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

WRIT PETITION NO. 1706 OF 2023

ExxonMobil Company India Pvt. Ltd. ....Petitioner

V/s.

The Deputy Commissioner of Income Tax – 6(1)(1), Mumbai and Anr. ...Respondents

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Mr. Paras Savla for Petitioner.
Mr. Devvrat Singh for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 16th APRIL 2024

P.C. :

1. Since the pleadings in the petition are completed, we have decided to dispose the petition at the admission stage itself.

2. Rule. Rule made returnable forthwith.

3. Petitioner has challenged an order along with demand notice dated 30th January 2023 passed by Respondent No.1 – Deputy Commissioner of Income Tax – 6(1)(1), Mumbai who is also an Assessing Officer (A.O.) of petitioner giving effect to the order of the Income Tax Appellate Tribunal (ITAT) for the Assessment Year (A.Y.) 2009-10. It is petitioner's case that the impugned order is non-est, time barred and results in the abatement of the assessment to assessee. Consequently, petitioner is

entitled to refund all taxes paid for A.Y. 2009-10 in excess of what was payable as per the return of income along with applicable interest arising on such refund.

4. Petitioner filed its return of income for A.Y. 2009-10 on 25th September 2009 declaring an income of Rs.44,59,83,972/-. Petitioner's case was selected for scrutiny assessment and the A.O. referred petitioner's case to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) of the international transactions. The TPO passed an order under Section 92CA(3) of the Income Tax Act, 1961 (the Act) on 23rd November 2012 recommending an enhancement of Rs.2,38,79,893/- to petitioner's returned income.

5. The transfer pricing addition was in relation to two activities of petitioner, Rs.40,49,175/- concerning provision of technical services and Rs.1,98,30,718/- concerning provision of back office support services. The A.O. in addition to incorporating TPO's recommendation had also proposed a total disallowance of Rs.4,85,91,645/-. Respondent No.1 thereafter passed draft assessment order dated 14th March 2013 incorporating the transfer pricing adjustment and disallowance. Against final assessment order that was passed petitioner filed an appeal. The Commissioner of Income Tax (Appeal) [CIT(A)] by an order dated 29th March 2017 upheld the transfer pricing additions of Rs.2,38,79,893/- and part of the disallowance made.

Against the said order of the CIT(A) petitioner approached the Income Tax Appellate Tribunal (ITAT). The ITAT by an order dated 27th July 2020 with respect to the transfer pricing addition in relation to provision of back office support services set aside the findings of the CIT(A) as well as the A.O. and remanded the matter to file of the A.O./TPO for fresh adjudication. Paragraph No.7 of the order reads as under :

> *7. In respect of provision of back-office support services, we find that similar issue arose before the ITAT 'K' Bench, Mumbai in the case of the appellant for AY 2008-09 (ITA No. 3601/Mum/2014). As mentioned earlier, the Ld. CIT(A) while confirming the adjustment of Rs.1,98,30,718/- has followed the order his predecessor-in-office for AY 2008-09. The Tribunal vide its order dated 23.05.2018 for the AY 2008-09 has set aside the order of the Ld. CIT(A) and restored the matter to the file of the AO/TPO for fresh adjudication.*
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> *Facts being identical, we follow the above order of the Co-ordinate Bench and restore the matter in respect of provision of back-office support services to the file of the AO/TPO for fresh adjudication, after affording reasonable opportunity of being heard to the appellant.*

6. The A.O. pursuant to the said order of the ITAT dated 27th July 2020 with prior approval of the Principal Commissioner of Income Tax – 6, Mumbai made a reference to the TPO on 31st December 2021 to give effect to the ITAT's order. The TPO passed the said order on 4th November 2022 and further rectification order dated 9th January 2023. The TPO in the order giving effect to tribunal order, suggested a transfer pricing addition of Rs.1,73,51,834/- in relation to provision of back office support services.

7. The A.O., i.e., Respondent No.1 passed an order dated 30th January 2023 giving effect to the ITAT's order by making a transfer pricing

addition of Rs.1,73,51,834/- and determining a demand of Rs.2,21,12,400/-. Against this order petitioner has filed this petition on various grounds. According to petitioner, the impugned order dated 30th January 2023 is barred by limitation.

8. Petitioner further states that the Tribunal by its order dated 27th July 2020 had remanded the transfer pricing issue for determining arm's length price of provision of back-office support services back to the file of the A.O./TPO. Therefore, in this case, there is no dispute that the provisions of Section 144C of the Act, read with Section 92CA of the Act were applicable. Section 144C(1) of the Act mandates that a draft assessment order is necessary before the A.O. can proceed to pass a final assessment order. Even in partial remand proceedings from the Tribunal, the A.O. is obliged to pass a draft assessment order under Section 144C(1) of the Act. Absent draft assessment, the order is without jurisdiction. Therefore, even on this count, the order giving effect along with demand notice dated 30th January 2023 passed by the A.O. is non-est in law and liable to quashed. Hence, the A.O. should forthwith refund the taxes paid by petitioner for the impugned assessment year in excess of what was payable by petitioner as per the return of income along with applicable interest arising on such refund.

9. Affidavit in reply opposing the petition through one Ms.Jayantika Singh, Deputy Commissioner of Income Tax – 6(1)(1),

Mumbai affirmed on 14th July 2023 has been filed. The stand taken by the Revenue is that the process of draft order is not to be ad-infinitum. According to the Revenue it is nowhere mentioned in the Act that the provisions of Section 144C of the Act will be attracted while giving effect to the order of the ITAT. According to the Revenue a draft order under Section 144C of the Act had already been shared with assessee on 14th March 2013 during the original assessment proceedings and just because the case was partially set aside by the ITAT for further verification on the issue of transfer pricing adjustment or a reference under Section 92CA(1) was made through TPO on 4th January 2022 does not mean that the draft assessment order under Section 254 read with Section 144C(1) read with Section 143(3) of the Act was required to be passed.

10. The issue in short is whether on remand the A.O. was obliged to pass a draft assessment order under Section 144C(1) of the Act.

11. The Division Bench of this court in ***Dimension Data Asia Pacific PTE Ltd. vs. Deputy Commissioner of Income Tax***[1] has considered this issue. The court held that even in partial remand proceedings from the Tribunal, the A.O. is obliged to pass a draft assessment order under Section 144C(1) of the Act. Paragraph Nos.8 and 9 of the *Dimension Data Asia Pacific PTE Ltd.* (supra) read as under :

1 (2018) 96 taxmann.com 182 (Bombay)

8. The contention of the Revenue that the requirement of passing a draft Assessment Order under Section 144C of the Act would only extend to the orders passed in the first round of proceedings or in respect of an order passed by the Assessing Officer in remand proceedings by the Tribunal which has entirely set aside the original assessment order. This distinction which is sought to be drawn by the Revenue is not borne out by Section 144C of the Act. In fact, the Delhi High Court in JCB (India) Ltd. (supra) held that, <u>even in partial remand proceedings from the Tribunal, the Assessing Officer is obliged to pass a draft assessment order under Section 144C(1) of the Act. According to us, the Assessing Officer, is obliged to, in terms of Section 144C of the Act to pass a Draft Assessment Order in all cases where he proposes to assess the Foreign Company under the Act by making a variation in the returned income.</u> In this case, the impugned order dated 31st January, 2018 has been passed in terms of Section 143(3) read with Section 144C read with Section 254 of the Act and it certainly makes a variation to the returned income filed by the petitioner. This even if, one proceeds on the basis that the returned income stands varied by the order of the Tribunal in the first round, to the extent the petitioner accepts it. Therefore, the Assessing Officer correctly invokes Section144C of the Act in the impugned order. <u>Once having invoked Section 144C of the Act, the Assessing Officer is obliged to comply with it in full and not partly.</u> This impugned order was passed consequent to the order of the Tribunal dated 5th May, 2017 restoring some of the issues before it to the Assessing Officer for fresh adjudication.

9. This "fresh adjudication" itself would imply that it would be an order which would decide the lis between the parties, may not be entire lis, but the dispute which has been restored to the Assessing Officer. According to us, the order dated 31st January, 2018 is not an order merely giving an effect to the order of the Tribunal, but it is an assessment order which has invoked Section 143(3) of the Act and also Section 144C of the Act. This invocation of Section 144C of the Act has taken place as the Assessing Officer is of the view that it applies, then the requirement of Section 144C(1) of the Act has to be complied with before he can pass the impugned order invoking Section 144C(13) of the Act. In fact, Section 144C(13) of the Act can only be invoked in cases where the assessee has approached the DRP in terms of sub-section 144(C)(2)(b) of the Act and the DRP gives direction in terms of Section 144C(5) of the Act. <u>In this case, the assessment order has invoked Section 144C(13) of the Act without having passed the necessary draft Assessment Order under Section 144C(1) of the Act, which alone would make an direction under Section144C(5) of the Act by the DRP possible. Thus, the impugned order is completely without jurisdiction.</u>

(emphasis supplied)

12. Even in the order dated 27th July 2020 passed by the ITAT, the ITAT has restored the matter to the file of A.O./TPO "for fresh adjudication". This court in ***Shell India Market Pvt. Ltd. vs. Additional/Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer and Ors.***[2] has taken a similar view. Paragraph Nos. 1 and 2 of *Shell India Market Pvt. Ltd.* (supra) read as under :

> *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***[3] *reads as under :*
>
> > *27. Applying the aforesaid principles to the facts of this case, <u>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, but a breach of a mandatory provision.</u> 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 30 th September, 2021. The Revenue ought to have appreciated that <u>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.</u> 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. <u>Depriving Petitioner of this valuable right to raise objection before DRP would be denial of substantive rights to the assessee,</u> 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.*

2 Writ Petition No. 1802/2021 dated 22nd December 2021

3 (438) ITR 317 (BOM)

> *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 assesee 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.*

(emphasis supplied)

13. Therefore, in our view this is a clear case of jurisdictional error. The assessment order passed by the A.O., i.e., impugned in this petition is vitiated on account of lack of jurisdiction and requires to be quashed and set aside as void ab initio.

14. In the circumstances, Rule made absolute in terms of prayer clause – (a)(i) which reads as under :

> *(a) that this Hon'ble Court be pleased to call for all papers and proceedings for AY 2009-10 and after examining the validity, legality and propriety of the Petitioner's claim,*
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> > *(i) to issue a Writ of Certiorari or any other appropriate writ, order or direction under Article 226 in the Constitution of India quashing the order giving effect along with the demand notice dated 30 January 2023 (Exhibit I-1 and I-2) passed by the Respondent No.1; and*

15. Petition disposed.

(DR. NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**