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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.06.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.31165 of 2018

and

W.M.P.Nos.36367 & 36389 of 2018

M/s.Enfinity Solar Solutions Private Limited,
Represented by its Director,
Mr.Shalin Shah,
No.55, Teachers Colony,
Venkatarathnam Nagar,
Chennai - 600 020.

.. Petitioner

vs

The Deputy Commissioner of Income Tax,
Corporate Circle - 2(1),
R.No.511, Wanaparthi Block,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

.. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records on the file of the Respondent in PAN: AACCE3046M and quash the impugned Assessment Order issued under Section 143(3) r.w.s 254 of the Income Tax act, 1961 dated 01.11.2018 passed by the respondent.

For Petitioner : Mr.Veerabathiran Prasanth
For Mr.R.Sivaraman

For Respondent : Mr.D.Prabhu Mukunth Arunkumar
Standing counsel

O R D E R

The Assessment order dated 01.11.2018 passed under Section 143 (3) read with Section 254 of the Income Tax Act for the Assessment Year 2012-13 is under challenge in the present writ petition.

2. The petitioner is a Private Limited Company engaged in the business of development and sale of integrated solar installations and other related services for solar power installations. The petitioner filed the return of income for the



Assessment Year 2012-13 on 28.11.2012. The return was duly processed under Section 143(1) and the case was selected for scrutiny under Section 143(2) dated 20.04.2015 and the petitioner company had international transactions with the Associated Enterprise and the case was transferred to the Transfer Pricing Officer under Section 92CA of the Act for determining the Arm's Length Price.

3. The Transfer Pricing Officer vide his order dated 29.01.2016 under Section 92 CA(3) of the Income Tax Act, made an adjustment to the Arm's Length Price of the international transactions undertaken by the petitioner company. Thereafter, a Draft Assessment order was issued on 31.03.2016 under Section 144(3) read with Section 144C(1) of the Act. Aggrieved over the said order, the petitioner company filed its objections before the Disputes Resolution Panel, Bangalore. The Disputes Resolution Panel vide its order dated 21.10.2016, in addition to the adjustments proposed by the Transfer Pricing Officer, directed the authority to make adjustments on the transactions with Non-Associated Enterprises. Consequently, the Assessing Officer issued the final assessment order under Section 143(3) read with Section 144(C)(13) incorporating the said adjustment. The petitioner company preferred an appeal before the Income Tax Appellate Tribunal[hereinafter referred to as 'ITAT'], Chennai in ITA.No.2018/Mds/2018. The Tribunal vide its order dated 03.04.2017, remitted back the matter to the Transfer Pricing Officer to examine the selection of most appropriate method for determining the Arm's Length Price and also to see whether the Associated Enterprises has derived any benefit or mark up on the price charged by the vendor for supply of raw materials to petitioner's Associated Enterprise. The petitioner company once again made its submissions before the Transfer Pricing Officer, through its authorized representative. After the entire hearing, the Transfer Pricing Officer vide his order dated 27.10.2018, computed the Arm's Length Price of International transactions with respect to purchase of materials, which resulted in a downward adjustment.

4. The petitioner states that the order of the Transfer Pricing Officer would reveal that the authority has failed to consider several crucial aspects. The respondent under those circumstances, instead of issuing a draft assessment order as mandated under Section 144(C)(1) of the Act, has issued the final assessment order under Section 143(3) read with Section 254 of the Act in proceedings dated 01.11.2018. Thus, the petitioner is constrained to move the present writ petition.

5. The learned counsel for the petitioner strenuously contended that the procedures followed by the respondent for passing of the impugned order of final assessment is directly in



violation of the procedures contemplated under Section 144(C) of the Income Tax Act. No draft assessment order has been passed after remitting the matter back by the ITAT. Thus, the petitioner is deprived of filing objections before the Disputes Resolution Panel by submitting their objections. The denial of opportunity in this regard is violation of the very provision itself. Thus, the impugned final assessment order is liable to be set aside.

6. In support of the said contention, the learned counsel for the petitioner referred the judgment of this Court in the case of Principal Commissioner of Income Tax-4 Vs. Headstrong Services India (P) Ltd., reported in [2021] 125 taxmann.com 262 (Delhi) and the relevant paragraphs are extracted hereunder:

"13. The ITAT while remanding the matter of transfer pricing adjustment to the Assessing Officer vide order dated 17th July, 2012 had not only 'restored' the matter "to the file of the Assessing Officer "for following proper procedure" but also to "decide the matter de novo".

