207 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP-2367-2019 (O&M)
Date of Decision: 11.12.2024

M/s Mavenir India Pvt. Ltd. …Petitioner

Vs.

Deputy Commissioner of Income Tax Officer, Circle-2(1) …Respondent

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Deepak Chopra, Advocate and
Mr. Ashish Sarda, Advocate for the petitioner.

Mr. Varun Issar, Sr. Standing Counsel for the revenue.

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SANJEEV PRAKASH SHARMA, J.(Oral)

1. The petitioner by way of instant petition assails the order of assessment dated 10.12.2018, passed under Section 143(3) of the Income Tax Act, 1961 (for short 'the Act, 1961'), for AY: 2008-2009.

2. Learned counsel for the petitioner submits that after the first round of litigation which ended before the Income Tax Appellate Tribunal (for short 'ITAT'), in an order for remand being passed, the Transfer Pricing Officer (for short 'the TPO'), passed a fresh order, which was considered by the Assessing Officer and without providing the proposed draft assessment order to the petitioner as per the provisions of Section 144C of the Act, 1961, the Assessing Officer proceeded to issue a show cause notice holding that penalty is to be levied under Section 271C and also interest under Section 234A, B and C of the Act, 1961.

3. Learned counsel submits that the provisions of Section 144C of the Act, 1961, are binding and mandatory to be followed as the same would

be necessary for the reference of matter to the dispute resolution panel. Learned counsel relies on the judgment passed by the Delhi High Court in the case of ***JCB India Ltd. & Ors. Deputy Commissioner of Income Tax & Ors [2017] 398 ITR 189 (Delhi)***, SLP (Civil) Diary No.7090/2018 dated 16.03.2018, passed by the Supreme Court affirming the judgment of the Delhi High Court and Exxon Mobil Company (P) Ltd. vs. Deputy Commissioner of Income Tax [2022] 138 taxmann.com 539 (Bombay).

4. Per contra, learned counsel for the respondents submits that Section 144C(1) of the Act, 1961, only requires the Assessing Officer to forward draft of the proposed order of assessment at the first instance. Since at the initial stage the Assessing Officer had already forwarded the draft of proposed order of assessment, which was the subject matter of litigation and ended it by the orders of remand passed by the ITAT and was not required to send again and passed a fresh draft assessment order and the purpose of remand was to pass a final order.

5. We have considered the submissions and also considered the provisions of law.

6. As per Section 144C of the Act, 1961, the Assessing Officer is bound to forward a draft of the proposed order of assessment to the eligible assessee, if he proposed to make any variations which are prejudicial to the interest of such assessee. The eligible assessee has been defined under Section 144C(15) of the Act, 1961, which means any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the TPO passed under sub-section (3) of Section 92-CA and any non-resident not being a company or any foreign company.

7. In the present case, we find that ITAT in appeal filed by the assessee passed the following order:-

> *"We find that in view of our direction to exclude the comparables chosen the TPO and one comparable chosen by the assessee as well as exclusion of the remaining two comparables by the TPO not challenged by the assessee before us, has left with no comparable in the sales and post sales support segment for determination of arm's length price. In view of the above facts and circumstances, we restore the matter to the TPO for carrying out a fresh search and selection of comparables having functions similarity to the segment of sales and post sales support and compute the adjustment accordingly as per law. Needless to mention that the assessee shall be provided sufficient opportunity of hearing."*

8. Thus the matter was remanded to the TPO to pass a fresh order under Section 92C (3) of the Act, 1961. Once the order has been passed by the TPO in accordance with the provisions, the petitioner becomes the eligible assessee and would come within the framework of Section 144C of the Act, 1961 and the Assessing Officer would have to pass a fresh order in terms of Section 144C of the Act, 1961. According to the order passed by the TPO, if any variations are made by the Assessing Officer on the said basis, he would have to compulsorily and necessarily pass a draft assessment order and forward it to the eligible assessee as the word used in Section 144C(1) of the Act, 1961, is '*shall*'. One such a proposed draft is forwarded to the eligible assessee, the procedure as laid down under Section 144C of the Act, 1961, would commence and would necessarily require to be completed accordingly. However, it appears that upon remand of the matter, the Assessing Officer has proceeded to pass an order finally in terms of Section 143(3) of the Act, 1961 without considering the provisions of Section 144C of the Act, 1961. The order, therefore, is not sustainable in law. The same view has been taken by the Delhi High Court and Bombay High Court (supra).

9. Accordingly, we set aside the order passed by the Assessing Officer dated 10.12.2018. Consequences thereto shall follow.

10. All pending misc. application(s) also stand dismissed.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SANJAY VASHISTH)
JUDGE

11.12.2024
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1. Whether speaking/reasoned? : Yes/No
2. Whether reportable? : Yes/No