आयकरअपीलीयअधिकरण,'डी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्रीमहावीर सिंह, उपाध्यक्षएवंश्री मनोज कुमार अग्रवाल, लेखा सदस्यके समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.:1022/DEL/2016**

निर्धारण वर्ष/Assessment Year: 2007-08

Pearson India Education Services Pvt. Ltd., (previously Dorling Kindersley India Pvt. Ltd.,), Knowledge Boulevard, 7th Floor, A-8, Sector-62, Noida – 201 309.	v.	**The Income Tax Officer,** Ward – 10(4), New Delhi.
PAN: AABCE 4944M (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/Appellant by : Shri Vikram Vijayaraghavan, Advocate

प्रत्यर्थीकीओरसे/Respondent by : Shri D. Hema Bhupal, JCIT

सुनवाई की तारीख/Date of Hearing : 29.06.2022

घोषणा की तारीख/Date of Pronouncement : 06.07.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

This appeal by the assessee is arising out of order of the Commissioner of Income-tax (Appeals), New Delhi in Appeal No.48/2012-13/CIT(A)-44, order dated 13.10.2015. The draft assessment order u/s.144C(1) of the Income Tax Act, 1961

(hereinafter the 'Act') dated 24.12.2010 was prepared for assessment year 2007-08 and in consequence to the same, final assessment order u/s.143(3) r.w.s. 144C of the act was made by the ITO, Ward 10(4), New Delhi vide order dated 22.02.2011.

2. It was brought to our notice by the assessee that vide order dated 24.01.2017, during financial year 2014-15 relevant to assessment year 2015-16, pursuant to scheme of arrangement (amalgamation), the assessee company i.e., Dorling Kindersley India Pvt. Ltd., merged with TutorVista Global Pvt. Ltd., and thereafter change in name happened and now, the name of the company changed to Pearson India Education Services Pvt. Ltd., (hereinafter referred to as the assessee or the company).

3. At the outset, the ld.counsel for the assessee Shri Vikram Vijayaraghavan stated that the assessee has moved a petition under Rule 11 of the Income Tax Appellate Tribunal Rules, 1963 (hereinafter the 'Rules') for admission of additional grounds. The ld.counsel for the assessee took us through the first two additional grounds which raises the issue of jurisdiction that the assessment order passed by AO i.e., final assessment order u/s.143(3)/144C of

the Act, dated 22.02.2011 is barred by limitation. For this, assessee has raised following two additional grounds:-

4. The ld.counsel for the assessee stated that Hon'ble Madras High Court in the case of Vedanta Limited vs. ACIT, (2020) 422 ITR 262(Mad) has held that the provisions of section 144C of the Act are prospective and will apply for and from assessment year 2011-12. The ld.counsel for the assessee stated that these additional grounds were raised in view of the decision of Hon'ble Madras High Court deciding the applicability of the provision of section 144c of the Act. He stated that in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corporation, 229 ITR 383, the legal or jurisdictional issue can be raised for the first time before the appellate forums for the first time. The additional grounds goes to the root of the matter and hence, being a jurisdictional issue, the same is to be admitted. The ld.counsel stated that once the draft assessment order passed by AO u/s.144C(1)of the Act dated 24.12.2010 is contrary to statutory scheme of the Income Tax At, the AO/TPO ought to have passed the final assessment order within time limit as provided in section153 of the Act. In view of the above facts, the ld.counsel stated that the additional ground be admitted and be adjudicated.

5. On the other hand, the ld. Senior DR contested the admissibility of additional ground and stated that the same is raised after almost six years which is barred by limitation and need not be admitted. He also argued that the provision of section 144C of the Act is procedural provision and the same applies to pending proceedings as in the present case.

6. After hearing rival contentions and going through the facts of the case, we noted that additional grounds raised by the assessee seeks to challenge the validity and the legality of the assessment order passed by AO u/s.143(3) r.w.s. 144C of the Act, dated 22.02.2011 for the assessment year 2007-08, on the ground that provisions of section 144C of the Act as introduced by the Finance (No.2) Act, 2009, with retrospective effect from 01.04.2009 has no application for the assessment year under consideration. We noted that the issue is purely legal and the facts relating to this legal issue are available on the assessment records and appellate records of the assessee and that of the Department. No new additional fact is required to be brought on record for adjudication of this issue. Hence, we admit the above grounds and adjudicate the same.

