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W.P.No.24679 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.08.2023

PRONOUNCED ON : 08.09.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.24679 of 2021

and W.M.P.Nos.25976 & 25977 of 2021

M/s.GE Oil & Gas India Private Ltd.,
Represented by its Authorized Signatory
Ranveer Singh Rana

... Petitioner

VS

1.The Additional/Joint/Deputy/Assistant
Commissioner of Income Tax,
Income Tax Officer,
National e-assessment Centre,
Delhi.

2.The Deputy Commissioner of Income Tax,
Corporate Circle 1,
67A, Race Course Road,
Coimbatore 641 018.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India for
issuance of a Writ of Certiorari calling for the records on the file of the
first respondent in passing the impugned order bearing order



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No.ITBA/AST/S/143(3)/2021-22/1036018060(1) dated 29.09.2021
under Section 143(3) r/w 144B of the Act for the Assessment Year 2018-19 and quash the same.

For Petitioner : Mr.R.Sivaraman

For Respondents : Mr.Prabhu Mukunth Arunkumar
Junior Standing Counsel &
Mr.B.Ramana Kumar
Senior Standing Counsel.

ORDER

The petitioner is aggrieved by the impugned order dated 29.09.2021 which has been purportedly passed under Section 143(3) r/w 144B of the IncomeTax Act, 1961. The dispute in the present case pertains to the Assessment Year 2018-19.

2. After the returns were filed by the petitioner on 30.11.2018 under Section 139 of the Income Tax Act, 1961, the petitioner was issued with a notice dated 23.09.2019 under Section 143(2) of the Income Tax Act, 1961 read with Rule 12(E) of the Income Tax Act, 1961 for scrutinising the return under E-Assessment Scheme, 2019 issued in



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S.O.3264(E)vide [Notification No. 61/2019/F.No. 370149/154/2019-TPL] dated 12.09.2019 by the Central Board of Direct Taxes Ministry of Finance (Department of Revenue) notifying the E-assessment Scheme, 2019. The petitioner however failed to respond to the above notice.

3. Thereafter, a further notice was served on the petitioner under Section 92CA(2) of the Income Tax Act, 1961 on 01.03.2021 by the Transfer Pricing Officer(TPO) for computation of Arm's length price as the petitioner had international transactions.

4. The petitioner once again failed to reply to the aforesaid notice dated 01.03.2021 of Transfer Pricing Officer (TPO). Therefore, a notice dated 02.07.2021 was issued to the petitioner under Section 271G of the Income Tax Act,1961 on 02.07.2021 by the Transfer Pricing Officer.

5. Since the petitioner had also failed to reply to the notice dated 02.07.2021, a Show Cause Notice dated 12.07.2021 was issued to the petitioner, to show cause as to why the Arm's Length Price of the International Transaction should not be determined as per the proposal



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contained therein. Relevant portion of the Show Cause Notice issued by the Transfer Pricing Officer(TPO) reads as follows:-

The assessee has not provided the above details till date. In the absence of the need-evidence-benefit analysis and documentation, the above explained Receipt of HQ Services and Technical Services ALP will be determined as “Nil”.

You are hereby requested to show cause as to why the Arm's Length Price of the International Transaction not be determined as per above mentioned proposal.

The objections, if any, of the taxpayer and the complete written submissions/information should be submitted on or before 16/07/2021. As it is time barring matter, it is kindly requested to adhere to the time limit. Further, the TPO may proceed to determine the ALP after the time limit given to you expires, without any further notice.

It is very pertinent to mention here that the transfer pricing is a factual intensive exercise. Thus, it is kindly requested to submit complete facts and evidences. Otherwise, the TPO had to take recourse to the information available on the record or in the public domain and complete the proceedings to the best of judgment.



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6. Thereafter, a notice dated 18.07.2021 under Section 129 of the Income Tax Act, 1961 was issued on account of change of incumbent in the Office of the Transfer Pricing Officer-2(1), Chennai. Notice dated 18.07.2021 gave the petitioner an opportunity of being heard. The said notice dated 18.07.2021 was followed by a Show Cause Notice cum Draft Assessment Order dated 26.09.2021 by the National Faceless Assessment Centre, New Delhi.

7. Para 2 to 4 of the Show Cause Notice-cum-Draft Assessment Order dated 26.09.2021 read as under:-

2. The variations as per the draft assessment order may be seen which are proposed to be made in your case:

M/s GE Oil & Gas India Pvt. Limited PAN: AAACD2199L for the Assessment year 2018-19 furnished return of income on 30.11.2018 declaring total income of Rs 1,16,32,29,720/- under normal provisions. The case was selected for scrutiny and notice u/s 143(2) of the Act was issued on 23.09.2019 and duly served on the assessee.

