar issue and held as under:

“9. We have considered rival submissions and perused material on record. The issue in dispute lies in a very narrow compass. It has to be examined whether the assessee can be termed as an “eligible assessee” under section 144C(15)(b) of the Act to empower the Assessing Officer to pass the draft assessment order under section 144C(1) of the Act. Before we examine the facts relevant for deciding the issue, it is necessary to deal with the relevant statutory provisions which are applicable to the facts of the present issue. Undisputedly, the Assessing Officer has proceeded to pass the draft assessment order under section 144C(1) of the Act against the assessee for the impugned assessment year. A

reading of section 144C(1) of the Act makes it clear that notwithstanding anything to the contrary contained under the Act the Assessing Officer shall propose a draft assessment order and forward it to the eligible assessee if he intends to undertake any variation in the income or loss returned by the said assessee which is prejudicial to the interest of the said assessee. Sub-section (15)(b) of section 144C of the Act defines eligible assessee as under:-“(15) For the purpose of this section,-(a)(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.]”10.A reading of the aforesaid provision makes it clear that „eligible assessee“ would mean a person in whose case the variation proposed in the draft assessment order arises as a consequence of an order passed by the Transfer Pricing Officer under section 92CA(3) of the Act and if it is a foreign company. Keeping in view the above statutory provision if we examine the facts of the present case, it can be seen that the Assessing Officer has neither made any reference to the Transfer Pricing Officer under section 92CA(1) of the Act nor the Transfer Pricing Officer has passed any order under section 92CA(3) of the Act. Therefore, the variation proposed in the draft assessment order is not as a consequence of any order passed by the Transfer Pricing Officer. Therefore, the first condition of section 144C(15)(b) of the Act is not satisfied. Thus, it requires to be seen whether the assessee can fit into the definition of a foreign company as provide du/s 144C(15)(b)(ii) of the Act. As per the definition of foreign company under section 2(23A) of the Act, it means a company which is not a domestic company. Section 2(22A) of the Act defines domestic company to be an Indian Company or any other company which declares and pays dividend within India out of its income. Whereas, the documentary evidences placed before us including the return of income filed by the assessee as well as the residency certificate issued under section 10F of the Act, it is seen thatthe status of the assessee has been shown as limited liability partnership. In fact, the Department has allotted PAN to the assessee in the status of a partnership firm. The definition of firm under section 2(23) of the Act includes a limited liability partnership. Further, in the draft assessment order passed under section 144C of the Act for the assessment year 2016-17, the status of the assessee has been shown as firm. Thus, from these facts, it becomes clear that the assessee is not a foreign company but a

limited liability partnership. The aforesaid factual position has not been controverted by the learned Departmental Representative by bringing before us any documentary evidence. Keeping in view the aforesaid factual position qua the relevant statutory provision, if we examine the judicial precedents it can be seen that in the case of ESS Advertising (Mauritius)S.N.C.(supra), the Tribunal while dealing with an identical issue has held as under:-

“5. We have considered the rival submissions on the issue of additional ground raised by the assessee before us and also the material referred to and the judgments in support of the said ground. All the additional grounds in the impugned assessment years involve purely a legal issue which goes to the very root of the validity of the assessment passed u/s 144C (1) and for adjudication of such an issue no new facts or material is required to be examined or investigated. Therefore, such an additional ground is admitted. For admission of such a legal ground, we are supported by the judgment of Hon’ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC). 6. As stated above, the assessee is a non-resident entity which is a partnership firm incorporated under the laws of Mauritius and is also a tax resident of Mauritius. It had filed its return of income shown „nil“ income on 31.10.2005 which was duly processed u/s 143(1) on 18.3.2006. Thereafter, assessee’s case was reopened U/S 147 vide notice dated 10th June, 2008 issued u/s 148 and in pursuance thereof, draft assessment order was passed/proposed u/s 144C (1). In the impugned draft assessment order, but has even noted the following facts:-“As the assessee had entered into international transactions with its associated enterprise, a reference was made to Transfer Pricing Officer u/s 92CA(1) on 18.9.2008 who vide his order dated 7.9.2009 did not draw any adverse inference in respect of the international transactions.” 7. After noting down such facts, passing of such a draft assessment order in absence of any order passed u/s 92CA(3) thereby making any kind of TP adjustment, then provision of section 144C could not have been resorted to, because the assessee cannot be reckoned as “eligible assessee” in whose case the draft order of assessment is required to be passed. Section 144 C(1) reads as:

“144C. (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.” 8. The aforesaid provision which is a non obstante clause,

provides that the AO has to forward a draft of the proposed order of assessment to the „eligible assessee“, if he proposes to make an order after the first day of October, 2009 making any variation in income and or loss returned which is prejudicial to the interest of such assessee. The “eligible assessee” has been defined in clause (b) of sub section 15 which reads as under:-144C(15)(b) “eligible assessee” means

i) any person in whose case the variation referred to in subsection (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.” From the conjoint reading of the aforesaid provisions it is quite clear that assessee must be a foreign company in whose case the variation which has been referred and if there is any variation arising out of consequence of order passed by the TPO in terms of section 92CA (3), then only provision of section 144C can be triggered. Here in this case as noted by AO himself, there is no variation as a consequence of any order passed by the TPO as there is no adjustment made in the case of the assessee. We find that in the case of ESPN Star Sports Mauritius SNC ET Compagnie (supra) the Hon“ble Jurisdictional High Court on same issue had quashed such order passed u/s 144C (1) and consequently the final assessment order passed in pursuance of DRP“s direction. The relevant observation and finding reads as under:-“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 assessee’s is also held to be invalid.” 9. Again this issue had come up for consideration before the Tribunal in the case of assessee’s sister concern, i.e., ESPN Star Sports Mauritius SNC ET Compagnie (supra) wherein on exactly similar facts this Tribunal following the judgment of Hon’ble Delhi High Court had observed and held as under:-“12. We now espouse the first condition, being, „any person“ in whose case variation is proposed in the income returned in the draft order consequent upon the passing of an order by the TPO. Though the assessee is „any person“”, but admittedly, the TPO has not proposed any variation in the income arising from the international transactions. Thus, it becomes manifest that the assessee has not fulfilled any of the conditions to become „eligible assessee“ in terms of section 144C(15)(b). A fortiori, no draft assessment could have been

proposed u/s 144C(1) of the Act which has in fact been proposed by the Assessing Officer before passing the final impugned assessment order.

The Hon'ble jurisdictional High Court in the assessee's own case for the assessment year 2010-11, since reported as *ESPN Star Sports Mauritius S.N.C.ET Compagnie v. Union of India* (2016) 388 ITR 383/241 Taxman.38/68 taxmann.com 377 (Delhi), has allowed the assessee's writ petition under similar circumstances by setting aside the draft assessment order and the final assessment order with the following observations made in para 30, which are as under:- "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 assessee“, is also held to be invalid." 14. Reverting to the assessment year under consideration, we find that the Assessing Officer passed draft assessment order u/s 144C(1) of the Act on receipt of the order from the TPO. Thereafter, the final assessment order was passed after routing the matter through the DRP. As the assessee is not an „eligible assessee“, the assessment should have been completed u/s 143(3) instead of adopting the path of passing the draft assessment order u/s 144C(1). We find that the facts and circumstances for the assessment year under consideration are identical to those considered and decided by the Hon'ble High Court in writ petition for the assessment year 2010-11. Respectfully following the binding precedent, we set aside the final assessment order. The additional ground is, therefore, allowed to this extent. 15. In view of our decision on the additional ground setting aside the assessment order, there is no need to deal with the grounds on merits." 10. There are other judgments of Hon'ble Delhi High Court wherein similar issue has been decided in favour of the assessee like in the case of, *Honda Cars India Limited vs. DCIT* judgment dated 17.2.2016 passed in WP(C)4262/2015 and CM No. 7736/2015; wherein the Hon'ble High Court had observed and hold as under:- "8. A reading of Section 144C(1) of the Act shows that the Assessing Officer in the first instance is to forward a draft of the proposed order of assessment to the "eligible assessee", if he proposes to make any variation in the income or loss return which is prejudicial to the interest of such assessee. The draft assessment order is to be forwarded to an "eligible assessee" which means that for the section to apply a person has to be an "eligible assessee". 9.

