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W.A.No.2006 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.06.2025

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SUNDER MOHAN

W.A.No.2006 of 2022
and C.M.P.No.14988 of 2022

M/s.Enfinity Solar Solutions Pvt Ltd
Rep by its Director
Mr.Guy Philemon Roger Baeyens,
No.55, Teachers Colony,
Venkatarathnam Nagar, Chennai-20. ... Appellant

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: Appeal filed under Clause 15 of the Letters Patent against the order dated 21.06.2021 passed by the learned Single Judge in W.P.No.31165 of 2018.

For Appellant : Mr.Veerapathiran Prasanth
For M/s.R.Sivaraman



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For Respondent : Mr.B.Ramanakumar

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JUDGMENT

(Delivered by the Hon'ble Sunder Mohan J.)

The Writ appeal impugns the order dated 21.06.2021 passed by the learned Single Judge, dismissing a petition seeking quashing of the assessment order dated 01.11.2018 issued under Section 143 (3) read with Section 254 of the Income Tax Act, 1961 [hereinafter referred to as '**Act**'].

2. The writ appeal arises under the following circumstances

(a) Appellant/assessee 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.

(b) They filed return of income for assessment year 2012-13 on 28.11.2012. The return was duly processed under Section 143(1) of the Act and the same was selected for scrutiny under Section 143(2) of the Act. Since appellant had international transactions with its associated enterprises, the case was transferred to the Transfer Pricing Officer [hereinafter referred to as '**TPO**'] under Section 92CA of the Act for



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determining the Arm's Length Price.

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(c) On 29.01.2016, TPO made an adjustment to the Arm's Length Price of the international transactions undertaken by appellant amounting to Rs.7,03,16,975/-. Pursuant to the same, a Draft Assessment Order was passed on 31.03.2016. Appellant company filed its objections before the Dispute Resolution Panel [hereinafter referred to as the '**DRP**'], Bangalore. **DRP** in addition to the adjustments made by TPO had proposed additional adjustments and directed TPO to re-compute the Arm's Length Price.

(d) Consequent to the directions of **DRP**, the TPO, vide order dated 20.12.2016, reworked the downward adjustment to the International Transaction with the associated enterprises at Rs.20,67,02,931/- instead of the original adjustment determined at Rs.7,03,16,975/-.

(e) Accordingly, Assessing Officer [hereinafter referred to as '**AO**'] issued the final Assessment Order on 25.12.2016 under Section 143 (3) r/w Section 144C(13) adding Rs.20,67,02,931/- to the income of assessee.



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WEB COPY (f) Appellant preferred an appeal before the Income Tax Appellate Tribunal [hereinafter referred to as '**ITAT**'], Chennai. ITAT remanded the issue to TPO to apply the appropriate method for determining the Arm's Length Price and also to see whether the associated enterprises had derived any benefit or mark up on the price charged by the vendor for the supply of raw materials to assessee's associated enterprises.

(g) TPO by the order dated 27.10.2018 determined the Arm's Length Price of International Transactions with respect to purchase of materials at Rs.24,02,00,735/- and made a downward adjustment of Rs.4,60,88,405/-.

(h) AO passed a final order dated 01.11.2018 assessing the income at Rs.7,59,10,281/-.

(i) Appellant filed writ petition in WP No.31165 of 2018 challenging the said assessment order, *inter alia*, on the ground that it was not preceded by a Draft Assessment Order as mandated under Section 144C(1) of the Act.



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(j) The learned Single Judge observed that the matter was remanded

by ITAT only to apply the appropriate method for assessing the Arm's Length Price and also to see whether assessee derived any benefit or mark up on the price charged by the vendor for the supply of raw materials to assessee's associated enterprises and held that there was no necessity for passing of a Draft Assessment Order. The learned Judge therefore, dismissed the writ petition. Aggrieved by the same, instant Writ appeal is filed.

3. Mr.K.Veerabathiran Prasanth, learned counsel for appellant/assessee submitted that the issue is covered by several judgments of this Court and that of Bombay High Court and submitted that even if the proceedings are remanded to AO, he should scrupulously follow the provisions under Section 144C of the Act, as assessee would lose his right of having his case examined by DRP, if no draft assessment order is passed.

4. Learned counsel relied upon a judgment of Delhi High Court in **JCB India Ltd., v. Deputy Commissioner of Income-Tax**¹ and judgment of

¹ (2017) 85 taxmann.com 155



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the Bombay High Court in **CWT India (P.) Ltd. v. Assistant Commissioner of Income-tax¹**.

5. Mr.B.Ramanakumar, learned Standing counsel for the revenue per contra submitted that since the remand was to decide a particular issue, it was not necessary for AO to once again follow the procedure prescribed under Section 144C of the Act and therefore, the non issuance of Draft Assessment Order would not render the assessment order invalid. He further submitted that assessee had a right to challenge the assessment order if it is aggrieved and hence, the learned Single Judge was justified in dismissing the writ petition.

