2023:DHC:7638-DB

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

Reserved on: 10th October, 2023
Pronounced on: 18th October, 2023

\+ **W.P.(C) 1879/2023**

SINOGAS MANAGEMENT PTE LTD ..... Petitioner

Through: Mr. Ashish Mehta, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR.
..... Respondents

Through: Mr. Aseem Chawla, Senior Standing Counsel with Mr. Viplav Acharya, Ms. Pratishtha Chaudhary and Mr. Aditya Gupta, Advocates for ITD.
Ms. Bakshi Vinita, Senior Panel Counsel for UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGEMENT

SANJEEV NARULA, J.

1. The Petitioner, Sinogas Management PTE. Ltd., challenges the order dated 23rd June, 2022 ("**impugned order**"), issued by Respondent No. 1 – Deputy Commissioner of Income Tax. This order, rendered under Section 143(3) read with Section 263 of the Income Tax Act, 1961 ("**the Act**"), and the consequent demand and penalty notices flowing from it,[1] are assailed on

[1] Dated 23rd June, 2022 and 24th June, 2022, respectively.

a jurisdictional ground that the mandate of Section 144C for issuance of draft assessment order, was not followed.

Case set up by the Petitioner

2. The facts and the arguments laid out by Mr. Ashish Mehta, counsel representing the Petitioner, are detailed below:

2.1 The Petitioner-company, incorporated under the legal framework of Singapore, is primarily engaged in the business of operating ships. It is a tax resident of Singapore, and thus, it filed its return of income in India, declaring its total income as nil for the Assessment Year ("**AY**") 2017-18.

2.2 On 23rd August, 2018, the return of income filed by Petitioner was selected for scrutiny under Section 143(2) of the Act and a notice requiring the Petitioner to furnish certain details, such as the nature of business activities, tax residency certificate, copy of agreements with Indian customers, financial statements, details of permanent establishment in India etc., was issued on 08th November, 2019. The Petitioner responded to the above queries *vide* correspondence dated 15th November, 2019, asserting that it does not have a permanent establishment in India. A tax residency certificate was also submitted with the response. Petitioner further stated that its income fell within the purview of Article 8 of the India-Singapore Double Taxation Avoidance Agreement ("**DTAA**"), and thus, the same is taxable only in Singapore. Accordingly, the return was filed declaring income in India as nil. In addition, Respondent No. 1 was informed of a time charter agreement executed between Petitioner and Hindustan Petroleum Corporation Limited for transportation of LPG. After considering the Petitioner's reply, on 03rd December, 2019, Respondent No.1 passed an

assessment order under Section 143(3) of the Act, granting benefit of Article 8 of the DTAA to Petitioner. The return of income filed by Petitioner was thus accepted, without making any additions to the total income declared.

2.3. However, on 06th January, 2022, the Commissioner of Income Tax ("**CIT**") issued a notice under Section 263 of the Act, proposing to revise the assessment order of 03rd December, 2019 for AY 2017-18, on the grounds that the Assessing Officer ("**AO**") had failed to appreciate various relevant factual and legal aspects before accepting the Petitioner's computation. The said notice was responded to by the Petitioner on 17th January, 2022, maintaining that the assessment order dated 03rd December, 2019 is neither erroneous nor prejudicial to the interest of revenue, and thus, cannot be reviewed under Section 263.

2.4. In exercise of their power under Section 263 of the Act, after reviewing the material furnished by the Petitioner, on 24th March, 2022, the CIT held that the assessment order passed by Respondent No. 1 was not only flawed, but also detrimental to revenue's interest. Consequently, the CIT remanded the matter back to Respondent No. 1 with instructions to revise the assessment order dated 03rd December, 2019, and tax the income received by Petitioner, as per the provisions of the Act.

2.5. Consequently, Respondent No. 1 issued the impugned order on 23rd June, 2022, overruling the earlier assessment order dated 03rd December, 2019, whereby the Petitioner's claim to benefits under the DTAA was negated, and its income was assessed to tax under the Act.

2.6. Section 144C(1) of the Act mandates the AO to first issue a draft assessment order to an "eligible assessee", as defined in Section 144C(15)(b). However, Respondent No. 1 has bypassed this statutory

mandate. As the Petitioner is a foreign entity incorporated under laws of Singapore, it qualifies as an 'eligible assessee' and Respondent No. 1 ought to have issued a draft assessment order before passing a prejudicial order, in compliance with Section 144C(1) of the Act. The requirement of supplying a draft order affords the assessee a fair opportunity to raise objections before the Dispute Resolution Panel ("**DRP**"). However, the Petitioner has been deprived of this recourse by Respondent No. 1. Furthermore, pursuant to the impugned order, a notice imposing a staggering demand of INR 10,51,97,960/-, has also been issued to the Petitioner. Penalty proceedings for misreporting the income have also been initiated, in terms of Section 270A of the Act. Given the non-adherence to Section 144C(1) of the Act, such actions are inherently flawed and lack legal standing.