7. Brief facts are that the assessee company Dorling Kindersley India Pvt. Ltd., (now known as Pearson India Education Services Pvt. Ltd.) furnished return of income electronically on 16.11.2007 for the assessment year 2007-08. This return of income was processed u/s.143(1) of the Act and subsequently the case was selected for scrutiny assessment by issuing notice u/s.143(2) of the Act. The AO prepared draft assessment order u/s.144C(1)of the Act dated 24.12.2010 and the assessee accepted the draft assessment order in term of the provisions of section 144C of the Act and accordingly, final assessment order was passed u/s.143(3) r.w.s. 144C of the Act vide order dated 22.02.2011. Now, the assessee has challenged the impugned assessment order i.e., final assessment order passed u/s.143(3) r.w.s. 144C of the Act dated 22.02.2011 by raising these additional grounds.

8. The ld.counsel for the assessee first of all took us through the provisions of section 144C of the Act, wherein the provision envisaged preparing of draft assessment order by the AO in term of section 144C(1) of the Act and thereafter the procedure prescribed for challenging before DRP as well as acceptance given by assessee of the variations made by the AO to the returned income of the assessee and subsequently can be challenged before CIT(A). The

ld.counsel for the assessee stated that the provisions of section 144C was introduced in the Income Tax Act by the Finance (No.2) Act, 2009 w.e.f. 01.04.2009 but made applicable on or after 01.10.2009. The ld.counsel for the assessee drew our attention to the Explanatory Circular No.5 of 2010 dated 03.06.2010 issued by the Central Board of Direct Taxes (CBDT) clarifying the applicability of provisions of section 144C of the Act, wherein this amendment made applicable w.e.f. 01.10.2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. The ld.counsel for the assessee drew our attention to para 45.5, of the Circular No.5 of 2010 dated 03.06.2010, which reads as under:-

> 45.5 Applicability - These amendments have been made applicable with effect from 1-10-2009, and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. The Dispute Resolution Panel Rules have been notified by SO. No. 2958(E) dated 20-11- 2009.

8.1 The ld.counsel stated that subsequently Board admitted the mistake and in the above extracted para 45.5 noted that there has been inadvertent error in stating applicability of provisions of section 144C and the same was replaced by the following para 45.5:-

> **45.5. Applicability:** Section 144C has been inserted with effect from 1st April, 2009. Accordingly, the Assessing Officer is required to forward a draft assessment 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. In other words

> section 144C is applicable to any order which proposes to make variation in income or loss returned by an eligible assessee, on or after 1st October, 2009 irrespective of the assessment year to which it pertains. Amendments to other sections of the Income-tax Act referred to in para 45.3 of the circular 5/2010 dated 3rd June, 2010 shall also apply from 1st October, 2009"

8.2 This was issued vide Circular No.9 of 2013, dated 19-11-2013 as reported in (2013) 359 ITR (St.) 7-8. The ld.counsel further stated that this issue was considered by Hon'ble Madras High Court in the case of Vedanta Ltd., *supra* and both the Circulars were considered and finally held that the provisions of section 144C of the Act do not merely prescribe procedure but a substantive exercise in assessment is carried out. A substantive right has enured to the parties by virtue of the introduction of section 144C of the Act and in view of settled position that the law applicable on the first day of assessment year should be reckoned as applicable law for assessment year for that year and hence, the inescapable conclusion is that the provisions of section 144C can be held to be applicable only prospectively i.e. from the assessment year 2011-12. The ld.counsel also took us through the timelimit provided u/s.153 of the Act and stated that the thirty three months provided in the Act by the Finance Act, 2007 w.e.f. 01.06.2007 reads as under:-

> 153. Time limit for completion of assessments and reassessments
> (1) 1 No order of assessment shall be made under section 143 or section 144 at any time after the expiry of-

(a) two years from the end of the assessment year in which the income was first assessable; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988 , or any earlier assessment year, is filed under sub- section (4) or sub- section (5) of section 139, whichever is later.]

Provided that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2004 but before the 1st day of April, 2010, the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty-one months" had been substituted]

Provided further that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2005 but before the 1st day of April, 2009 and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA—

(i) Was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) Is made on or after the 1st day of June, 2007,

The provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted]

In view of the above, ld.counsel stated that this issue is covered in favour of assessee and the final assessment order dated 22.02.2011 is barred by limitation.

9. On the other hand, the ld. Senior DR stated that these are procedural provisions and a procedure is adopted by the legislature for framing of assessment u/s.144C of the Act. The statutory provisions of section 144C of the Act itself state that the AO shall

forward a draft order of assessment if he proposes to make any variation in the income or loss return by the assessee on or after October 01, 2009. He laid emphasis on the words "on or after October 01, 2009" in the provision, he says, means any procedure that are pending as on 01.10.2009, the new procedure adopted u/s.144C of the Act, will apply to all the assessee across i.e. those comes under transfer pricing provisions. No doubt, to the clause under which the assessee comes. For this, he relied on the decision of Hon'ble Supreme Court in the case of CCE v. Ratan Melting and Wire Industries [2008] 231 ELT 22.

10. We have heard rival contentions and gone through facts and circumstances of the case. We have gone through the provisions of the Act i.e., 144C of the Act as introduced by the Finance (No.2) Act, 2009 with retrospective effect from 01.04.2009 but it proposes to make draft assessment order after the first day of October 2009 and also Circulars issued by CBDT i.e. Explanatory Circular No.5 of 2010 dated 03.06.2010 and Circular No.9 of 2013, dated 19-11-2013. We noted that these Circulars are considered by Hon'ble Madras High Court in the case of Vedanta Ltd., *supra* and Hon'ble Madras High Court has noted that there is change in the forum of assessment itself and further goes on that such change is not a mere deviation

in procedure but a substantive shift in the manner of framing of assessment. The Hon'ble Court noted that a substantive right has enured to the parties by virtue of introduction of section 144C of the Act and thereby the same was held to be applicable only prospectively from assessment year 2011-12.

10.1 The ld.counsel for the assessee also relied on the Co-ordinate Bench decision of this Tribunal i.e., Delhi Bench in the case of A.T. Kearney Ltd., for assessment year 2003-04 in ITA No.4405/Del/2011, order dated 25.05.2021, wherein it was held as under:-

> 13. We find that the only decision which is directly on the point of dispute before us is that of the Hon'ble Madras High Court in the case of Vedanta Ltd. (supra) where there was a direct challenge to the applicability of section 144C of the Act to assessment proceedings for AY 2007-08 on the ground that the said provision would apply prospectively, viz., from AY 2011-12. The Hon'ble Madras High Court had accepted the submissions of the assessee having regard to Circular No. 5/2010 dated 3rd June, 2020 issued by the Board clarifying that the substantive procedure of assessment enshrined in section 144C of the Act I.T.A.No.4405/Del/2011/A.Y.2003-04 11 would apply from AY 2011-12 onwards and the ratio laid down by the Hon'ble Supreme Court in the case of Karimtharuvi Tea Estate Ltd. vs. State of Kerala (60 ITR 262) to the effect that assessment has to be made as per the law in force on the first date of the assessment year. The decisions relied upon by the Revenue, including the decision from the Division Bench of the Madras High Court, do not specifically deal with the aforesaid controversy since the same having not been canvassed before the Hon'ble Court, the Hon'ble Court did not have any occasion to deal with the same.
>
> 14. In our considered view the decision of the Court is an authority for what it decides having regard to the facts and controversy projected before the

> Court as is evident from the following extract from the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works (P) Ltd. 198 ITR 297 at page 320: "… …. …. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete law declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must I.T.A.No.4405/Del/2011/A.Y.2003-04 12 carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasoning…. …… ….."
>
> 15. The decision of the Hon'ble Madras High Court in the case of Vijay Television Pvt. Ltd. 369 ITR 130 relied upon by the DR has dealt with the question of validity of corrigendum issued subsequently, whether the same could cure the invalidity of the assessment? Thus, the issue decided by the Division Bench of the Hon'ble Madras High Court is different than the controversy decided in the case of Vedanta Ltd. (supra).

10.2 We noted from the above decision A.T. Kearney Ltd., *supra* that the Tribunal relying on the Madras High Court decision in the case of Vedanta Ltd., *supra,* noted that there was a direct challenge to the applicability of section 144C of the Act to the assessment proceedings for assessment year 2007-08 on the ground that the said provision would apply prospectively from assessment year 2011-12. The Tribunal relying on the decision of Hon'ble Madras High Court held the assessment is barred by limitation.

We have gone through the provisions and case laws relied on and noted that the procedural amendment affecting vested substantive

rights of a litigant party are prospective unless and until specifically made applicable retrospectively. We noted that Lord Denning in Blyth v Blyth, (1966) 1 All ER 524 observed that

> "The rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give evidence."

10.3 Further, while deliberating on the vested rights acquired under the existing law viz-a-viz creation of new application or imposing a new duty, the France Court has observed and Lopes L.J in Re, Pulborough Parish School Board Election, Bourke V. Nutt, (1894) 1 QB 725 observed that

> "Every Statute, it has been said which takes away or impair vested rights acquired under existing law, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect".

