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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Date of Decision: 03.09.2025*+ **ITA 334/2025 CM APPL. 52525/2025****THE COMMISSIONER OF INCOME TAX - INTERNATIONAL  
TAXATION -3** .....Appellant

Through: Mr. Ruchir Bhatia, SSC

versus

**TRAVELPORT LP** .....RespondentThrough: Dr. Shashwat Bajpai, Mr. Naman  
Kasliwal, Adv.**CORAM:****HON'BLE MR. JUSTICE V. KAMESWAR RAO****HON'BLE MR. JUSTICE VINOD KUMAR****V. KAMESWAR RAO, J. (ORAL)**

1. This appeal under Section 260A of the Income Tax Act, 1961 (the Act), lays a challenge to an order dated 09.02.2023 passed by the Income Tax Appellate Tribunal (ITAT) in I.T.A. No. 6503/De1/2019 relatable to the Assessment Year (AY) 2011-12.
2. The appeal before the ITAT was preferred by the respondent/assessee against order dated 21.06.2019 framed under Sections 144C(13) read with Section 147, 143(3) of the Act.
3. The Tribunal allowed the appeal of the respondent by stating in paragraphs 19, 20, 21, 22, 23 & 24 as under:

*“19. Facts of the case in hand show that no order has been’*



passed by the TPO, therefore, there is no question of any variation arising as a consequence of the order of the TPO and since the assessee is an LLP, therefore, it cannot be termed as a foreign company, which means that provisions of section 144C of the Act with all its sub section do not apply to the assessee, which means that the impugned assessment order dated 21.06.2019 is void ab initio.

20. The co-ordinate bench at Mumbai in ITA No. 2572/Mum/2017 had the occasion to consider a similar issue and held as under:

"9. We have considered rival submissions and perused material on record. The issue in dispute lies in a very narrow compass. It has to be examined whether the assessee can be termed as an 'eligible assessee' under section 144C(15)(b) of the Act to empower the Assessing Officer to pass the draft assessment order under section 144C(1) of the Act. Before we examine the facts relevant for deciding the issue, it is necessary to deal with the relevant statutory provisions which are applicable to the facts of the present issue. Undisputedly, the Assessing Officer has proceeded to pass the draft assessment order under section 144C(1) of the Act against the assessee for the impugned assessment year. A reading of section 144C(1) of the Act makes it clear that notwithstanding anything to the contrary contained under the Act the Assessing Officer shall propose a draft assessment order and forward it to the eligible assessee if he intends to undertake any variation in the income or loss returned by the said assessee which is prejudicial to the interest of the said assessee. Sub-section (15)(b) of section 144C of the Act defines eligible assessee as under:-

"(15) For the purpose of this section, -(a) . . . . .

(b) "eligible assessee" means,-

(i) any person in whose case the variation referred



to in sub-section ( I ) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and(ii) any foreign company.] "10. A reading of the aforesaid provision makes it clear that „eligible assessee" would mean a person in whose case the variation proposed in the draft assessment order arises as a consequence of an order passed by the Transfer Pricing Officer under section 92CA(3) of the Act and if i t is a foreign company. Keeping in view the above statutory provision if we examine the facts of the present case, it can be seen that the Assessing Officer has neither made any reference to the Transfer Pricing Officer ..under section 92CA(I) of the Act nor the Transfer Pricing Officer has passed any order under section 92CA(3) of the Act. Therefore, the variation proposed in the draft assessment order is not as a consequence of any order passed .by the Transfer Pricing Officer. Therefore, the first condition of section 144C(15)(b) of the Act is not satisfied. Thus, i t requires to be seen whether the assessee can fit into the definition of a foreign company as provide du/s 144C(15)(b)(ii) of the Act. As per the definition of foreign company under section 2(23A) of the Act, it means a company which is not a domestic company. Section 2(22A) of the Act defines domestic company to be an Indian Company or any other company which declares and pays dividend within India out of its income. Whereas, the documentary evidences placed before us including the return of income filed by the assessee as well as the residency certificate issued under section 10F of the Act, it is seen that the status of the assessee has been shown as limited liability partnership. In fact, the Department has allotted PAN to the assessee in the status of a partnership firm. The definition of



*firm under section 2(23) of the Act includes a limited liability partnership. Further, in the draft assessment order passed under section 744C of the Act for the assessment year 2076-17, the status of the assessee has been shown as firm. Thus, from these facts, it becomes clear that the assessee is not a foreign company but a limited liability partnership. The aforesaid factual position has not been controverted by the learned Departmental Representative by bringing before us any documentary evidence. Keeping in view the aforesaid factual position qua the relevant statutory provision, if we examine the judicial precedents it can be seen that in the case of ESS Advertising (Mauritius)S. N.C. (supra), the Tribunal while dealing with an identical issue has held as under:-*

*"5. We have considered the rival submissions on the issue of additional ground raised by the assessee before us and also the material referred to and the judgments in support of the said ground. All the additional grounds in the impugned assessment years involve purely a legal issue which goes to the very root of the validity of the assessment passed u/s 144C (1) and for adjudication of such an issue no new facts or material is required to be examined or investigated. Therefore, such an additional ground is admitted. For admission of such a legal ground, we are supported by the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC).6. As stated above, the assessee is a non-resident entity which is a partnership firm incorporated under the laws of Mauritius and is also a tax resident of Mauritius. It had filed its return of income shown „nil” income on 31.10.2005 which was duly processed u/s 143(1) on*



18.3.2006. Thereafter, assessee's case was reopened U/S 147 vide notice dated 10th June, 2008 issued u/s 148 and in pursuance thereof, draft assessment order was passed proposed u/s 144C (1). In the impugned draft assessment order but has even noted the following facts:- "As the assessee had entered into international transactions with its associated enterprise, a reference was made to Transfer Pricing Officer u/s 92CA(1) on 18.9.2008 who vide his order dated 7.9.2009 did not draw any adverse inference in respect of the international transactions." 7. After noting down such facts, passing of such a draft assessment order in absence of any order passed u/s 92CA(3) thereby making any kind of TP adjustment, then provision of section 144C could not have been resorted to, because the assessee cannot be reckoned as "eligible assessee" in whose case the draft order of assessment is required to be passed. Section 144C(1) read as:

"144C. (I) 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 1<sup>st</sup> day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee." 8. The aforesaid provision which is a non obstante clause, provides that the AO has to forward a draft of the ,proposed order of assessment to the „eligible assessee", if he proposes to make an order after the first day of October, 2009 making any variation in income and or loss returned which is prejudicial to the interest of such assessee. The "eligible assessee"



has been defined in clause (b) of sub section 15 which reads as under:- 144C(15)(b) "eligible assessee" means

(i) any person in whose case the variation referred to in subsection ( I ) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA and (ii) any foreign company." From the conjoint reading of the aforesaid provisions it is quite clear that assessee must be a foreign company in whose case the variation which has been referred and if there is any variation arising out of consequence of order passed by the TPO in terms of section 92CA (3), then only provision of section 144C can be triggered. Here in this case as noted by AO himself, there is no variation as a consequence of any order passed by the TPO as there is no adjustment made in the case of the assessee. We find that in the case of ESPN Star Sports Mauritius SNC ET Compagnie (supra) the Hon'ble Jurisdictional High Court on same issue had quashed such order passed u/s 144C (1) and consequently the final assessment order passed in pursuance of DRP's direction. The relevant observation and finding reads as under:- "It appears to the Court that it is plain that under Section 144C, the AO should have proceeded to pass an order under Section 143(30) of the Act. Instead the AO confirmed the draft assessment order passed under Section 144C (1) of the Act. This, Therefore, vitiated the entire exercise. The Court has no hesitation in holding that the final assessment order dated 28<sup>th</sup> January, 2015 is without jurisdiction and null and void. The draft assessment order dated 28<sup>th</sup> March, 2014, having been passed in respect of entities which were not eligible assessee's is also held to be invalid." 9. Again this issue had come up for consideration



before the Tribunal in the case of assessee's sister concern, i.e., ESPN Star Sports Mauritius SNC ET Compagnie (supra) wherein on exactly similar facts this Tribunal following the judgment of Hon'ble Delhi High Court had observed and held as under:-"12. We now espouse the first condition, being, „any person" in whose case variation is proposed in the income returned in the draft order consequent upon the passing of an order by the TPO. Though the assessee. is „any person """, but admittedly, the TPO has not proposed any variation in the income arising from the international transactions. Thus, it becomes manifest that the assessee has not fulfilled any of the conditions to become „eligible assessee" in terms of section 144C(15)(b). A fortiori, no draft assessment could have been proposed u/s 144C(1) of the Act which has in fact been proposed by the Assessing Officer before passing the final impugned assessment order. The Hon'ble jurisdictional High Court in the assessee's own case for the assessment year 2010-11, since reported as ESPN Star Sports Mauritius S.N.C.ET Compagnie v. Union of India (2016) 388 ITR 383/241 Taxman.38/68 taxmann.com 377 (Delhi), has allowed the assessee's writ petition under similar circumstances by setting aside the draft assessment order and the final assessment order with the following observations made in para 30, which are as under:-"It appears to the Court that it is plain that under Section 144C, the AO should have proceeded to pass an order under Section 143(3) of the Act. Instead the AO confirmed the draft assessment order passed under section 144C(1) of the Act. This, therefore, vitiated the entire exercise. The Court has no hesitation in holding that the final assessment order dated 28th January, 2015 is without jurisdiction and null and



void. The draft assessment order dated 28th March, 2014 having been passed in respect of entities which were not eligible assessee", is also held to be invalid." 14. Reverting to the assessment year under consideration, we find that the Assessing Officer passed draft assessment order u/s 144C(1) of the Act on receipt of the order from the TPO. Thereafter, the final assessment order was passed after routing the matter through the DRP. As the assessee is not an eligible assessee", the assessment should have been completed u/s 143(3) instead of adopting the path of passing the draft assessment order u/s 144C(1). We find that the facts and circumstances for the assessment year under consideration are identical to those considered and decided by the Hon'ble High Court in writ petition for the assessment year 2010-11. Respectfully following the binding precedent, we set aside the final assessment order. The additional ground is, therefore, allowed to this extent. 15. In view of our decision on the additional ground setting aside the assessment order, there is no need to deal with the grounds on merits." 10. There are other judgments of Hon'ble Delhi High Court wherein similar issue has been decided in favour of the assessee like in the case of, Honda Cars India Limited vs. DCIT judgment dated 17.2.2016 passed in WP(C)4262/2015 and CM No. 7736/2015; wherein the Hon'ble High Court had observed and hold as under: "8. A reading of Section 144C(1) of the Act shows that the Assessing Officer in the first instance is to forward a draft of the proposed order of assessment to the "eligible assessee"", if he proposes to make any variation in the income or loss return which is prejudicial to the interest of such assessee. The draft assessment order is to



be forwarded to an "eligible assessee" which means that for the section to apply a person has to be an "eligible assessee". 9. Section 144C (15) (b) of the Act defines as eligible assessee" to mean (i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under section 92CA(3); and (ii) any foreign company.