2. The assessee company GE Oil and Gas has its headquarters in London, United Kingdom and is engaged in providing mission critical



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equipment and services to the global oil and gas industry. The equipment and services are used in applications spanning the entire value chain from drilling through production, liquefied natural gas (LNG) and pipeline compression, pipeline inspection, and downstream processing in refineries and petrochemical plants. GE Oil and Gas designs and manufactures surface and subsea drilling and production systems, equipment for floating production platforms, compressors, turbines, turbo expanders, high pressure reactors, industrial power generation and a broad portfolio of auxiliary equipment.

TPO Adjustments:

3. A reference was made to the Transfer Pricing Officer, Chennai under section 92CA the IT Act. The TRANSFER PRICING DC/ACIT TP 2(1) CHENNAI(TPO) vide order in ITBA/TPO/F92CA3/2021-22/1034562119(1) dated 31/07/2021 has made the following adjustments: -

TPO REMARKS: -

- 3.1. On verification of the details submitted, it is found that the assessee is very generic. The assessee itself stated that these are stewardship services.
- 3.2. In this context the following OECD guidelines (para No. 7, 9, Page No. 207) "in a narrow range of such case, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to



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pay for it were they independent enterprises). Such an activity would be one that a group member, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies" assumes significance.

3.3.The European Union Joint Transfer Pricing Forum (JTPF), in their summit at Brussels on 4.2.2010 on the "guidelines on low value adding intra-group services" has discussed this issue elaborately. It says that costs of managerial and control (monitoring) activities related to the management and protection of the investment in participations are of shareholders activities only and these costs are to be classified as shareholders cost only. Hence the benefit received from such stewardship services can only be considered as "incidental benefits" as per the OECD guidelines and do not require a separate payment. The relevant para N. 7.12 of OECD guidelines states that "The incidental benefits ordinarily would not cause these other group members to be treated as receiving an intra group service because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would be willing to pay".

3.4.Judicial Pronouncements: M/s Knorr Bremse India Ltd vs ACIT Faridabad (I/TAT "I:" Bench, New Delhi ITA No. 5097/Del/2011) - it was held that only passive and incidental benefits were received by the assessee and ALP was determined as nil.

3.5.Conclusion: Considering the fact that the payment was made for stewardship services



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the cost incurred for which needs to be assigned to shareholders the ALP is adjusted to Nil.

3.6. Therefore, a downward adjustment of Rs 41,85,79,067/- is proposed to the receipt of Head quarter services and Rs. 4,95,10,421 to the receipt of Technical Services.

[Addition: Rs 46,80,89,488/-]

4. On perusal of the Profit and Loss account of the assessee for the relevant previous year, it is found that the assessee has claimed Rs 2,34,98,058/- as lease rent paid on vehicles. It is also noticed from the records, that similar issue was in the assessment year 2016-17 and during the course of assessment proceeding the assessee stated that "certain vehicles on finance lease and in line with the recognition criteria provided under Accounting Standard (AS)-19, the assessee had capitalized the assets taken under finance lease and claimed depreciation for the purpose of books of account. For income-tax purpose, since the assessee is not the legal owner of the assets, no depreciation is claimed under section 32 of the Act. The assessee has capitalized the assets for the purpose of companies Act. However the assessee has claimed the lease rentals of the above amounts as deduction. Finance lease is one where the lessee uses the asset substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. Therefore, the payment made towards the finance lease is nothing but towards acquisition of capital asset and is thus the payment made by the assessee company is



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capital in nature. In view of this, the amount of Rs.2,34,98,058/- claimed by the assessee is hereby disallowed u/s 37 of the IT Act.

[Addition of Rs
2,34,98,058/-]

5. It is also noticed that the assessee company has debited Registration costs and taxes paid on assets acquired under finance lease to the tune of Rs.31,26,490/-. The assessee company had incurred the expenditure towards the acquisition of capital assets, which is capital in nature, hence the expenditure of Rs.31,26,490/- incurred by the assessee is hereby disallowed .

The assessment is completed as above, as per the downward adjustment determined by the TPO and the total income of the assessee is computed as under:-

<i>Returned income</i>	<i>Rs.1,16,32,29,720/-</i>
Add: adjustment as per TPO's order n para “ 3.6”	Rs.46,80,89,488/-
Add: Disallowance u/s37(as per para4)	Rs.2,34,98,058/-
Add : Disallowance u/s37(as per para5)	Rs.31,26,490/-
Total Income assessed	Rs.1,65,79,43,756/-

3. Kindly submit your response through your registered e-filing account at www.incometax.gov.in by 23:59 hours of 28.09.2021, whereby you may either:-



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- a. accept the proposed variation ; or*
- b. file your written reply objecting to the proposed variation; or*
- c.If required, after filing written reply you may request for personal hearing so as to make oral submissions or present your case. The request can only be made by clicking the Seek Video Conferencing button available against the SCN, in the view notices of this proceeding in the e-proceedings tab on e-filing portal. The request can be made only before expiry of compliance date and time On approval of request, personal hearing shall be conducted exclusively through video conference.*

4. In case no response is received by the given time and date, the assessment shall be finalized as per the draft assessment order.