2.7. It is an established legal principle that any order passed by the AO during remand proceedings, or in adherence to instructions of a higher-ranking authority, qualifies as an assessment order under Section 143(3) of the Act. This conclusion is further bolstered by Respondent No. 1's notice, raising a demand of INR 10,51,97,960/- and imposition of a penalty under Section 270A of the Act, on the basis of findings of the order dated 23rd June, 2022. The communication issued to the Petitioner, informing them of their right to contest the order before an appellate authority, also underscores the nature of the order.

Respondent's arguments

3. Counter arguments presented by Mr. Aseem Chawla, Senior Standing Counsel for Respondent No. 1, are as follows:

3.1 The impugned order and resultant proceedings were initiated against

the Petitioner upon the direction of CIT, in exercise of their power under Section 263 of the Act. These proceedings were predicated on the premise that the assessment order (dated 03rd December, 2019) was both, erroneous and prejudicial to the interest of revenue.

3.2 Scheme of Dispute Resolution under Section 144C of the Act *inter-alia* envisions an opportunity to file objections to the assessee, which are then considered by the Dispute Resolution Panel, *i.e.*, a collegium comprising of three Principal Commissioners or Commissioners of Income Tax, constituted by the Central Board of Direct Taxes. Further, Section 144C(14A) makes it explicitly clear that provisions of the section shall not apply to any assessment/ re-assessment order passed by the AO with the prior approval of Principal Commissioner or Commissioner, as provided in terms of Section 144BA(2) of the Act.

3.3. Section 144C would not apply to revisionary powers exercisable under Section 263, as the purpose of the latter is disparate from the former. Schematic method of interpretation should be used, with the design or purpose of the relevant provisions in mind, rather than the letter of the legislation. Thus, the applicable provisions must be construed in a manner that would give effect to the objective which was sought to be achieved with their enactment. In such a case, it is necessary to avoid a literal interpretation of the relevant provisions. Reliance was placed upon the judgement of the Supreme Court in ***Fuzlunbi v. K. Khader Vali and Another***,[2] wherein it was observed that: "*the 'schematic and teleological' method of interpretation… is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the*

sentence. They go by the design of purpose which lies behind it."

3.4. An efficacious alternate remedy exists, the Petitioner can assail the impugned order or the revisional order passed by the CIT under Section 263 of the Act (pursuant to which the impugned order has been passed), before the Income Tax Appellate Tribunal.

Analysis and findings

4. We have deliberated on the afore-noted contentions. The crux of the dispute hinges on the procedural compliance of Section 144C(1) of the Act by Respondent No. 1. The question that arises for consideration is whether the failure to pass a draft assessment order before the final assessment, as required for a foreign company such as the Petitioner, invalidates the impugned order dated 23rd June, 2022 and the ensuing proceedings.

5. For the sake of convenience, relevant portion of Section 144C above is extracted hereunder:

> *"**144C. Reference to dispute resolution panel** - (1) 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 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.*
> *(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—*
> *(a) file his acceptance of the variations to the Assessing Officer; or*
> *(b)file his objections, if any, to such variation with,—*
> *(i) the Dispute Resolution Panel; and*
> *(ii)the Assessing Officer.*
> .
> .
> .
> *(15) For the purposes of this section,—*

[2] (1980) 4 SCC 125.

> *(a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;*
> *(b) "eligible assessee" means,—*
> *(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 sub-section (3) of section 92CA; and*
> *(ii) any non-resident not being a company, or any foreign company.*

6. The provisions of Section 144C(1) of the Act provides that in case of an 'eligible assessee', an AO proposing to pass an assessment order, shall at the first instance, forward a draft assessment order to the assessee, in case they wish to make variations prejudicial to the interest of the assessee. On receipt of the draft assessment order, the eligible assessee has a remedy of filing objections before the DRP. It is undisputed and manifestly clear that no draft assessment order, as envisioned by Section 144C(1) of the Act, was ever framed in the present case. While the CIT exercised the revisionary powers enshrined under Section 263 of the Act, this action was primarily rooted in the belief that the original assessment was erroneous and potentially detrimental to the revenue's interests. However, on remand, the AO passed the impugned order, revising the Petitioner's income, and increased its tax liability. Thus, the impugned order is clearly prejudicial to the interest of the assessee and a draft order should have been made available to the assessee.

7. The mention of 'schematic and teleological' method of interpretation by Mr. Chawla underscores the significance of understanding the larger purpose behind a provision, rather than adopting a strictly literal interpretation. It must therefore be ascertained whether bypassing the

procedures of Section 144C(1) would align with such an interpretative approach. In our opinion, the answer has to be in the negative. Section 144C commences with a non-obstante clause and overrides other provisions of the Act. It prescribes a special procedure for passing an assessment in case of an eligible assessee. The process outlined in Section 144C(1) of the Act is not discretionary, but mandatory. It must be adhered to even when the assessment order is issued in line with directions from a higher authority. While Mr. Chawla argued that the provisions of Section 144C shall not apply to orders issued under Section 263, in our opinion, the exercise of revisionary powers does not dilute the requirement of compliance with Section 144C of the Act. The exception carved out in Section 144C(14A) extends to assessment/ re-assessment orders passed by the AO with the prior approval of the Principal Commissioner or Commissioner, as per Section 144BA(12) of the Act. The nature of proceedings initiated under Section 144BA differs from the ones commenced under Section 263. Thus, Mr. Chawla's reliance upon this provision is misconceived, and does not aid the Respondents' case. Section 144C(14A) does not dispense with the AO's obligation to intimate a draft order to an eligible assessee, which term includes foreign companies like Petitioner.

8. Respondent No. 1 failed to discern the true nature and essence of the impugned order. Although this order was passed in remand proceedings to give effect to the directions of the CIT, issued under Section 263 of the Act, yet it qualifies as a fresh assessment order within the ambit of Section 143(3) of the Act. Given this characterization, it was incumbent upon Respondent No. 1, not just as a matter of procedure, but also as a matter of law, to adhere to the special provisions delineated in Section 144C(1) of the

Act. The omission to do so renders the subsequent actions and orders/ notices ensuing from this foundational oversight, as unlawful. Failure to do so renders the order dated 23rd June, 2022 void of jurisdiction. Consequently, the demand and penalty notices issued under Sections 156 and 270A of the Act, respectively, are also bereft of jurisdiction.

9. It is essential to highlight that the omission by Respondent No. 1 in passing a draft assessment order has effectively denied the assessee an opportunity to seek adjudication before the Dispute Resolution Panel, as stipulated in Section 144C(1) of the Act. Had Respondent No. 1 followed this mandated procedure and issued a draft assessment order, it would have enabled the Petitioner to raise objections before the Panel, especially concerning the allegations detailed in the assessment order dated 23rd June, 2022. This procedural route would have granted the Petitioner an avenue to submit additional evidence for a comprehensive adjudication before the Panel. This would have then shifted the adjudication to an entirely distinct statutory forum. The direct issuance of final impugned assessment order has, in effect, unjustly deprived the Petitioner of a choice of a forum, that the Act rightfully grants them.

10. Lastly, while the existence of an alternate remedy, as argued by the Respondents, is acknowledged, it is essential to reiterate that procedural lapses, especially ones that could impact the jurisdiction of an order, need rectification at the earliest stage. Delaying this to appellate stages, results in unnecessary procedural complexities and prolonged litigation, which is contrary to the principles of effective and efficient justice delivery. Respondent No. 1's omission to pass a draft assessment order is not merely a procedural oversight, but a substantive lapse, which renders the subsequent

impugned order devoid of jurisdiction. The question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirement of first passing the draft assessment order in terms of Section 144C(1) of the Act is no longer *res integra*; there is a long series of decisions where the Court has explained the legal provision/ position.[3]

11. For the foregoing reasons, we hold that failure by Respondent No. 1 to adhere to the mandatory requirement of Section 144C(1) of the Act and pass a draft assessment order, would result in invalidation of the final assessment order and the consequent demand notice and penalty proceedings.

12. The present petition is therefore, allowed with following directions:

12.1 Impugned order dated 23rd June, 2022, demand notice dated 23rd June, 2022, and penalty notice dated 24th June, 2022, issued by Respondent No. 1, are quashed.

12.2 The matter is remanded back to AO to proceed in terms of order dated 24th March, 2022 passed by CIT under Section 263 of the Act.

13. Disposed of.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

OCTOBER 18, 2023
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[3] *See:* ***Turner International India Pvt. Ltd. v. Dy. CIT****, DHC Neutral Citation: 2017:DHC:2668-DB, and* ***Nokia India Pvt. Ltd. v. Additional CIT****, dated 07th September, 2017 in W.P(C) 3629/2017.*