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11. In Section 1440 (15)(b) of the Act, the term "eligible assessee" is followed by an expression "means" only and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of an order of the Transfer Pricing Officer and (ii) any foreign company. The use of the word "means" indicates that the definition "eligible assessee" for the purposes of Section 144(C)(15)(b) is a hard and fast definition and can only be applicable in the above two categories. 12. First of all, the petitioner is admittedly not a foreign Company. Secondly, the Transfer Pricing Officer has not proposed any variation to the return filed by the petitioner. The consequence of this is that the Assessing Officer cannot propose an order of assessment that is all variance in the income or loss return. Transfer Pricing Officer has accepted the return filed by the petition. In view of the which, neither of the two conditions are satisfied in the case of the petitioner and thus the petitioner for the purposes of Section 144C(15)(b) is not an "eligible assessee". Since the petitioner is not an eligible assessee in terms of Section 144C(15)(b), no draft order can be passed in the case of the petitioner under Section 144C(1).



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14. In view of the above, it is clear that the petitioner, not being an “eligible assessee” in terms of Section 144C(15)(b) of the Act, the Assessing Officer was not competent to pass the draft assessment order dated 31.3.2015 is accordingly quashed. 15. Since we have quashed the draft assessment order, the question that the assessment has now become time barred is left open and it is open to the parties to take recourse of such remedy, as may be available to them in law.” 11. Following these judgments, now there are numerous judgments not only passed by the various High Courts but also by this Tribunal, wherein it has been categorically held that, if assessee is not an “eligible assessee” in terms of section 144C(15)(b), then AO is not competent to pass a draft assessment order u/s 144C and the final assessment order consequently becomes time barred. Accordingly, following the aforesaid binding judicial precedents, we hold that the draft assessment order is invalid and consequently the impugned final assessment order is also unsustainable in law and is set aside. Consequently the additional ground as well as the appeal of the assessee is allowed.”

11. The Hon'ble Delhi High Court in *Honda Cars India Ltd. (supra)* and *ESPN Star Sports Mauritius SNC (supra)*, have also expressed similar view. The Hon'ble Gujarat High Court in *Pankaj Extrusion Ltd. (supra)* has also held that unless the assessee is an eligible assessee under section 144C(15)(b) of the Act, the Assessing Officer cannot pass a draft assessment order under section 144C of the Act. Keeping in view the principle of law propounded in the aforesaid



*judicial precedents, we have no hesitation in holding that the draft assessment order passed in case of the assessee for the impugned assessment year is invalid. Therefore, all the proceedings consequent thereupon are also invalid. Consequently, the draft assessment order as well as the final assessment order passed in pursuance thereof is quashed. In view of our aforesaid decision in the additional ground raised by the assessee, the main grounds raised in the present appeal have been rendered academic in nature and no adjudication is required.”*

*21. In light of the above judicial decisions and provisions of section 144C of the Act, we have no hesitation in holding that the assessment order is void ab initio. Ground No. 2 with its sub-grounds is allowed.*

*22. Even on merits of the case, the assessee has to succeed in as much as the findings given by the Assessing Officer is totally based upon the findings given in earlier Assessment Years. Even the directions of the DRP are based upon the directions given in earlier Assessment Years and both the authorities grossly erred in not realizing that the assessee has discontinued its business after Assessment Year 2010-11. Therefore, drawing support from earlier year's order would do no good to the Revenue as the facts are not similar. In fact, the Assessing Officer has put the entire burden on the assessee to show in whose hands the receipts shown in Form 26AS has been declared.*

*23. In our considered opinion, by putting the onus on the assessee, the Assessing Officer has grossly erred as the assessee is not responsible to explain the recipients of the receipts shown in Form No. 26AS. The Assessing Officer should have asked the payer, details of the payee to whom payments have been made by the payer on which it could deduct tax at source. Therefore, on merit also, addition cannot survive as facts are not identical to the facts of earlier Assessment Years.*

*24. In the result, the appeal of the assessee in ITA No.*



6503/DEL/2019 is allowed.”

4. At the outset, the learned counsel for the respondent would submit that the issue which arises for consideration is covered on merits by the judgments of this Court in two IT appeals which are relatable to the assessee herein.

5. Mr. Ruchir Bhatia, learned Senior Standing Counsel for the appellant/Revenue would submit that the said judgment was in the context where the Court did not decide the issue raised by the appellant herein as the case of respondent was covered, in its favour, on merits.