14. This Court is of the view that once the ITAT directed the Assessing Officer to decide the matter de novo, it meant that a new hearing of the matter had to be conducted, as if the original hearing had not taken place (See: meaning of "De novo hearing" in Black's Law Dictionary).

15. Consequently, the Assessing Officer had to decide the matter in accordance with the elaborate procedure mentioned in Section 144C and not de hors it.

SECTION 144C ENVISAGES A CHANGE OF FORUM AND IT LEADS TO COMPLETE CESSATION OF THE JURISDICTION OF THE ASSESSING OFFICER ON PASSING OF THE DRAFT ORDER. THEREAFTER THE ASSESSING OFFICER IS TO GIVE EFFECT TO EITHER THE DIRECTION OF THE DISPUTE RESOLUTION PANEL OR PASS AN ORDER ON ACCEPTANCE BY THE ASSESSEE.

17. In the opinion of this Court, Section 144C is a self contained provision which carves out a separate class of assesses i.e. 'eligible assessee' i.e. any person in whose case the variation arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of Section 92CA. For this class of assesses, it prescribes a collegium of three commissioners, once objections are preferred. Dispute Resolution Panel's powers are co-terminous with the CIT(A), including the power to confirm, reduce or enhance the variation proposed and to consider the issues not agitated by the Assessee in the objections. In fact, under Section 144C, the Dispute Resolution Panel can issue directions as it thinks fit for the



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guidance of the Assessing Officer to enable him to complete the assessment and the Dispute Resolution Panel can confirm, reduce or enhance the variations proposed in the draft order. It is specifically stipulated in Section 144C that every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer. This is akin to the Assessing Officer giving effect to an order passed by the Appellate Authority or the Courts.

18. Consequently, Section 144C envisages a change of forum and it leads to complete cessation of the jurisdiction of the Assessing officer on passing of the draft order. Thereafter the Assessing officer is to give effect to either the direction of the Dispute Resolution Panel or pass an order on acceptance by the Assessee.

THE EXPRESSION IN THE FIRST INSTANCE' HAS BEEN USED IN SECTION 144C TO SIGNIFY THE FIRST STEP TO BE TAKEN BY THE ASSESSING OFFICER IN A SERIES OF ACTS CONTEMPLATED BY THE SAID SECTION. TO ACCEPT THE APPELLANT'S ARGUMENT WOULD BE TO PERMIT THE ASSESSING OFFICER TO DECIDE THE OBJECTIONS FILED BY THE ASSESSEE - WHICH POWER HAS BEEN SPECIFICALLY DENIED BY THE STATUTE."

7. The learned counsel for the petitioner also cited the judgment in the case of M/s.Durr India Private Limited, Vs. The Assistant Commissioner of Income Tax, Corporate Range-I in W.P.No.32751 of 2017 dated 27.05.2021. Further, in the case of GE Oil & Gas India Private Limited Vs. Assistant Commissioner of Income Tax, the Madras High Court passed an order on 05.01.2021 in W.P.No.1575 of 2020 and the relevant paragraphs are extracted hereunder:

"3. The Officer raises the question of maintainability on the ground that a statutory remedy is available before the Assessing Officer for rectification of mistake. The error committed is not a technical lapse as sought to be explained away, but one that is substantive. It is an admitted position that the assessment of this petitioner involves issues of transfer pricing and an order has been passed by the Transfer Pricing Officer determining the arms length price.

5. I draw support in this regard from a decision of this Court in Vijay Television V. Dispute Resolution Panel (369 ITR 113), confirmed by the Division Bench in 407 ITR 642 that reiterates the settled proposition that Section 144C sets forth a mandatory scheme of



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assessment and it is incumbent upon the Assessing Officer to pass an order of draft assessment at the first instance before proceeding to finalise the assessment in line with the procedure set out under Section 144C.

7. In Principal Commissioner of Income Tax V. Headstrong Services India Private Limited (I.T.A.No.77 of 2019 dated 24.12.2020), the challenge was to an assessment made on remand from an appellate authority and the issue that arose was whether the assessing authority would have to pass a draft order of assessment or a final order of assessment. The phrase 'in the first instance' in Section 144C was interpreted by the Division Bench to the effect that, be an original order of assessment or an assessment made on remand, the mandate of Section 144C must be followed."

8. Relying on the above judgments, the learned counsel for the petitioner reiterated that issuance of draft order is mandatory and contemplated under Section 144(C) of the Income Tax Act. Thus, the respondents have not only violated the provisions of the Act, but violated the legal principles settled by various Courts across the country.

