

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 1741/Del/2015
Asstt. Year: 2010-11

Assistant Commissioner of Income Tax, Range-1, Circle 1(2)(2), International Taxation, New Delhi.	Vs.	M/s ESPN Star Sports Mauritius SNC et Companie, 604, St. James Court, St. Denis Street, Port Louis (Mauritius)-999999 (PAN: AABFE6801E)
(Appellant)		(Respondent)

Assessee by:	Shri Porus Kaka, Sr. Advocate and Shri Dinesh Chawla, Advocate
Department:	Shri G.K. Dhall, CIT,DR

ORDER

PER H.S. SIDHU, J.M.

The aforesaid appeal filed by the Revenue against the Ld. Dispute Resolution Panel-IV (DRP), New Delhi Directions dated 26.12.2014 passed u/s. 144C(5) of the Income Tax Act, 1961 (in short "Act) on the following grounds:-

1. On the facts and circumstances of the case, the order passed by the Ld. DRP is bad in law and void abinitio.

2. On the facts and circumstances of the case, the Ld. DRP erred in misinterpreting the provision of Section 144C.

3. On the facts and circumstances of the case, the Ld. DRP erred in determination of the status of the assessee as defined in sub section 15(b) of Sec 144C.

4. On the facts and circumstance of the case, the Ld. DRP erred by ignoring the provision of sub section 8 of Section 144C read with explanation to it.

5. On the facts and circumstance of the case, the Ld. DRP erred by not providing opportunity to the Assessing officer as envisaged in provision of sub section 11 of Section 144C.

6. Ld. DRP has erred in not considering that the definition of "firm" u/s 2(23)(i) of the income-tax Act, includes "Limited Liability Partnership" as defined in the LLP Act, 2008 whereas as per section 2(d) of the LLP Act, the LLP is a "body corporate" which means "a company" as defined in section 3 of the companies Act, 1956 and includes "A LLP incorporated outside India". Thus, a LLP incorporated outside India is considered a "Body Corporate" i.e. a company under the domestic laws. Therefore, the assessee is an "eligible assessee".

7. Without prejudice, similar draft order and final assessment order passed earlier in the case of the assessee for AY 2007-08 was accepted by the assessee and this

issue has never been agitated by the assessee either before Hon'ble DRP or Hon'ble ITAT.

8. Hon'ble DRP has failed to appreciate that u/s 292B of the IT Act, 1961 no assessment made in pursuance of any provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such assessment, if such assessment in substance and effect is in conformity with and according to the intent and the purpose of this Act.

9. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.

2. Briefly stated facts of the case are that the assessee is a partnership firm established under the laws of Mauritius by Worldwide Wickets, Mauritius (formerly known as ESPN (Mauritius) Ltd.) having 99.9% share and ESS Asian Networks Pte. Ltd. having 0.1% share in profits. The assessee is engaged in the business of acquiring and allotting advertisement time and program sponsorship of ESPN Channels. The assessee entered into an agreement with ESPN Software India (P) Ltd ('ESPN India') (now known as Star Sports India Private Limited) whereby ESPN India acquires advertisement time from the assessee and allots it to various India advertisers and advertising agencies. M/s ESPN India has deducted tax of Rs. 12,56,36,709/- while making payment to the assessee. This withholding tax was claimed as refund in its Return of Income (ROI) by the assessee. The assessee, by assuming that it had not had any Permanent Establishment (PE) in India, showed NIL business income in its ROI filed on 31.10.2010. However, the assessee has shown interest income

of Rs.91,63,938/- (interest u/s 244A worked out by the AO in respect of the withholding tax of preceding year) in its ROI. The case was picked up for scrutiny. Since the assessee had undertaken international transactions with its Associated Enterprises (AE), the AO made a reference u/s 92CA(1) to the Transfer Pricing Officer (TPO), New Delhi. The TPO, vide his order dated 17.12.2013, proposed NIL variation in the returned income. However, the AO held the income of the assessee taxable u/s 9(1) consequent to his finding that the assessee has a PE in India. Accordingly, the AO, vide his draft assessment order, proposed to tax the income of the assessee at Rs.94,93,95,777/-. Aggrieved with the aforesaid draft assessment order, the assessee came before the Ld. DRP, who vide its Directions dated 26.12.2014 held that the assessee is not an “eligible assessee” in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee is a foreign company. Thus, the Ld. DRP has no jurisdiction over the case and accordingly declined to issue any direction in this case and dismissed the proceedings in-limine. Thereafter, the AO vide his final assessment order dated 28.1.2015 passed u/s. 143(3) r.w.s. 144C(13) of the Act has assessed the income at Rs. 95,85,59,715/-. Now the Revenue is in appeal before us against the directions of the Ld. DRP dated 26.12.2014.

3. Ld. CIT(DR) has relied upon the order of the Assessing Officer.
4. Ld. Sr. Counsel has relied upon the order of the Ld. DRP and also stated that the Ld. DRP has rightly held that the assessee is not an “eligible assessee” in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee is a foreign company. Thus, the Ld. DRP has no jurisdiction over the case and accordingly declined to issue any direction in this

case and dismissed the proceedings in-limine. He also filed the copy ITAT, 'B' Bench decision dated 20.8.2018 in the case of sister concern of assessee i.e. Ess Advertising (Mauritius SNC etc. Compagnie (earlier known as ESPN Star Sports Mauritius SNC Etc. Compagnie) and stated that the issue in dispute i.e. assessee is not an "eligible assessee" in accordance with section 144C(15)(b) of the Act is squarely covered by the aforesaid decision dated 20.8.2018. Therefore, he requested to follow aforesaid precedent and dismiss the appeal of the Revenue by upholding the order of the Ld. DRP.

5. We have heard both the parties and perused the records especially Ld. DRP Directions as well as the Tribunal's order dated 20.8.2018 passed in the case of sister concern of assessee i.e. Ess Advertising (Mauritius SNC etc. Compagnie (earlier known as ESPN Star Sports Mauritius SNC Etc. Compagnie). We find that Ld. DRP has elaborately adjudicated the issue vide its Directions dated 26.12.2014 vide para no. 4.1 to 5 at page no. 4 to 5 of its Directions. The relevant portion of the Ld. DRP Directions are reproduced as under:-

"4.1 We have carefully considered the facts of the case and the submission of the assessee. We have perused all the case laws referred above, impugned order and the TPO's order dated 17.12.2013. We have noticed that status of the assessee has been specifically mentioned as "partnership Firm1 not only in the format of the impugned order but also in para 2 of the impugned order. It is also noticed that the Form No. 35A is signed by Mr. Boopendradas Sungker and the narration the signature reads as: "Authorized Signatory/ Status of assessee: Foreign Partnership

Firm. A perusal of section 144C which lays down the legal framework for the operation of the Dispute Resolution Panel (DRP) shows that only the 'eligible assessee' can come before the DRP. The sub section (1) of Sec 144C which opens with a non-obstante clause lays down that the AO, in the first instance, is required to forward a draft of the proposed assessment order to the assessee if he proposes to make any variation to the income or loss of the 'eligible assessee'. In other words, no draft assessment order is legally required to be sent to any assessee other than the 'eligible assessee'. The 'eligible assessee' has been defined in sub section 15(b) of Sec 144C; which reads as under:

"eligible assessee" means:

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 92CS; and Any foreign company"

4.2 In view of the above, we are of the considered opinion that the assessee is not an "eligible assessee" in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee is a foreign company. Thus, we do not have the jurisdiction over the case. Consequentially, we decline to issue any direction in this case. The proceedings here are therefore, dismissed in-limine in view of the above.

5. *Subject to the above finding, the other grounds of objections are not being considered here for issuing any direction.”*

5.1 We further note that ITAT, ‘B’ Bench vide its decision dated 20.8.2018 in the case of sister concern of assessee i.e. Ess Advertising (Mauritius SNC etc. Compagnie (earlier known as ESPN Star Sports Mauritius SNC Etc. Compagnie) has adjudicated the similar issue in dispute i.e. assessee is not an “eligible assessee” in accordance with section 144C(15)(b) of the Act, vide para no. 5 to 12 at page no. 4 to 11 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 144 C(1) reads as:-

“144C. (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.”

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 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 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(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'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.

13. *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 assesseees', 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 144C (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. The 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 under section 144C (1) of

the Act. 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.”

5.2 After perusing the Directions of the Ld. DRP as reproduced under para no. 5, as aforesaid as well as the ITAT, ‘B’ Bench decision dated 20.8.2018 in the case of sister concern of assessee i.e. Ess Advertising (Mauritius SNC etc. Compagnie (earlier known as ESPN Star Sports Mauritius SNC Etc. Compagnie finding as reproduced in para no. 5.1, as aforesaid, we do not find any infirmity in the Directions of the Ld. DRP. Hence, by respectfully following the

Tribunal's order dated 20.8.2018, as aforesaid, we uphold the Directions of the Ld. DRP and dismiss the Revenue's Appeal.

6. In the result, the appeal of the Revenue stands dismissed.

Order pronounced on 04th December, 2018.

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 04/12/2018

SR BHATNAGAR

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, New Delhi