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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
18 & 19

+ **W.P.(C) 4260/2015**

TURNER INTERNATIONAL INDIA PVT. LTD. Petitioner

Through: Mr. M.S. Syali, Senior Advocate with
Mr. Mayank Nagi & Mr. Tarun
Singh, Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 25(2),
NEW DELHI Respondent

Through: Mr. Dileep Shivpuri, Senior Standing
Counsel & Mr. Sanjay Kumar, Junior
Standing Counsel

And

+ **W.P.(C) 4261/2015**

TURNER INTERNATIONAL INDIA PVT. LTD. Petitioner

Through: Mr. M.S. Syali, Senior Advocate with
Mr. Mayank Nagi & Mr. Tarun
Singh, Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 25(2),
NEW DELHI Respondent

Through: Mr. Dileep Shivpuri, Senior Standing
Counsel & Mr. Sanjay Kumar, Junior
Standing Counsel

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE CHANDER SHEKHAR

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ORDER
17.05.2017

Dr. S. Muralidhar, J.:

1. The challenge in these writ petitions is to the Assessment Orders passed by the Assessing Officer ('AO') on 31st March, 2015 for the Assessment Year ('AY') 2007-08 (subject matter of challenge in WP (C) No. 4261/2015) and AY 2008-2009 (subject-matter of challenge in WP (C) No. 4260/2015). Both the Assessment Orders were accompanied by the Demand Notices which have also been challenged in these writ petitions.
2. The background facts are that the Petitioner is a wholly-owned subsidiary of Turner Broadcasting System Asia Pacific Inc. It is engaged in the business of sub-distribution of distribution rights and sale of advertisement inventory on satellite delivered channels.
3. For the AY 2007-08, it filed its returns on 31st October 2007, declaring its income at Rs. 10,69,43,491/-. This was later revised on 31st March, 2009 to claim a higher TDS. As far as AY 2008-09 is concerned, the Petitioner filed a return of income on 30th September, 2008 declaring its income at Rs. 35,04,23,465/-.
4. In respect of both the returns, since there were international transactions involving the Assessee, a reference was made by the AO to the Transfer Pricing Officer ('TPO'). In respect of both the AYs, two separate orders were passed by the TPO on 29th October, 2010 (in respect of AY 2007-08) and 17th October, 2011 (in respect of AY 2008-09), in respect of the Distribution Activity segment.

5. On the basis of the above orders of the TPO, draft Assessment Orders were passed by the AO. These were objected to by the Petitioner before the Dispute Resolution Panel ('DRP'). After the DRP concurred with the TPO, final assessment orders were passed by the AO. These were appealed against by the Petitioner before the ITAT.

6. By a common order dated 14th January 2013, in both the appeals pertaining to the two AYs, the ITAT observed that neither the Petitioner nor the TPO had taken into consideration appropriate comparables and, therefore, the determination of arms length price ('ALP') was not justifiable. While setting aside the order of the DRP, the ITAT remanded the matters to the AO for undertaking a transfer pricing study afresh and framing an assessment in accordance with law.

7. Following the above order of the ITAT, fresh notices were sent on 2nd August, 2013 by the TPO to the Petitioner under Section 92CA(2) of the Income Tax Act, 1961 ('Act').

8. Two separate orders were passed by the TPO on 30th January, 2015 proposing an upward adjustment to the total income of the Petitioner for each of the AYs.

9. Pursuant to the above order, the AO on 31st March, 2015 passed final Assessment Orders in respect of both AYs under Sections 254/143(3)/144 C (13) read with Section 92 CA (4) of the Act confirming the additions as proposed by the TPO. Accompanying the aforementioned final Assessment

Orders were notices of demand under Section 156 of the Act and notices under Section 271(1)(c) of the Act initiating penalty proceedings.

10. The short ground on which the aforementioned final assessment orders and the consequent demand notices have been challenged is that there was non-compliance with the mandatory provision contained in Section 144C(1) of the Act requiring the AO to first frame draft assessment orders.

11. The question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirements of first passing draft assessment order in terms of Section 144C(1) of the Act is no longer *res integra*. There is a long series of decisions to which reference would be made presently.

12. In ***Zuari Cement Ltd. v. ACIT*** (decision dated 21st February, 2013 in WP(C) No.5557/2012), the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under Section 144C (1) of the Act would result in rendering the final assessment order “without jurisdiction, null and void and unenforceable.” In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was affirmed by the Supreme Court by the dismissal of the Revenue's SLP (C) [CC No. 16694/2013] on 27th September, 2013.

13. In ***Vijay Television (P) Ltd. v. Dispute Resolution Panel [2014] 369 ITR 113 (Mad.)***, a similar question arose. There, the Revenue sought to rectify a mistake by issuing a corrigendum after the final assessment order

was passed. Consequently, not only the final assessment order but also the corrigendum issued thereafter was challenged. Following the decision of the Andhra Pradesh High Court in ***Zuari Cement Ltd. v. ACIT*** (*supra*) and a number of other decisions, the Madras High Court in ***Vijay Television (P) Ltd. v. Dispute Resolution Panel*** (*supra*) quashed the final order of the AO and the demand notice. Interestingly, even as regards the corrigendum issued, the Madras High Court held that it was beyond the time permissible for issuance of such corrigendum and, therefore, it could not be sustained in law.

14. Recently, this Court in ***ESPN Star Sports Mauritius S.N.C. ET Compagnie v. Union of Indi*** [2016] 388 ITR 383 (Del.), following the decision of the Andhra Pradesh High Court in ***Zuari Cement Ltd. v. ACIT*** (*supra*), the Madras High Court in ***Vijay Television (P) Ltd. v. Dispute Resolution Panel, Chennai*** (*supra*) as well as the Bombay High Court in ***International Air Transport Association v. DCIT*** (2016) 290 CTR (Bom) 46, came to the same conclusion.

15. Mr. Dileep Shivpuri, learned counsel for the Revenue sought to contend that the failure to adhere to the mandatory requirement of issuing a draft assessment order under Section 144C (1) of the Act would, at best, be a curable defect. According to him the matter must be restored to the AO to pass a draft assessment order and for the Petitioner, thereafter, to pursue the matter before the DRP.

16. The Court is unable to accept the above submission. The legal position as explained in the above decisions is unambiguous. The failure by the AO

to adhere to the mandatory requirement of Section 144C (1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings.

17. For the aforementioned reasons, the final assessment orders dated 31st March, 2015 passed by the AO for AYs 2007-08 and 2008-09, the consequential demand notices issued by the AO and the initiation of penalty proceedings are hereby set aside.

18. The petitions are allowed in the above terms. No order as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 17, 2017

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