8. The petitioner was requested to respond through its Registered e-filing account to the above mentioned Show Cause Notice cum Draft Assessment Order dated 26.09.2021 by 23.59 hours. Response of the petitioner was received in time. Thereafter, the Impugned Assessment Order dated 29.09.2021 was passed under Section 143(3)r/w 144B of the Income Tax Act, 1961.



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9. Along with the Impugned Assessment Order dated 29.09.2021, the petitioner was issued with Notice of Demand dated 29.09.2021 under Section 156 and a Notice of penalty dated 29.09.2021 under Section 274 r/w Section 270A of Income Tax Act, 1961.

10. It is the specific case of the petitioner that the impugned order has been passed without complying with the procedure laid down in Section 144B of the Income Tax Act, 1961 as amended. In support of the present writ petition, the learned counsel for the petitioner has placed reliance on the following decisions:-

- i. **Vijay Television P Ltd., vs. Dispute Resolution Panel and Others**, (2014) 369 ITR (Mad.)
- ii. **Assistant Commissioner of Income Tax and Another vs. Vijay Television Private Ltd. and Another**, (2018) 407 ITR 642W (Mad.)
- iii. **Oil and Gas India Private Ltd., vs. Assistant Commissioner of Income Tax**, (2021) 436 ITR (Mad.)
- iv. **Shl (India) Pvt. Ltd. vs. Deputy Commissioner of Income Tax and Others**, (2021) 438 ITR 317 (Bom.)
- v. **Bekaert Mukand Wire Industries**



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Pvt.Ltd.,vs.Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax Officer and ors, W.PNo.2153 of 2021 dated 17.09.2021

- vi. **M/s.Take Solutions Limited rep.by its Director Ms.N.S.Shobana vs. The Income Tax Officer, National E-Assessment Centre Income Tax, Department Ministry of Finance Room No.401, 2nd Floor, E-RAMP Jawaharlal Nehru Stadium, Delhi 110 003., WP.No.12817 of 2021**
- vii. **Pr.Commissioner of Income Tax-2, BMTC Complex, Koramangala, Bangalore and Other vs. M/s.Cisco Systems Capital(India) Pvt.Ltd., Brigade South Parade, No.10, M.G.Road, Bengaluru 560 001, I.T.A.No.128 of 2021 dated 20.09.2021**

11.On behalf of the respondent, the learned counsel for the respondent has stated that the petitioner conceded that it received Show Cause Notice dated 12.07.2021 and an opportunity to show cause against the proposed determination of arm's length price of the international transactions by the TPO was given. It is submitted that the Assessing Officer was well placed to examine and evaluate the submissions of the petitioner before finality of the assessment was reached.



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12. It is submitted that although the assessment was completed vide order dated 29.09.2021, the petitioner was not left without any remedies. It is further submitted that the submission of the petitioner claims that it is bereft of the option of approaching the DRP owing to the failure of the 1st respondent in communicating the draft assessment order to the assessee before the finalisation of assessment proceedings cannot be countenanced.

13. It is submitted that the DRP is a collegiums Commissioners of Income Tax and the filing of an appeal before the CIT(A) would have lent the petitioner a similar opportunity as per the provisions of Section 250 of the Act. Although the CIT (A) is barred from setting aside an assessment proceeding and remit the case back to the file of AO; the petitioner separately wishes to avail of this Court. It is submitted that CIT (A) in his powers is entitled to call for any information, consider the same and adjudicate as per law. The availability of such an alternate remedy renders the filing of this writ petition, not maintainable. Hence, this writ petition is liable to be dismissed.



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14. I have perused the impugned order passed by the first respondent. The impugned order was preceded by a Show Cause Notice cum Draft Assessment Order dated 26.09.2021, content of which has been extracted above.

15. The **Andhra Pradesh High Court in Zuari Cements V ACIT Circle- 2(1)** vide order dated 21.02.2013 in W.P No 5557 of 2012 held as under:-

“A reading of the above section shows that if the Assessing Officer proposes to make, on or after October 1, 2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forward it to the assessee and after the assessee files his objections, if any, the Assessing Officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.

