

**आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम**

IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM

**श्रीदुव्वुस्वारएलरेड्डी, न्यायिकसदस्यएवंश्रीएसबालाकृष्णन, लेखासदस्यकेसमक्ष**

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &  
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./ I.T.A. No.222/Viz/2023

(निर्धारणवर्ष/ Assessment Year : 2018-19)

M/s. Polisetty Somasundaram  
Global Limited,  
Office No.E-55G-26, Hamriyah  
Freezone, Sharah 999999,  
Foreign, United Arab Emarites.  
PAN: AALCP 2296 F

(अपीलार्थी/ Appellant)

अपीलार्थीकीओरसे/ Assessee by

प्रत्यार्थीकीओरसे/ Revenue by

सुनवाईकीतारीख/ Date of Hearing

घोषणाकीतारीख/Date of

Pronouncement

Vs. The Deputy Commissioner of  
Income Tax,  
Central Circle-1,  
Guntur.

(प्रत्यर्थी/ Respondent)

Sri M.V. Prasad, AR

Dr.Satyasai Rath, CIT-DR

21/11/2023

15/12/2023

**ORDER**

**PER S. BALAKRISHNAN, Accountant Member :**

This appeal is filed by the assessee against the order of the  
Ld. Commissioner of Income Tax (Appeals)-3, Visakhapatnam in  
DIN & Order No. ITBA/APL/S/250/2023-24/1054379946(1),  
dated 14/07/2023 arising out of the order passed U/s. 153C of

the Income Tax Act, 1961 [the Act] in DIN & Order No. ITBA/AST/S/153C/2021-22/1042390716(1) dated 31/3/2022 for the AY 2018-19.

2. Briefly stated the facts of the case are that the assessee - M/s. Polisetty Somasundaram Global Limited - is registered as a Foreign Company in the year 2012 with the Registrar of Companies, ROK, UAE as International Business Companies (IBC). The Registered Address as per the incorporation Certificate is PO Box 50592, Hamriya FZ, Sharja, UAE. A search and seizure operation U/s. 132 of the Act was conducted on M/s. Polisetty Somasundaram Group, Guntur, Andhra Pradesh on 28/01/2020. As a part of search operations conducted U/s. 132 of the Act, the business premises and residence of Shri Polisetty Sham Sundarwas also covered and search was conducted. The case was centralized to DCIT, Central Circle-1, Guntur vide order U/s. 127 of the Act issued by the CIT (International Taxation & Transfer Pricing), Hyderabad vide F.No. CIT(IT & TP)/40/127/2020-21 on 12/03/2021. Consequently, a notice U/s. 153C was issued on 21/12/2021 and served on the assessee on 23/12/2021. In response, the assessee-company filed its return of income declaring Rs. 5,73,66,823/- on 27/1/2022

admitting that Place of Effective Management [POEM] is applicable for the current Assessment Year 2018-19. Subsequently, notices U/s. 143(2) and 142(1) were issued and served on the assessee. The assessee filed its reply on 4/2/2022 and also filed part of the information on 21/2/2022 and 26/2/2022. Another notice U/s. 142(1) of the Act was issued on 28/03/2022. In response, the Assessee's Representative appeared and filed certain submissions before the Ld. AO. Thereafter, another notice U/s. 143(2) was issued on 28/03/2022 for which the assessee filed its reply on 28/03/2022. The Ld. AO finally issued a show cause notice on 29/03/2022 for which the assessee filed its reply on 30/03/2022. Considering the replies and the statements recorded U/s. 132 of the Act, the Ld. AO, rejecting the explanation and submissions of the assessee, considered Rs. 34,02,29,806/- as income in the hands of M/s. Polisetty Somasundaram Global Limited on protective basis. Aggrieved by the addition of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A), after examining the submissions made by the Assessee's Representative, dismissed the appeal of the assessee. Aggrieved by the order of the Ld. CIT(A), the

assessee is in appeal before the Tribunal and raised 17 grounds on various issues.

3. Additionally, the assessee has also filed a petition for admission of **legal ground** as follows:

*"On the facts and circumstances of the case whether the final assessment order passed by the Assessing Officer in the case of the appellant which is a foreign company without issuing a draft assessment order as mandated under section 144C of the Act is null and void and unsustainable in law?"*

4. The petition for admission of **legal ground is admitted**. Before we proceed to adjudicate the original grounds of appeal raised by the assessee, we deem it fit to adjudicate the legal ground raised by the assessee.