10.4 From the above and in the light of the case law cited, we are of the view that procedural law needs to be seen in the light of any amendment been a change of forum and it is well settled principle that amendment in law relating to forum and limitations are procedural in nature whereas amendments in law relating to rights of action and right of appeal are substantive in nature. But, change of forum is considered as a form of procedure so amendment in law relating to forum typically amounts to procedural in nature. But, we

noted that a stand has been taken by the judiciary that change in forum in pending proceeding would not remain procedural in nature but it would create a substantive right. Therefore, any law or amendment bringing any change in forum does not affect pending actions or proceedings in court of law unless the new law or amendment as a provision in it providing a clear indication that the pending actions or proceeding are to be affected. This principle was reiterated by the Hon'ble Supreme Court in the case of CIT vs. Dhadi Sahu, (1992) SCR 3 168, wherein the Hon'ble Supreme Court observed that

> "it was true that no litigant had any vested right in the matter of procedural law, but where the question is of the change of 'forum', it ceases to be a question of procedure only, with reference to pending matter".

The '*forum*' of appeal or proceedings, it was held, was a vested right as opposed to pure procedure to be followed before a particular '*forum*'. It was therefore concluded, that a right becomes vested when the proceedings are initiated, in spite of change of jurisdiction/ forum by way of amendment thereafter.

10.5 Further, the Hon'ble Supreme Court in the case of Videocon International Limited vs. Securities and Exchange Board of India, (2015) 4 SCC 33, incorporating the principles of prospective application of statutes dealing with vested rights reiterated the same

position and held that the general legal principle is that the law which introduces in a change in forum is not applicable on the pending actions or proceedings unless the intention to the contrary is clearly shown. The court further observed that one of the modes for showing such intentions could be by incorporating a provision of change-over proceedings from the court where they are pending to the court which now has the jurisdiction to try such cases. Additionally, the court held that no litigant has a vested right in the matter of procedural law but when there is a change of forums then it is no longer a question of procedural law but becomes a vested right.

10.6 Further, the Hon'ble Supreme Court discussing the general principles concerning restrospectivity carried out discussion in the case of CIT vs. Vatika Township P. Ltd., (2014) 367 ITR 466 and noted

> 31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips

> vs. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.
>
> 32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

10.7 Before us, in the present case, the assessment year involved is assessment year 2007-08 and draft assessment order u/s.144C(1) of the Act was framed on 24.12.2010 and served on the assessee on 31.12.2010. The assessee has accepted the draft assessment order and assessee vide letter dated 18.02.2011 requested the AO that they are not filing objection before DRP and they are preferring appeal before CIT(A) and the relevant text of the letter reads as under:-

> "This is with reference to the subject order received by the assessee on 31st Dec 2010, wherein, your goodself had proposed to make an addition of Rs.10,74,51,644/-.
> In this regard, we wish to inform you that we are not in agreement with the adjustments/additions proposed in the draft order u/s 144C(1) of the Income Tax Act, 1961 and we have decided to prefer an appeal before the CIT(A) instead of an appeal before the Dispute Resolution Panel.

> In view of the above we request you to kindly pass the final order. Therefore, in view of sub-section (4) r.w.sub-section (3) of section 144C of the Act, the assessment order is being passed.

10.8 In term of the above, the ITO, Ward 10(4), New Delhi framed final assessment order u/s.143(3) r.w.s. 144C of the Act dated 22.02.2011. We have reproduced the extract of the provisions of section 153 of the Act as applicable to assessment year 2007-08 in above para 8.2 and the details of particular for assessment year 2007-08 i.e., the events and dates are as under:-

S.No.	Particulars for AY 07-08	Date
1	Order of TPO under section 92CA(3) of the Act	04-10-2010
2	Draft Assessment order under section 144C of the Act	24-12-2010
3	Letter filed by Appellant that they are going to CIT(A), not DRP	18-02-2011
4	Final order under section 143(3) r.w.s.144C of the Act	22-02-2011
5	Order of the CIT(A)	13-10-2015
6	Giving effect order passed by the Ld TPO	01-04-2016

10.9 In view of the above, we are of the view that in term of section 153 of the Act, a final assessment order u/s.143(3) of the Act, in the absence of provisions of section 144C of the Act being held as prospective in term of decision of Hon'ble Madras High Court in the case of Vedanta Limited, *supra*, the assessment should have been framed on or before 31.12.2010 but actually this was framed only on 22.02.2011, which is barred by limitation.

10.10 Since we have adjudicated the additional ground raised by assessee and held the assessment as barred by limitation, we need not to go into the merits of the case and hence, the same has become academic.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 6th July, 2022 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 6th July, 2022

RSR

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त /CIT	5. विभागीयप्रतिनिधि/DR	6. गार्डफाईल/GF.