Section 144C (15)(b) of the Act defines as “ eligible assessee” to mean (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 section 92CA(3); and (ii) any foreign company.

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11. In Section 144C (15)(b) of the Act, the term “eligible assessee” is followed by an expression “means” only and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of an order of the Transfer Pricing Officer and (ii) any foreign company. The use of the word “means” indicates that the definition “eligible assessee” for the purposes of Section 144(C)(15)(b) is a hard and fast definition and can only be applicable in the above two categories. 12. First of all, the petitioner is admittedly not a foreign Company. Secondly, the Transfer Pricing Officer has not proposed any variation to the return filed by the petitioner. The consequence of this is that the Assessing Officer cannot propose an order of assessment that is all variance in the income or loss return. The Transfer Pricing Officer has accepted the return filed by the petition. In view of the which, neither of the two conditions are satisfied in the case of the petitioner and thus the petitioner for the purposes of Section 144C(15)(b) is not an “eligible assessee”. Since the petitioner is not an eligible assessee in terms of Section 144C(15)(b), no draft order can be passed in the case of the petitioner under Section 144C(1).

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14. In view of the above, it is clear that the petitioner, not being an “eligible assessee” in terms of Section 144C(15)(b) of the Act, the Assessing Officer was not competent to pass the draft assessment order under section 144C (1) of the Act. The draft assessment order dated 31.3.2015 is accordingly quashed. 15. Since we have quashed the draft assessment order, the question that the assessment has now become time barred is left open and it is open to the parties to take recourse of such remedy, as may be available to them in law.” 11. Following these judgments, now there are numerous judgments not only passed by the various High Courts but also by this Tribunal, wherein it has been categorically held that, if assessee is not an “eligible assessee” in terms of section 144C(15)(b), then AO is not competent to pass a draft assessment order u/s 144C and the final assessment order consequently becomes time barred. Accordingly, following the aforesaid binding judicial precedents, we hold that the draft assessment order is invalid and consequently the impugned

final assessment order is also unsustainable in law and is set aside. Consequently the additional ground as well as the appeal of the assessee is allowed.”

11. The Hon'ble Delhi High Court in Honda Cars India Ltd. (supra) and ESPN Star Sports Mauritius SNC (supra), have also expressed similar view. The Hon'ble Gujarat High Court in Pankaj Extrusion Ltd. (supra) has also held that unless the assessee is an eligible assessee under section 144C(15)(b) of the Act, the Assessing Officer cannot pass a draft assessment order under section 144C of the Act. Keeping in view the principle of law propounded in the aforesaid judicial precedents, we have no hesitation in holding that the draft assessment order passed in case of the assessee for the impugned assessment year is invalid. Therefore, all the proceedings consequent thereupon are also invalid. Consequently, the draft assessment order as well as the final assessment order passed in pursuance thereof is quashed. In view of our aforesaid decision in the additional ground raised by the assessee, the main grounds raised in the present appeal have been rendered academic in nature and no adjudication is required.”

21. In light of the above judicial decisions and provisions of section 144C of the Act, we have no hesitation in holding that the assessment order is void ab initio. Ground No. 2 with its sub-grounds is allowed.

22. Even on merits of the case, the assessee has to succeed in as much as the findings given by the Assessing Officer is totally based upon the findings given in earlier Assessment Years. Even the directions of the DRP are based upon the directions given in earlier Assessment Years and both the authorities grossly erred in not realizing that the assessee has discontinued its business after Assessment Year

2010-11. Therefore, drawing support from earlier year's order would do no good to the Revenue as the facts are not similar. In fact, the Assessing Officer has put the entire burden on the assessee to show in whose hands the receipts shown in Form 26AS has been declared.

23. In our considered opinion, by putting the onus on the assessee, the Assessing Officer has grossly erred as the assessee is not responsible to explain the recipients of the receipts shown in Form No. 26AS. The Assessing Officer should have asked the payer, details of the payee to whom payments have been made by the payer on which it could deduct tax at source. Therefore, on merit also, addition cannot survive as facts are not identical to the facts of earlier Assessment Years.

24. In the result, the appeal of the assessee in ITA No. 6503/DEL/2019 is allowed.

The order is pronounced in the open court on 09.02.2023.

Sd/-

[ANUBHAV SHARMA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 09th February, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	