6. ITAT, while remanding the matter to AO, had observed as follows:

“...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

¹ (2023) 155 taxmann.com 450



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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. By the aforesaid order, ITAT had not only remitted the issue regarding selection of most appropriate method, but also had given liberty to assessee to raise any other grounds in support of its claim. Thus, by this remand, ITAT had directed AO/TPO to consider all issues afresh. Therefore, in effect, the earlier draft assessment order ceased to exist. On fresh consideration, if AO makes a variation which is prejudicial to the interest of assessee, the procedure provided in Section 144C(1) of the Act would take effect. AO, therefore, is bound to forward draft assessment order to enable the assessee to either accept the variations or file its objections to the variations with DRP and AO.

8. In our view, it would make no difference whether variation was made by AO at the first instance or pursuant to a remand by ITAT as regards the requirement to follow the procedure prescribed under Section 144C of the Act. Any other interpretation would be opposed to the consistent view taken by the Courts with regard to the interpretation of



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these provisions.

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9. In a similar case, where the tribunal had set aside the Transfer Pricing adjustments and remanded the matter to AO/TPO, for *de novo* consideration, the Bombay High Court in ***CWT India Limited's case*** (supra), in which one of us [the Hon'ble Chief Justice] was a member, held that the failure to forward the draft assessment order would render the assessment order invalid. The relevant portion of the said judgment reads as follows:

“7. It is clear that the AO shall, in the first instance, forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation is prejudicial to the interest of such assessee. Certainly there is a variation in the assessment order different from what was filed in the return of income and since it is by way of an addition made, the variation is prejudicial to the interest of Petitioner. In Andrew Telecommunications Private Limited (Supra) also the facts were identical. The Court relying on the judgments in the case of International Air Transport Association v. Deputy Commissioner of Income-tax 3 of this Court and in the case of Zuari Cement Ltd v ACIT 4 of the Division Bench of the Hon'ble Andhra Pradesh High Court has held that 'the failure to pass a draft assessment order under Section 144C(1)



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of the Act would result in rendering the final assessment as one without jurisdiction." Paragraphs 9,14,17 and 20 of Andrew Telecommunications (Supra) read as under:

"9. The matter was sent back to the Transfer Pricing Officer who gave hearing to the Assessee and passed a fresh order on 30th January 2014. Thereafter, the Assessing Officer, without issuing any draft assessment order, proceeded to pass an order on 2nd February 2015. The Assessee challenged the said order before the Commissioner of Income Tax (Appeals) and the appeal was partly allowed by the commissioner of Income Tax (Appeals) by order dated 13th March 2015. As against this order, the Revenue filed the Income Tax Appeal No. 271/2015 before the Income Tax Appellate Tribunal and the Assessee filed a Cross Objection No. 62/2015.

14. Mr. Pardiwala contended that a draft assessment order ought to have been issued and upon failure of the Officer to do so the Assessee has lost a valuable right. Mr. Pardiwala submitted that, when the Dispute Resolution Panel sent the proceedings back to the Transfer Pricing Officer, categorical observations were made that the order was passed in violation of the principles of natural justice and exercise had to be taken afresh. He submitted that therefore the earlier draft assessment order did not exist and a fresh draft order had to be issued and the failure has vitiated the further proceedings and, therefore, there is no error in the order passed by the Tribunal and there is no question of law arises. Mr. Pardiwala relied upon the decisions in the case of the Dy.CIT v. Control Risks India (P.) Ltd. [SPL(Civil) No.7090 of 2018]; Control Risks India (P.) Ltd. v. Dy. CIT [WP(C) 5722 of 2017 & CM No.23860 of 2017 (Stay), dated 27-7-2017]; International Air Transport Association v. Dy. CIT [2016] 68 taxmann.com 246/241 Taxman 249 (Bom); JCB India Ltd. v. Dy. CIT [2017] 85 taxmann.com 155/251 Taxman 143/398 ITR 189 (Delhi) and Turner International India (P.) Ltd. v. Dy. CIT [2017] 82 taxmann.com 125/398 ITR 177(Delhi).

17. In the case of International Air Transport Association (supra), the Division Bench of this Court has held that the order passed by the Assessing Officer without their being any draft assessment order is illegal and without jurisdiction. The same view has been reiterated in the case of



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Zuari Cement Ltd. v. ACIT [WP(C) No. 5557 of 2012, dated 21-02-2013] by the Division Bench of Andhra Pradesh High Court which also held that the failure to pass a draft assessment order under Section 144C(1) of the Act would result in rendering the final assessment as one without jurisdiction. This position of law is settled.