5. **With respect to the legal ground** raised by the assessee, at the outset, the Ld. Authorized Representative [AR] argued that the assessee being a Foreign Company is covered by the provisions of section 144C(15)(b)(ii) of the Act. It was also further submitted that it is mandatory for the Ld. AO to first pass a draft Assessment Order enabling the assessee to file its objections before the Ld. Dispute Resolution Panel [DRP]. The Ld. AR vehemently opposed to the fact that the Ld. AO has failed to pass a Draft Assessment Order thereby denying the right to

the assessee to raise its objections. The Ld. AR heavily relied on the judgment of the Hon'ble jurisdictional High Court of Andhra Pradesh in the case of M/s. Zuari Cement Ltd., vs. Assistant Commissioner of Income Tax, Circle-2(1), Tirupathi in W.P. No. 5557 of 2012, order dated 21/02/2013 wherein the Hon'ble High Court of Andhra Pradesh has categorically held that ***as per the provisions of section 144C(1) of the IT Act, 1961, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete the assessment. On the contrary, passing the final assessment order without complying this procedure, which is mandatory as per the provisions of section 144C of the Act, is without jurisdiction, null and void.*** The Ld. AR further submitted that the decision of the Hon'ble jurisdictional High Court (supra) was challenged by the Revenue before the Hon'ble Supreme Court by way of Special Leave Petition [SLP] and the Hon'ble Apex Court vide Special Leave (Civil) CC 16694/2013, dated 27/09/2013 dismissed the SLP. The Ld. AR also further placed reliance on the decision of the ITAT, "D" Bench, Chennai in the case of Daewon Kang Up Co. Limited vs. Deputy Director of Income Tax, International Taxation-1,

Chennai in ITA No. 818/Mds/2015 (AY 2010-11), dated 30.12.2016. The Ld. AR also relied on the decision of the Hon'ble Delhi High Court in the case of Sinogas Management PTE Ltd vs. DCIT &Anr in W.P. (C) 1879/2023, dated 18/10/2023. Further, the Ld. AR also relied on the judgment of the Hon'ble Bombay High Court in the case of M/s. CWT India Private Limited vs. ACIT in W.P. No. 1784 of 2022, dated 4<sup>th</sup> September, 2023. It is the prayer of the Ld. AR that in all the above cited decisions, it was categorically held that ***failure to adhere to the mandatory requirement of section 144C(1) of the Act and failure to pass a draft assessment order, would result in invalidation of the final assessment order and the consequent demand notice and penalty proceedings.*** The Ld. AR also relied on the following case laws viz., (i) Judgment of the Hon'ble Delhi High Court in the case of Control Risks India Pvt Ltd vs. DCIT , dated 27/07/2017 (ii) Judgment of the Hon'ble Delhi High Court in the case of JCB India Ltd vs. DCIT, dated 7/9/2017; (iii) Judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. C-Sam (India) Pvt Ltd [2017] 398 ITR 182 (Guj.), dated 31/07/2017 in support of his arguments. The Ld. AR therefore pleaded that since the Draft Assessment Order was not passed by the Ld. AO in the case of the assessee violating the provisions of section 144C(1) of the Act, the Final Assessment Order passed by the Ld. AO is non-est in law and deserves to be quashed.

Per contra, the Ld. Departmental Representative [DR] fully supported the orders of the Ld. Revenue Authorities. Further, the Ld. DR heavily relied on the judgment of the **Hon'ble High Court of Madras(Single Bench)** in the case of **Volex Interconnect (India) (P.) Ltd vs. Assistant Commissioner of Income Tax, Corporate Circle-3(2), Chennai** reported in [2022] 442 ITR 425 (Madras). It is the argument of the Ld. DR that in the case of Volex Interconnect (India) (P.) Ltd (supra), the Hon'ble High Court of Madras has remitted the matter back to the Ld. AO to pass a Draft Assessment Order. Therefore, following the same ratio, the case of the assessee may also be remitted back to the file of Ld. AO to pass a draft assessment order. He strongly relied on the decision of the Ld. Revenue Authorities and argued in support of the same.

6. We have heard the rival contentions and perused the material available on record as well as the orders of the Ld. Revenue Authorities. It is an admitted fact that the assessee-company is a Foreign Company within the meaning of the provisions of section 144C(15)(b)(ii) of the Act. Further, the assessee-company is also an **"eligible assessee"** as defined in section 144C(15) of the Act. It is the case of the Ld. AO that the Place of Effective Management [POEM] lies in India and hence the assessee shall be subjected to tax in India as per the

Indian Income Tax provisions. However, while making the assessment, the Ld. AO has not followed the procedure mandated U/s. 144C of the Act in the case of the assessee. For the sake convenience and immediate reference, we hereby extract below the provisions of section 144C of the Act:

*“Reference to dispute resolution panel.*

**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 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.

(3) .....

(4) .....

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

**(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—**

(a) **draft order;**

(b) **objections filed by the assessee;**

(c) to (g).....

(7) to (14C) .....

(15) .....

(a) .....