In the case of the petitioner, admittedly the Transfer Pricing Officer suggested an adjustment of Rs. 52.14 crores under section 92CA of the Act on September 20, 2011, and forwarded it to the Assessing Officer and to the assessee under sub-



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section (3) thereof. The Assessing Officer accepted the variation submitted by the Transfer Pricing Officer without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after October 1, 2009, the cut-off date prescribed in sub-section (1) of section 144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly, this has not been done and the respondent has passed a final assessment order dated December 22, 2011, straightaway. Therefore, the impugned order of assessment is clearly contrary to section 144C of the Act and is without jurisdiction, null and void.

The contention of the Revenue that Circular No. 5 of 2010 of the Central Board of Direct Taxes has clarified that the provisions of section 144C shall not apply for the assessment year 2008–09 and would apply only from the assessment year 2010–11 and later years is not tenable in as much as the language of sub-section (1) of section 144C referring to the cut-off date of October 1, 2009, indicates an intention of the Legislature to make it applicable, if there is a proposal by the Assessing Officer to make a variation in the income or loss returned by the assessee which is prejudicial to the assessee, after October 1, 2009. Therefore, this particular provision introduced by the Finance (No. 2) Act, 2009, would apply if the above condition is satisfied and other provisions, in which



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similar contrary intention is not indicated, which were introduced by the said enactment, would apply from April 1, 2009, i.e., from the assessment year 2010–11.

It is not disputed that the Memorandum Explaining the Finance Bill and the Notes on Clauses accompanying the Finance Bill which preceded the Finance (No. 2) Act, 2009, clearly indicated that the amendments relating to section 144C would take effect from October 1, 2009. In our view, Circular No. 5 of 2010 issued by the Central Board of Direct Taxes stating that section 144C(1) would apply only from the assessment year 2010–11 and subsequent years and not for the assessment year 2008–09 is contrary to the express language in section 144C(1) and the said view of the Revenue is unacceptable. The circular may represent only the understanding of the Board/Central Government of the statutory provisions but it will not bind this court or the Supreme Court. It cannot interfere with the jurisdiction and power of this court to declare what the Legislature says and take a view contrary to that declared in the circular of the Central Board of Direct Taxes (*Ratan Melting and Wire Industries case* (supra), *Indra Industries* (supra)). The Revenue has not been able to persuade us to take a contra view by citing any authority.

In this view of the matter, we are of the view that the impugned order of assessment dated December 23, 2011, passed by the respondent is contrary to the mandatory provisions of section 144C of the Act and is



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passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated December 23, 2011, issued by the respondent is set aside.”

16. The Andhra Pradesh High Court in Zuari Cements V ACIT

Circle- 2(1) vide order dated 21.02.2013 in W.P No 5557 of 2012, merely held that Assessment Order dated 22.12.2011 passed by the assessing officer therein and the demand notice dated 23.12.2011 were unsustainable and unenforceable.

17. The Court has not said that the assessment proceedings will abate if the impugned order itself was passed within the limitation period for completion of assessment mentioned under Section 153 of the Income Tax Act, 1961.

18. In **Vijay Television (P) Ltd., vs. Dispute Resolution Panel &Ors**, (2014) 369 ITR 113 which was affirmed by the Hon’ble Division Bench of this Court in **Assistant Commissioner of Income Tax, Media Circle-11, Chennai v. Vijay Television (P) Ltd**, relied upon is not relevant for the present dispute. There the Assessment Order dated



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26.03.2013 was passed for the Assessment Year 2009–2010.

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19. There, the last date for completing the assessment expired on 31.03.2013. The assessment order was passed on 26.03.2013 without issuance of a Draft Assessment Order. Subsequently, a corrigendum was issued on 15.04.2013 to the said Assessment Order dated 26.03.2013, by which time the limitation had expired under Section 153 of the Income Tax Act, 1961.

20. In Parapgraph Nos. 31 to 33, in **Vijay Television (P) Ltd., vs. Dispute Resolution Panel &Ors**, (2014) 369 ITR 113, the learned single Judge held as under:-

“31.The decision of the Division Bench of the Andhra Pradesh High Court deals with an identical issue as that of the present case. In this case, against the order passed by the second respondent on March 26, 2013, the petitioner filed objections before the Dispute Resolution Panel, the first respondent herein and the first respondent refused to entertain it by stating that the order passed by the second respondent is a final order and it had jurisdiction to entertain objections only if it is a