9. The learned Standing counsel appearing on behalf of the respondent disputed the contentions raised on behalf of the petitioner by stating that the facts in the present case with reference to Section 144C of the Income Tax Act is no way connected with the judgments relied upon. In the present case, the draft assessment order was passed by the respondent. Thereafter, an assessment order was passed on 25.12.2016. The petitioner preferred an appeal before the Income Tax Appellate Tribunal and the appeal was partly allowed and the matter was remitted back to the Assessing Officer only to decide a particular issue and therefore, the Assessing officer decided that issue and passed the assessment order. In such circumstances, if at all, the petitioner is aggrieved from and out of the assessment order passed, he has got a right of an appeal under Section 246A before the Commissioner of Income Tax (Appeals). Even without exhausting the Appellate remedy contemplated under the Act, the present writ petition is filed. Thus, the writ petition is to be dismissed.

10. With reference to the judgments relied upon, the learned Standing counsel is of an opinion that though the judgments are on different facts and circumstances and therefore, the same cannot be relied upon for the purpose of considering the case of the writ petitioner. The facts in the present case is entirely different and thus, the writ petition



is liable to be dismissed.

11. Let us now consider the spirit of Section 144(C) of the Income Tax Act, which contemplates procedures by itself. Sub Clause 1 enumerates "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 which is prejudicial to the interest of such assessee."

12. Sub Clause 2 to Section 144(C) denotes that "On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,-

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer"

13. Sub Clause 3 to Section 144C stipulates that "The Assessing Officer shall complete the assessment on the basis of the draft order, if-

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2)."

14. Careful perusal of the above provision, as rightly pointed out by the petitioner, the draft order is mandatory under Section 144(C) of the Income Tax Act. An Assessing officer, at the first instance, forward a draft proposed order of assessment, enabling the assessee to accept the variations to the Assessing Officer or file his objections, if any, with the Disputes Resolution Panel and the Assessing Officer. Thus, the procedure of passing of draft assessment order provides a right to an assessee to file his objections before the Disputes Resolution Panel and the Assessing Officer for vindicating his grievances and redress the same. It is needless to state that the provisions of the Act must be complied with by the executives in its letter and spirit. When the procedure of passing the draft assessment order is contemplated under the Act, the same is to be scrupulously followed by the authorities competent.

15. Let us now consider whether the draft assessment order has been passed in the present case or not?

16. It is an admitted fact that the draft assessment order



was passed by the respondent for the Assessment Year 2012-13 in proceedings dated 31.03.2016. Thereafter, the petitioner filed his objections before the Disputes Resolution Panel as contemplated under Sub Clause 2(b) to Section 144-C of the Income Tax Act. Subsequently, all these materials were considered by the Assessing Officer and the final assessment order was passed under Section 143(3) read with Section 144C(13) in proceedings dated 25.12.2016 for the Assessment Year 2012-13. Thus, it is crystal clear that the procedures contemplated under Section 144C of the Income Tax Act had been followed by the respondents scrupulously, while passing the assessment order under Section 143(3) of the Act in proceedings dated 25.12.2016. Once the process under Section 144C has been scrupulously followed and a final assessment order is passed, then one cannot raise that the procedures were not followed.

17. However, the petitioner is of an opinion that even after remand by the Income Tax Appellate Tribunal, such a procedure is to be followed. In the present case, the petitioner preferred an appeal before the Income Tax Appellate Tribunal and the Appellate Tribunal adjudicated the issues on merits and passed an order on 03.04.2017. The relevant portion of the final order in Paragraphs 6 and 7 reads as under:

"6. We have heard both the parties and perused the material on record. As seen from the order of DRP, the assessee has only filed the purchase invoice relating to its purchase from its AE and also filed back to back invoice copies relating to AE purchasing to the tune of Rs.286,289,140.43. However, the assessee had not substantiated that AE has not derived any benefit or mark up on the price charged by the vendor for supply of material to it (AE), which it has sold to the present assessee. Unless the assessee filed full details of financial statement to show that the assessee's AE has not derived any benefit, it is not possible to apply the CUP method. In view of this, in the interest of justice, we remit the issue regarding application of the method whether the CUP Method or TNMM as a most appropriate method, to the file of AO to see whether the AE derived any benefit or mark up on the price charged by the vendor for supply of raw materials to assessee's AE, which it has sold to assessee. With this observation, we remit the present issue for selection of appropriate method to the AO for fresh consideration. Since we have remitted the issue regarding selection of most appropriate method by the AO/TPO, at this state it is too premature to decide any other issues raised by the assessee. Further, we make it clear that the assessee is at liberty to raise any other grounds in support of the claim of assessee in



this case.

7. In the result, the appeal of assessee is partly allowed for statistical purposes.”

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18. Perusal of the above order clarifies that the Income Tax Appellate Tribunal remitted the issue regarding application of the method whether the CUP method or TNMM as a most appropriate method to the file of Assessing Officer to see whether the AE derived any benefit or mark up on the price charged by the vendor for supply of raw materials to assessee's AE, which it has sold to assessee. With these observations, the Income Tax Appellate Tribunal remitted the issue for selection of appropriate method to Assessing Officer for fresh consideration.

19. Thus, it is not the case, where the entire order is set aside and a direction is issued, remanding the matter to conduct a fresh adjudication of the entire issues by following the procedures contemplated under Section 144C of the Income Tax Act. The Income Tax Appellate Tribunal, in clear terms, directed the Assessing Officer to decide regarding the application of method i.e., whether CUP method or TNMM as a most appropriate method. Thus, a specific issue was directed to be decided by the Assessing Officer and a direction was issued to the Assessing Officer to make it clear that the assessee is at liberty to raise any other grounds in support of the claim of the assessee in this case. The ITAT further held that the matter was remitted. The issue regarding selection of most appropriate method by the Assessing Officer / Transfer Pricing Officer and has not decided other issues raised by the assessee.

20. Considering the above findings of the ITAT, this Court is of the considered opinion that once again following the procedures right from the beginning as contemplated under Section 144C of the Income Tax Act would not arise at all. Admittedly, the procedures contemplated under Section 144C of the Act in the present case had been scrupulously followed by the respondent by passing a draft assessment order on 31.03.2016 and the assessee filed an objection before the Disputes Resolution Panel, who in turn, also passed an order and thereafter, a final assessment order under Section 143(3) was passed on 25.03.2016. Thus, once again commencing from the beginning is not the idea behind the provision and therefore, the very principles mooted out by the petitioner to commence the proceedings right from the initial stage deserves no merit consideration and stands rejected. Once the procedure has been followed and the Appellate Tribunal remitted the matter back to decide the particular issue with a specific finding, then it is sufficient if the remitted issue was decided by the Assessing



Officer / Transfer Pricing Officer and a final assessment order is passed. Repetition of the same procedures would become an empty formality, which is not intended under the provision and therefore, this Court is of the considered opinion that when the matter was remitted with reference to a particular issue to be clarified or decided by the competent authority, it is sufficient if such an issue is decided and thereafter, a final assessment order is passed. Even in such circumstances, the assessee is having a right of appeal under the provisions of the Act and therefore, in the event of any grievance with reference to an assessment order subsequent passed after remitting the matter by the ITAT, the petitioner is at liberty to file an appeal and thus, the grounds raised once again to pass the draft assessment order would not arise at all.

21. The procedures as contemplated under Section 144C of the Act must be meaningfully followed and constructive interpretation is to be adopted. Repeatedly passing draft assessment order is not the spirit of the provision. The legislative intention is to provide an opportunity to an assessee before passing the final assessment order. Thus, such an opportunity is already provided and the assessee also availed of the opportunity by submitting an objection before the Disputes Resolution Panel and the Assessing Officer and thereafter, a final assessment order is passed and after remitting the matter by ITAT to decide a particular issue, the same procedure in entirety contemplated under Section 144 C of the Act need not be followed and such a repetition is not only unnecessary, but not contemplated. The very intention of the provision is to provide an opportunity to the assessee. The opportunity has already been provided. Further, the opportunity is made available before the Appellate authority to redress the grievances. Thus, in the event of again directing the authorities to follow the procedures right from the beginning, the proceedings would not only be prolonged, it will be protracted, which would provide an undue advantage to the assessee in the matter of payment of income tax.

22. This being the principles to be followed, which all are considered by this Court with reference to the facts and circumstances of the writ on hand, this Court has no hesitation in forming an opinion, the petitioner has not made out any acceptable ground for the purpose of considering the relief as such sought for in the present writ petition. If at all, the petitioner is aggrieved by the assessment order, which is impugned in this writ petition, he is at liberty to prefer an appeal before the Appellate authority namely the Commissioner of Income Tax (Appeals) by following the procedures as contemplated.

23. With this liberty, the writ petition in W.P.No.31165 of



2018 stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

Kak

To

The Deputy Commissioner of Income Tax,
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Chennai - 600 034.

+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 28693

W.P.No.31165 of 2018

CP(CO)
GN(22/07/2021)