6. He has placed before us the decision dated 07.12.2023 in ITA 708/2023 & ITA 709/2023. In this regard, we may reproduce the conclusion drawn by this Court from paragraph 8 onwards as under:

*“ 8. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, fairly concedes that insofar as the merits of the case are concerned, the decision of the Supreme Court rendered concerning AY 2006-07, in the case of the respondent/assessee, holds the field.*

*8.1 Mr Bhatia, in this behalf, has drawn our attention to the following order passed by the Supreme Court in the case of Commissioner of Incometax (International Taxation) v. Travelport L.P. USA, [2023] 153 ITA 708/2023 & ITA 709/2023 Page 3 of 4 taxmann.com 176 (SC). Since the order of the Supreme Court refers to a judgment of this court, the order is extracted hereafter:*

*“1. Delay of 146 days is condoned.*

*2. Learned Additional Solicitor General appearing for the petitioner has submitted that the issues which arise in this petition have been considered and held against the Revenue in [Civil Appeal Nos. 6511- 6518/2010] DIT v. Travelport Inc. [2023] 149 taxmann.com 470/454 ITR 289 (SC) by affirming the judgment of the High Court. His*



submission is placed on record.

3. In the circumstances, the special leave petition is dismissed. Pending application(s) shall stand disposed of.”

9. The moot point, on merits, that arises in the appeals preferred by the appellant/revenue, before the Tribunal, was whether the view taken by the Commissioner of Income Tax (Appeals) [in short, CIT(A)], that 15 percent of the revenue generated from the bookings made within India were attributable to the Permanent Establishment (PE) of the respondent/assessee, is sustainable.

9.1 The coordinate bench, in AY 2006-07, while dealing with ITA 301/2022, had sustained the said conclusion and had gone on to hold that no substantial question of law arose for its consideration. It is this decision that was affirmed by the Supreme Court, with the dismissal of the SLP as noted hereinabove.

10. To be noted, the Tribunal via the impugned order, did not rule on the merits of the case for AYs 2007-08 to 2010-11.

10.1 The appellant/revenue, in the instant appeals, has not proposed a question on merits, perhaps, having regard to the aforementioned judgment of the Supreme Court as well as the decision of the Tribunal on the narrow ITA 708/2023 & ITA 709/2023 Page 4 of 4 issue of limitation.

10.2 The Tribunal, in the instant case, had dismissed the appeal of the appellant/revenue on the ground of limitation for the AYs in issue, i.e., AYs 2008-09 and 2010-11.

10.3 The reason given by the Tribunal for dismissal, on merits, was that the final assessment order was barred by limitation, as per Section 153 of the Income-tax Act [in short, “Act”].

10.4 Furthermore, the appellant’s/revenue’s plea that the provisions of Section 144C of the Act would come into play was repelled by the Tribunal for the reason that framing a draft assessment order was not required for the periods in issue, and therefore, the non-obstante clause under Section 144C of the Act would not override Section 153 of the Act.



*11. Since on merits the matter stands closed, in our view, these appeals need not be entertained vis-à-vis the questions proposed by the appellant/revenue as they have, in a sense, been rendered academic.*

*12. The appeals are, accordingly, closed.*

*13. The Registry will dispatch a copy of the order passed today to the respondent/assessee via all modes, including e-mail.”*

7. Suffice to state, Mr. Ruchir Bhatia states in view of the judgment of this Court in the aforesaid ITAs, the issue having been determined in favour of the respondent assessee on merits, the questions of law which have been raised in this petition have been rendered academic.

8. Noting the submission, the appeal is closed as in our view these appeals cannot be entertained *vis-a-vis* the questions proposed by the appellant Revenue being academic.

**V. KAMESWAR RAO, J**

**VINOD KUMAR, J**

**SEPTEMBER 03, 2025**

*RT*