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draft assessment order. While so, the order dated March 26, 2013, of the second respondent can only be termed as a final order and in such event it is contrary to section 144C of the Act. As mentioned supra, in and by the order dated March 26, 2013, the second respondent determined the taxable amount and also imposed penalty payable by the petitioner. According to the learned senior counsel for the petitioners, even as on this date, the website of the Department indicate the amount determined by the second respondent payable by the company in spite of issuance of the corrigendum on April 15, 2013, as a tax due amount. Thus, while issuing the corrigendum, the second respondent did not even withdraw the taxable amount determined by him or updated the status in the website. **In any event, such an order dated March 26, 2013, passed by the second respondent can only be construed as a final order passed in violation of the statutory provisions of the Act. The corrigendum dated April 15, 2013, is also beyond the period prescribed for limitation. Such a defect or failure on the part of the second respondent to adhere to the statutory provisions is not a curable defect by virtue of the corrigendum dated April 15, 2013.** By issuing the corrigendum, the respondents cannot be allowed to develop their own case. Therefore, following the order passed by the Division Bench of the Andhra Pradesh High Court, which was also affirmed by the honourable Supreme Court by dismissing the special leave petition filed



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thereof, on September 27, 2013, the orders, which are impugned in these writ petitions are liable to be set aside.”

21. The learned Single Judge of this Court in **Vijay Television (P) Ltd., vs. Dispute Resolution Panel &Ors**, (2014) 369 ITR 113 followed the views of the Andhra Pradesh High Court in **Zuari Cements V ACIT Circle- 2(1)**.

22. The learned Single Judge of this Court **Vijay Television (P) Ltd., vs. Dispute Resolution Panel & Ors**, concluded that there was a violation of Section 144C of the Income Tax Act, 1961 while passing final order of assessment and therefore such order cannot be cured by way of corrigendum dated 15.04.2013 as it is issued only after the limitation period for completing assessment under Section 153 of the Income Tax Act, 1961 had expired.

23. This Court in **Vijay Television (P) Ltd., vs. Dispute Resolution Panel &Ors**, has also referred to the decision of the



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Allahabad High Court in **Commissioner of Income Tax vs. Shital**

Prasad Kharag Prasad, 280 ITR 541. The Court was influenced by Memorandum explaining the Finance Bill, 2009 which preceded to Finance (No.2) Act, 2009, wherein it was stated that Section 144C of the Act would take effect from 01.10.2009 and therefore it was held Circular No.5/10 issued by CBDT stating that amended Section 144C would apply only from the assessment year 2010-11 and subsequent years and not for the assessment year 2008-09 was held contrary to the express language in Section 144C(1) of the Income Tax Act, 1961 and the view of the Revenue was found unacceptable.

24. The dispute in the case pertains to the assessment year 2018-19. As per Section 153(1) of the Income Tax Act, 1961, the assessment had to be completed within a period of 18 months from the end of the assessment year in which the income was first assessable. In other words, ordinarily the last date for completing the assessment would have expired on 30.09.2020 for the Assessment Year 2018 – 2019, under Section 153(1) of the Income Tax Act, 1961.



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25. In case, there was intervention under Section 92 CA of the Income Tax Act, 1961 by the Transfer Pricing Officer (TPO). The Transfer Pricing Officer (TPO) was required to pass an order under Section 92CA(3) at least 60 days prior to the date meant for completion of the assessment under Section 153(1) of the Income Tax Act, 1961.

26. When reference is made under Section 92CA of the Income Tax Act, 1961, the time for passing the assessment order by the assessing officer gets extended by another 12 months under Section 153(4) of the Income Tax Act from the expiry of period of limitation under Section 153(1) of the Income Tax Act, 1961.

27. In other words, as per Section 153(4) of the Income Tax Act, 1961 the normal period of 18 months would stand extended by 12 months i.e. to 30.09.2021 from 30.09.2020.

28. In this case, admittedly, the case was referred to the Transfer Pricing Officer (TPO) as per Section 92CA. Thereafter, the Transfer Pricing Officer (TPO) passed an order under Section 92CA(3) of the



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Income Tax Act, 1961 on 31.07.2021 when the country was under lockdown due to the out break of Covid-19 Pandemic from 24/25th March 2020.

29. In this case, notice dated 23.09.2019 was issued under Section 143(2) of the Income Tax Act, 1961. It was prior to the lock down and prior to the reference to the Transfer Pricing Officer (TPO).

30. The Assessment was partly governed by the procedure under E-Assessment Scheme, 2019, as notified by the Central Board of Direct Taxes vide S.O.3264(E) vide Notification No.61/2019/ F.No.370149/ 154/2019-TPL) in S.O.3264(E)

31. The said scheme later got subsumed into Section 144B of the Income Tax Act, 1961 with effect from 01.04.2021. In fact, Section 144B of the Income Tax Act, 1961 was later substituted by an amendment to Income Tax Act, 1961 in 2022 vide Finance Act, 2022 with effect from 01.04.2022 with which we are not concerned with.



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32. Even if there was no intervention under Section 92CA by the Transfer Pricing Officer, the procedure prescribed both in the E-Assessment Scheme of 2019 referred (supra) and later under Section 144B of the Income Tax Act, 1961 as amended with effect from 01.04.2021 ought to have been followed by the respondents.

33. If the proceedings under 92CA before the Transfer Pricing Officer (TPO) was not contemplated, after notice dated 23.09.2019 under Section 143(2) of Income Tax Act, 1961 was issued, the assessment was to be made by the National Faceless Assessment Centre under Section 144B of the Income Tax Act, 1961 with effect from 01.04.2021.

34. The National Faceless Assessment Centre was required to intimate the petitioner that the assessment will be completed in accordance with the procedure under Section 144B of the Income Tax Act, 1961(formerly E-Assessment Scheme) 2019.



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35. The National Faceless Assessment Centre was to follow the procedure in Section 144B (1)(iv) of the Income Tax Act, 1961 as it stood till 31.03.2022 by referring the assessment to the Specific Assessment Unit (SAU). Thereafter, a draft assessment order was required to be prepared by the “Assessing Unit” (AU) as is contemplated under Section 144B(1) (xiv). Section 144B(1)(xiv) of the Income Tax Act, 1961 reads as under:-

“144B(1)(xiv) – the assessment unit shall, after taking into account all the relevant material available on record make in writing, a draft assessment order or, in a case where intimation referred in clause (xiii) is received from the National Faceless Assessment Centre, make in writing, a draft assessment order to the best of its judgement, either accepting the income or sum payable by, or sum refundable to, the assessee as per his return or making variation to the said income or sum, and send a copy of such order to the National Faceless Assessment Centre”.

36. The Assessing unit was required to take into account all the relevant materials available on record including the order dated 31.07.202 of the Transfer Pricing Officer under Section 92CA(3) of the Income Tax



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Act, 1961 and pass a Draft Assessment Order to the best of its judgement, either accepting the income or sum payable by, or sum refundable as per the return filed or make variation to the said income or sum, and send a copy of such order to the National Faceless Assessment Centre as per Section 144B(1)(xiv) of the Income Tax Act, 1961. The procedure under Section 144B(1)(xiv) ought to be followed strictly.

37. On receipt of the Draft Assessment Order under Section 144B(1)(xiv) the National Faceless Assessment Centre had to follow the procedure prescribed under Section 144B(1)(xvi) of the Income Tax Act, 1961 by either finalising the assessment in terms of Section 144B(1)(xvi) where no variations were proposed prejudice to the interest of assessee or provide an opportunity to the assessee, in terms of Section 144B(1)(xvi) where a variations was proposed prejudice to the interest of assessee or assign the Draft Assessment order to a review unit as mentioned in Section 144B(1)(xvi) of the Income Tax Act, 1961.

38. Section 144B(1)(xvi) of the Income Tax Act, reads as under :-

144B(1)(xvi)- The National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk
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management strategy specified by the board, including by way of an automated examination tool, whereupon it may decide to -

(a)	(b)	(c)
Finalise the assessment, in case no variation prejudicial to the interest of assessee is proposed, as per the draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, along with the demand notice, specifying the sum available by, or refund of any amount due to, the assessee on the basis of such assessment; or	provide an opportunity to the assessee, in case any variation prejudicial to the interest of assessee is proposed , by serving a notice calling upon him to show as to why the proposed variation should not be made; or	assign the draft assessment order to a review unit in any one Regional Faceless Assessment Centre through an automated allocation system, for conducting review of such order

39. In this case, the National Faceless Assessment Centre issued a Show Cause Notice cum Draft Assessment Order dated 26.09.2021 to the petitioner. The said Show Cause Notice cum Draft Assessment Order dated 26.09.2021 is inconsonance with the requirement prescribed under Section 144B(xvi)(b) of the Income Tax Act, 1961.

40. A reference could have been made to Review Unit under



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Section 144B(1)(xvi) (c) of the Income Tax Act, 1961. Thereafter, the petitioner was required to furnish a response to Show Cause Notice cum Draft Assessment Order in terms of Section 144B (1)(xxii) of the Income Tax Act, 1961. In this case, the petitioner has responded to Show cause Notice cum Draft Assessment Order dated 26.09.2021 on 28.09.2021.

41. Upon receiving the response/reply to the Show Cause Notice cum Draft Assessment Order the National Faceless Assessment Centre ought to have sent the response /reply to the Assessing Unit (AU) as per Section 144B(1)(xxiii)(b) of the Income Tax Act, 1961. The Assessing Unit (AU) was thereafter required to pass a Revised Draft Assessment Order and should have sent the same to the National Faceless Assessment Centre in terms of Section 144B(1)(xxiv).

42. In the present case, no Revised Draft Assessment Order was passed under Section 144B(1)(xxiv) of the Income Tax Act, 1961 by the Assessing Unit. Instead, an Assessment Order dated 29.09.2021 was passed directly.



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43. Upon receipt of Revised Draft Assessment Order, the National Faceless Assessment Centre ought to have followed the procedure laid down in Section 144B (1)(xxv) of the Income Tax Act, 1961. The National Faceless Assessment Centre had two options under Section 144B(1)(xxv) to proceed with the assessment that is either 144B(1)(xxv)(a) & 144B(1)(xxv)(b).

44. The National Faceless Assessment Centre was required to follow the requirement of Section 144B(1)(xxv)(a) of the Income Tax Act, 1961 only where there are any variations in the Revised Draft Assessment Order are “not prejudicial” to the interest of the assessee in comparison to the Draft Assessment Order.

45. Section 144B(1)(xxv)(a) of Income Tax Act, 1961 reads as under:-

144B(1)(xxv)(a)- In case the variations proposed in the revised draft assessment order are not prejudicial to the interest of the assessee in comparison to the draft assessment order or the final draft assessment order and ;



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In case of Eligible Assessee,	In any other case,
(A) In case the revised draft assessment order is in respect of an eligible assessee and there is any variation prejudicial to the interest of the assessee proposed in draft assessment order or the final draft assessment order, forward the said revised draft assessment order to such assessee;	(B) In any other case, finalise the assessment as per the revised draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee along with the demand notice, specifying the sum payable by , or refund of any amount due to, the assessee on the basis of such assessment.

46. Thus, only where any variations made in the Revised Draft Assessment Order that are “not prejudicial” to the interest of the assessee in comparison to the Draft Assessment Order, the National Faceless Assessment Centre could proceed with Section 144B(1)(xxv).

47. In case, where any variations are made in the Revised Draft Assessment Order “prejudicial” to the interest of the assessee in comparison to the Draft Assessment Order, the National Faceless Assessment Centre was required to provide an opportunity to show cause as mentioned under Section 144B(1)(xxv)(b) of the Income Tax Act, 1961 to the assessee.



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48. Section 144B(1)(xxv) (b) of the Income Tax Act, 1961 read as under:-

144B(1)(xxv)(b):- **in case the variations proposed in the revised draft assessment order are prejudicial to the interest of the assessee in comparison to the draft assessment order or the final draft assessment order, provide an opportunity to the assessee, by serving a notice calling upon him to show-cause as to why the proposed variation”.**

49. Upon replying to Show Cause Notice issued to an assessee in terms of Section 144B(1)(xxv)(b), the procedure laid down in 144B(1)(xxiii), 144B(1)(xxiv), 144B(1)(xxv) of the Income Tax Act, 1961 were to apply *mutatis mutandis*.

50. In case of an “eligible assessee”, to whom a Revised Draft Assessment Order under Section 144B(1)(xxv)(a)(A) of the Income Tax Act, 1961 is issued such an “eligible assessee” has to within a period of



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30 days from the date of receipt of such order either : -

- a. file acceptance to the variations before the National Faceless Assessment Centre; or
- b. file objections, if any to such variation with:-
 - i.the Dispute Resolution Panel (DRP); and
 - ii.the NFAC.

51. In the former case, where the assessee on the receipt of the Revised Draft Assessment Order files acceptance or when no objections are filed before the National Faceless Assessment Centre within a period of 30 days, the National Faceless Assessment Centre as the assessing authority has to finalise the assessment in terms of Section 144B(1)(xxviii) of the Income Tax Act, 1961 within a period of one month from the end of the month in which:-

- (a)The assessee intimates to the NFAC his acceptance of variation; or
- (b)when no objections are received by the NFAC within the period specified in sub-section (2) of Section 144C.

52. Where on receipt of the Revised Draft Assessment Order the assessee files his objections within a period of 30 days before the Dispute Resolution Panel (DRP) in terms of Section 144B (1)(xxix) of the Income



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Tax Act, 1961, the Dispute Resolution Panel is required to issue directions under Section 144C(5) read with Section 144C(12) of the Income Tax Act, 1961 within a period of 9 months from the end of the month in which the Revised Draft Assessment Order was forwarded to the eligible assessee.

53. Thereafter, the NFAC is required to forward such direction to the Assessing Unit to complete the Assessment. The Assessing Unit, upon receiving such direction has to make a “Draft Assessment Order” and send it to the National Faceless Assessment Centre in terms of Section 144B(1)(xxx) of the Income Tax Act, 1961. It is only, thereafter the NFAC can finalise assessment within a period of one month from the end of the month in which such Draft assessment order is received.

54. The Court can take judicial notice of initial difficulties and teething problems in implementing the E-Assessment Scheme, 2019 and the procedure prescribed under Section 144B(1) of the Income Tax Act, 1961 with effect from 01.04.2021. Such mistakes can be condoned if the



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time for completing the assessment has not expired.

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55. The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 came to be issued by the Ministry of Finance for providing relaxation on 31.03.2020. Thereafter, Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 was passed by the Parliament. Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 received the assent of the President on 29.09.2020. The Act gave power to the Central Government under Section 3 to specify the period for completion or compliance of such action mentioned therein.

56. Relevant portion of Section 3 of Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 reads as under :-

3.(1)Where, any time-limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of



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March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as—

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or

b)

c)

(i)

(I)

(II)

(ii)

and where completion or compliance of such action has not been made within such time, then, the time-limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 31st day of March, 2021, or such other date after the 31st day of March, 2021, as the Central Government may, by notification, specify in this behalf:



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57. The period under Section 3 of the Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 was extended to 30.03.2021 in S.O. 4805(E) by notification No 93/2020/F. No. 370142/35/2020-TPL dated 31.12.2020. Thereafter, by notification No.10/2021/F.No. 370142/35/2020-TPL in S.O. 966(E) (Statutory Order) was passed where period completion of assessment extended from as follows :-

(b) for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof, —	
(i) expires on the 31 st day of March, 2021 due to its extension by the said notification, such time limit shall stand extended to the 30thday of April, 2021;	(ii) is not covered under (i) and expires on 31st day of March, 2021, such time limit shall stand extended to the 30thday of September, 2021;

58. This was further extended to 30.06.2021 by notification No. 38 /2021/ F. No. 370142/35/2020-TPL in S.O. 1703(E). Yet again due to the ongoing pandemic the limitation period was further extended to 30.09.2021 by notification No.74/2021/ F.No.370142/35/2020-TPL S.O. 2580(E).



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59. The time for completing the assessment in case of an “eligible assessee” would have expired only on 30.09.2022 in view of relaxation under Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 and later under Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 and notifications issued therein.

60. Thus, the period for completing assessment under Section 153(1) of the Income Tax Act, 1961 stood extended to 30.09.2021. However, in view of Section 153(4) the said period will further stand extended to 30.09.2022.

61. Therefore, the time for passing such order had not expired on the date when the impugned assessment order dated 29.09.2021. At the same time, as mentioned above, the impugned assessment order dated 29.09.2021 was not in accordance with the above procedure. Since the limitation had not expired, the assessment cannot abate.



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62. It is the view of this Court the assessment cannot be kept in a state of flux. It has to be completed or abate on account of limitation. In this case, assessment proceedings cannot abate under the provisions of Income Tax Act, 1961 unless the time specified have expired and in view of the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 and Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 and notifications issued therein.

63. The decision of this Court in the petitioner's own case in W.P.No.1575 of 2020 dated 05.01.2021 for the Assessment Year 2016-17 cannot be applied straightaway as there has been change in the procedure for completing the assessment under Section 144B of the Income Tax Act, 1961 with effect from 01.04.2021.

64. Therefore, the view taken in W.P.No.1575 of 2020 dated 05.01.2021 the said decision is rendered in context of the Assessment Order passed on 24.12.2019 cannot be applied in support of the case of the petitioner. That apart, it precedes the out-break of Covid-19 Pandemic



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and the relaxation pursuant to Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Ordinance 2020.

65. Therefore, the impugned order is set aside and the case is remitted back to the respondent to treating the impugned order as a Draft Assessment Order and facilitate the petitioner to work out remedy against the Draft Assessment Order in the manner known to law under the provisions of Section 144 B of the Income Tax Act, 1961.

66. Time taken from the date of impugned order till the date of disposal of the writ petition and its receipt shall stand excluded for the purpose of computing limitation under section 153 of the Income tax Act, 1961.

67. In view of the above discussion, the impugned order is quashed and the connected notice issued under Section 156 of the Income Tax Act, 1961 and notice issued under Section 274 and notices penalty r/w 270 of the Income Tax Act, 1961 also stands quashed.

68. This Writ petition stands disposed of with the above observation by way of remand to pass a Draft Assessment Order. No



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costs. Consequently, connected miscellaneous petitions are closed.

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08.09.2023

Index : Yes/No

Neutral Citation : Yes/No

kkd

To

1.The Additional/Joint/Deputy/Assistant
Commissioner of Income Tax,
Income Tax Officer,
National e-assessment Centre,
Delhi.

2.The Deputy Commissioner of Income Tax,
Corporate Circle 1,
67A, Race Course Road,
Coimbatore 641 018.

C.SARAVANAN,J.
kkd



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Pre-delivery Order in
W.P.No.24679 of 2021

08.09.2023