

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
% Judgment Reserved on: 20th October, 2015
Judgment Delivered on: 17th February , 2016

+ WP(C) 4262/2015

**HONDA CARS INDIA LIMITED (FORMERLY – M/S HONDA
SIEL CARS INDIA LIMITED** Petitioner

versus

DEPUTY COMM. OF INCOME TAX & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Deepak Chopra with Mr Amit Srivastava and Ms Manasvini Bajpai.

For the Respondents: Ms Suruchi Aggarwal with Mr Lakshmi Gurung and Ms Radhika Gupta.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J

WP(C) 4262/2015 & CM No.7736/2015(stay)

1. A short question arises for consideration in the present writ petition, i.e., whether the Assessing Officer was competent to pass a draft assessment order under Section 144C(1) of the Income-tax Act, 1961 (hereinafter referred to as “the Act”)? The question arises in view of the contention of the petitioner that the petitioner does not fall

in the category of an “eligible assessee”, as defined under Section 144C(15)(b) of the Act.

2. The contention of the petitioner is that firstly the petitioner is not an eligible assessee, as defined under Section 144C(15)(b) of the Act as the Transfer Pricing Officer (TPO) had not proposed any variation in the income or loss return which was to the prejudice of the petitioner. Secondly, while framing the draft assessment order, the Assessing Officer was also required to give effect to the Circular issued by the Central Board of Direct Taxes (CBDT) while making disallowances under Section 40(a)(i) of the Act whereby the Assessing Officer could make disallowance of only the net amount and not the gross amount of purchases made by the petitioner from its associated enterprise. Thirdly, it is contended that in terms of Section 153(1) third proviso, the assessment could be completed by 31.03.2015 and since only a draft assessment order was passed, which suffers from jurisdictional defect, the assessment proceedings have now become time barred.

3. The petitioner is a Company incorporated in India and is engaged in the business of manufacture and sale of passenger cars. The petitioner is a subsidiary company of Honda Motors Company Limited, Japan (“Honda Japan” for short). The petitioner purchases raw material, spare parts, capital goods etc. from Honda Japan and cars are manufactured in India under the technical collaboration

agreements. The petitioner pays royalty to Honda Japan. On 29.11.2011, return of income was filed by the petitioner for the assessment year 2011-2012 declaring NIL income. Since the petitioner had entered into international transaction, on 11.11.2013, the Assessing Officer referred the same to the TPO under Section 92CA(1) of the Act for computing the arm's length price in relation to the international transaction.

4. On 30.01.2015, the TPO passed an order under Section 92CA(3) of the Act and no variation was proposed to the returned income of the petitioner and it was held as under:-

“4. The Transfer pricing documentation, which contains the functional and economic analysis of comparables and the assessee, has been examined and placed on record.

5. In view of the functional and economic analysis of assessee, no adverse inference is drawn in respect of the international transactions undertaken by the assessee during the FY 2010-11.”

5. On 31.03.2015, the Assessing Officer passed the impugned draft assessment order under Section 144C of the Act proposing the total income of the petitioner to be assessed at Rs 1830,07,49,517/-. While making disallowance under Section 40(a)(i) of the Act in respect of payments made by the petitioner to non-resident associated enterprise, the Assessing Officer has proposed to disallow the entire

payments made by the petitioner for purchasing raw materials, spare parts etc.

6. The petitioner has impugned the draft assessment order and raised the three contentions, as noted hereinabove. With regard to the contention of the petitioner that the Assessing Officer was required to give effect to the Circular issued by the CBDT while making disallowance under Section 40(a)(i) of the Act, the respondents in their counter-affidavit have contended that in terms of the Circular No.3/2015 dated 12.02.2015 issued by the CBDT disallowance under Section 40(a)(i) should be made only in the appropriate proportion of the sum chargeable to tax as per Section 195(1) of the Act and as the said Circular of CBDT is binding on the Assessing Officer, the benefit of the Circular would be given to the assessee. In view of the categorical stand taken by the respondent, conceding to the contention of the petitioner, we need not dwell further into this issue.

7. With regard to the first contention of the petitioner that the petitioner is not an “eligible assessee”, we may note relevant portion of Section 144C of the Act which reads as under:

Reference to dispute resolution panel.

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.

XXXX XXXX XXXX XXXX

(15) For the purposes of this section,—

(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.

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 an “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.

10. The Supreme Court in *P.Kasilingam & Others v. P.S.G.College of Technology & Ors.* : 1995 Suppl 2 SCC 348 has held that the use of word “means” indicates that the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in the definition.

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 at variance in the income or loss return. The Transfer Pricing Officer has accepted the return filed by the petitioner. 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).

13. Similar is the view taken by the High Court of Gujarat in **Pankaj Extrusion Limited versus Assistant Commissioner of Income Tax** : (2011) 198 Taxman 6 (Gujarat), which has held as under:-

“7. Plain reading of clause (b) of sub-section (15) of section 144C would show that an assessee can be stated to be an eligible assessee as referred to in sub-section (1) of section 144C in whose case variation referred to in the said sub-section arises as a consequence of order of Transfer Pricing Officer passed under sub-section (3) of section 92CA. We have been taken through the order passed by the Assistant Commissioner of Income-tax dated 29-9-2010, wherein it is held as under:

"3. The assessee is engaged in the business of manufacture of Aluminium Profiles. The details of International transactions in terms of section 92B of the Act between the assessee and its Associate Enterprise are given in Form 3CE8. Relevant details regarding international transactions were produced by the assessee and are kept on record. After discussion and based on records produced, no adjustment is being made to the arm's length price of the transactions." (Emphasis supplied)

8. From the above, it is clear that for assessment

year relevant for our purpose, on account of procedure undertaken in section 92CA of the Act, there was no variation in the income by virtue of order of Transfer Pricing Officer. That being the position, the petitioner cannot be stated to be an eligible assessee as defined in clause (b) of subsection (15) of section 144C of the Act. Procedure for issuance of draft. order calling for his objection and taking further steps as laid down under section 144C therefore, would not apply.”

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 31.03.2015 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.

16. The petition is accordingly allowed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

BADAR DURREZ AHMED, J.

February 17, 2016/sn