20. In the case of JCB India Ltd. (supra) the Division Bench of the Delhi High Court in identical circumstances has held that after the remand on facts, the draft assessment order was necessary.” (emphasis supplied)

8. In Exxon Mobil Company Private Limited (Supra) where the facts were also similar, Revenue's counsel conceded that under Sub section (1) of Section 144C of the Act, the AO ought to have issued draft assessment order and if such draft assessment order has not been passed before the final assessment order is passed, the order has to be set aside.

9. Mr. Suresh Kumar basically reiterated whatever is submitted in the affidavit-in-reply filed through one Harish Kelkar. In the affidavit-in-reply, reliance has been placed on a judgment of the Hon'ble Madras High Court in the case of M/s. Enfinity Solar Solutions Private Limited v. The Deputy Commissioner of Income Tax, Corporate Circle-2(1), Chennai 5 . In fact, in the said judgment also the position as in law as noted above has been re-affirmed. Paragraph 14 of the judgment reads as under:

“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



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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.” (emphasis supplied).”

10. Similarly, the Delhi High Court on identical facts in **JCB India**

Limited's case (supra) held as follows:

“14. The short question that arises for consideration is whether, after the remand proceedings, the AO could have, without issuing a draft assessment order under Section 144C of the Act, straightway issued the final assessment order.

15. Mr. Syali, learned Senior Counsel for the Assessee, referred to the decision of this Court dated 17th May 2017 passed in W.P. (C) No. 4260/2015 (Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax, Circle 25(2), New Delhi) to urge that the AO could not have passed the final assessment order without complying with the mandatory requirement under Section 144C of the Act whereby first a draft order had to be issued in respect of which an objection can be filed by the Assessee before the DRP. The failure to do so, according to Mr. Syali, was not a mere irregularity. He further referred to a decision of the Gujarat High Court dated 31st July 2017 in Tax Appeal No. 542 of 2017 (Commissioner of Income Tax, Vadodara-2 v. C-Sam (India) Pvt. Ltd.).

16. In response, Mr. Sanjay Jain, learned Additional Solicitor General of India appearing for the Revenue, submitted that there was an efficacious alternative remedy available to the Petitioner to file appeals against the impugned final assessment orders passed by the AO. It is denied that it was mandatory on the part of the AO to pass a draft assessment order since this was a second round before the TPO pursuant to remand by the ITAT. Moreover, it was not as if the ITAT had set aside the entire assessment order of the AO. The setting aside



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was only in respect of the transfer pricing adjustment and that too with a specific direction to the AO for determining the arms length price "after considering fresh comparables." Since the assessment itself was not cancelled by the ITAT or completely set aside, it is the provisions of Section 153(3)(ii) of the Act which would apply. Mr. Jain submitted that the requirement of passing a draft assessment order under Section 144C was only in the first instance and not after the remand by the ITAT.

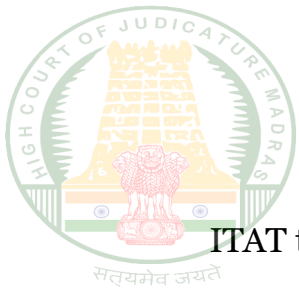
17. The Court is unable to agree with the submissions made on behalf of the Revenue by Mr. Jain. Section 144C (1) of the Act is unambiguous. It requires the AO to pass a draft assessment order after receipt of the report from the TPO. There is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.

18. It was then contended by Mr. Jain that the assessment order passed by the AO should not be declared to be invalid because of the failure to first pass a draft assessment order under Section 144C of the Act. In this regard, reference is made to Section 292B of the Act.

19. As already noted, the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality. Section 292B of the Act would not protect such an order. This has been explained by this Court in its decision dated 17th July 2015 passed in ITA No. 275/2015 (Pr. Commissioner of Income Tax, Delhi-2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.) where it was held:

"Section 292B of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act."

11. Therefore, we are of the considered view that the remand by



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ITAT to AO/TPO to consider the issues afresh, would not dispense with the mandatory procedure under Section 144C of the Act, since the variation on the reconsideration by AO is prejudicial to the interest of the assessee. Therefore, the statement of counsel for Revenue that draft assessment order need not be passed cannot be countenanced.

12. Further, it is well settled that where the assessment order is passed without a draft assessment order, it would be vitiated, as it is not a mere irregularity, but is an incurable illegality. This position of law has been reiterated in the judgments extracted supra.

13. In the result, the Writ Appeal is allowed and the impugned order dated 21.06.2021 is hereby quashed and set aside. Consequentially, the Assessment order dated 01.11.2018, which is impugned in the Writ Petition is quashed. There shall be no order as to costs. Consequently, interim application stands closed.



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(K.R.SHRIRAM, C.J.)

(SUNDER MOHAN, J.)

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THE HON'BLE CHIEF JUSTICE
AND
SUNDER MOHAN,J.

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To

The Deputy Commissioner of Income Tax
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Chennai-600 034.

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