**(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."***

7. Section **144C(15)(b)** of the Act defines the term **"eligible assessee"**. The term "eligible assessee" includes **"any non-resident not being a company, or any foreign company"** which was substituted by the Finance Act, 2020 w.e.f. 1/4/2020. **Even prior to its substitution, the term "eligible assessee" includes "foreign company"**. It is a fact that the assessee is a foreign company. Therefore, as per section 144C(1) of the Act, the Ld. AO is duty bound to pass the Draft or Proposed Assessment Order and shall forward the same to the 'eligible assessee' to enable the assessee to file the objections, if any, before the Dispute Resolution Panel. However, in the instant case, the Ld. AO has not passed the Draft Assessment Order, as mandated U/s. 144C(1) of the Act, before making the assessment and passed the Final Assessment Order. Therefore, in our considered view, the Ld. AO has not followed the procedure laid down U/s. 144C(1) of the Act and passed the final assessment order. It was incumbent on the part of the Ld. AO to have passed a Draft Assessment Order to adhere to the mandatory requirement of section 144C(1) of the Act otherwise it would

result in invalidation of the final assessment order and the consequent demand and penalty also. As discussed above the Hon'ble Jurisdictional High Court in the case of M/s. Zuari Cement Ltd vs. ACIT, Circle-2(1), Tirupati (supra), the Hon'ble jurisdictional High Court of Andhra Pradesh has held as follows:

*"In this view of the matter, we are of the view that the **impugned order of assessment dated 23/12/2011 passed by the respondent is contrary to the mandatory provisions of section 144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23/12/2011 issued by the respondent is set-aside.**"*

We also find from the submissions made by the Ld. AR that the SLP filed by the Revenue against the order of the Hon'ble High Court of Andhra Pradesh (supra) has been dismissed by the Hon'ble Supreme Court vide the judgment in Special Leave (Civil) CC 16694/2013, dated 27/09/2013. Further, the reliance placed by the Ld. AR in the case of M/s. CWT India Private Limited vs. ACIT (supra) the Hon'ble High Court of Bombay has observed 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) 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.

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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).

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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 **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.

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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)

Further, the Hon'ble Delhi High Court in the case of Sinogas Management PTE Ltd (supra) has held as under:

**"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 and penalty proceedings."**

From the above judgments of the Hon'ble High Court of Bombay (supra) and Hon'ble High Court of Delhi (supra), it is clear and settled law that the failure on the part of the Ld. AO to pass a draft assessment order U/s. 144C(1) of the Act would vitiate the final assessment order as one without jurisdiction. Therefore, in our considered view, the assessment order passed by the Ld. AO is without jurisdiction and in violation of the mandatory provisions of section 144C(1) of the Act and therefore null and void and cannot be enforceable.

8. The case law relied on by the Ld. DR in the case of **M/s. Volex Interconnect (India) Private Limited (supra)** is a **Single Judge decision**. We are not inclined to grant the request of the Ld. DR

to remand the matter for fresh consideration and to pass a draft assessment order because in the case of Ms.Volex Interconnect (Supra), the Hon'ble Madras High Court has rendered the decision on the facts and circumstances of that case which are different from that of the assessee's case and failure on the part of the Ld. AO to pass draft assessment order Section 144C(1) of the Act has rendered the assessment as one without jurisdiction. Where as the Division Bench of the Hon'ble Jurisdictional High Court in the case of M/s. Zuari Cement Limited (supra); Hon'ble High Court of Delhi in the case of Sinogas Management PTE Limited (supra) have held that the provisions of section 144C(15) has to be mandatorily followed with respect to the Foreign Companies.

9. Therefore, in view of the discussion in the foregoing paras, we are of the considered view that the ratio laid down by the Hon'ble jurisdictional High Court of Andhra Pradesh (supra) which is affirmed by the Hon'ble Supreme Court by dismissing the SLP are binding on us. The facts in the case of M/s. Zurai Cement Ltd (supra) are identical to the issue in the case of the assessee as well as the judgments of the various High Courts cited supra. Thus, we have no hesitation to come to the conclusion that the assessment order passed by the Ld. AO in the

case of the assessee is without jurisdiction and in violation of the mandatory provisions of section 144C(1) of the Act and therefore the assessment order passed U/s. 153C of the Act is null and void and unsustainable in law. Accordingly, the legal ground raised by the assessee deserves to be allowed thereby warranting quashing of the assessment order passed by the Ld.AO. It is ordered accordingly.

10. Since, the assessment order passed by the Ld. AO U/s. 153C of the Act, dated 31/03/2022 has been quashed considering the legal ground raised by the assessee in foregoing paragraphs of this order, the original grounds of appeal raised by the assessee on merits need no separate adjudication. Accordingly, the original grounds of appeal raised by the assessee have become infructuous.

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

Pronounced in the open Court on 15<sup>th</sup> December, 2023.

Sd/-

(दुव्वूरु.एलरेड्डी)

(DUVVURU RL REDDY)

**न्यायिकसदस्य/JUDICIAL MEMBER**

Sd/-

(एसबालाकृष्णन)

(S.BALAKRISHNAN)

**लेखासदस्य/ACCOUNTANT MEMBER**

Dated :15.12.2023

OKK - SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee-M/s. Polisetty Somasundaram Global Limited C/o. CA M.V. Prasad, D.No. 60-7-13, Ground Floor, Siddhartha Nagar, 4<sup>th</sup> Lane, Vijayawada, Andhra Pradesh – 520010.
2. राजस्व/The Revenue – The Deputy Commissioner of Income Tax, Central Circle-1, 3<sup>rd</sup> Floor, Raj Kamal Complex, Lakshmipuram Main Road, Guntur, Andhra Pradesh – 520002.
3. The Principal Commissioner of Income Tax,
4. आयकरआयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT, Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam