

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1802 OF 2021

Shell India Market Pvt. Ltd.

....Petitioner

V/s.

Additional/Joint/Deputy/Assistant
Commissioner of Income Tax/
Income Tax Officer and Ors.

...Respondents

Mr. J.D. Mistri, Senior Advocate a/w Mr. Madhur Agrawal, Ms. Sheeja John,
Ms. Radhika Nair and Mr. Varun Sonawala i/b M/s. M.P. Savla & Co. for
Petitioner.

Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 22nd DECEMBER, 2021

PC. :

1. Heard learned counsel and what we understood is that the Revenue has in effect, in the affidavit in reply, acknowledged that there was failure on the part of the Assessing Officer to follow the procedure prescribed under Section 144C(1) of the Income Tax Act, 1961 (the Act). But according to Mr. Suresh Kumar, it is merely a procedural or inadvertent error. Paragraph No.27 of the judgment of this court in ***SHL (India) Private Limited vs. Deputy Commissioner of Income Tax, Circle 8(2)(1), Mumbai***¹ reads as under :

27. 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;

1 (438) ITR 317 (BOM)

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.

2. Therefore, argument of Mr. Suresh Kumar that failure on the part of the Assessing Officer to follow the procedure under Section 144C(1) is merely a procedural or inadvertent error cannot be accepted. The requirement under Section 144C(1) of the Act to first pass the draft assessment order and to provide a copy thereof to the assessee is mandatory requirement that gave substantive right to the assessee to object to any variation, that is prejudicial to the assessee. Depriving petitioner of this valuable right to raise objection before DRP would be denial of substantive right to the assessee. As held in ***SHL (India) Private Limited*** (supra), failure to follow the procedure under Section 144C(1) of the Act would be a jurisdictional error and not merely procedural error or a mere irregularity. Therefore, the Assessing Officer has assumed jurisdiction to straight away pass the final order without following the mandatory procedure prescribed under Section 144C of the Act. It is held in ***SHL (India) Private Limited*** (supra) that this is not a mere irregularity but an incurable irregularity.

3. In the circumstances, we quash and set aside the impugned assessment order dated 15th June, 2021. However, there shall be no order as to costs.

4. Petition disposed.

(AMIT B. BORKAR, J.)

(K.R. SHRIRAM, J.)