



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA no.2572/Mum./2017  
(Assessment Year : 2013-14)

Maquet Holdings B.V. & Co. KG  
C/o India Bulls Finance Centre  
Tower-3, 27<sup>th</sup> 32<sup>nd</sup> Floor  
Senapati Bapat Marg  
Elphinstone Road (West)  
Mumbai 400 013  
PAN - AAXFM1661Q

..... Appellant

v/s

Dy. Commissioner of Income Tax (I.T.)  
Circle-3(2)(1), Mumbai

..... Respondent

Assessee by : Shri Milin Thakore  
Revenue by : Shri Manoj Kumar

Date of Hearing - 16.01.2019

Date of Order - 12.04.2019

**ORDER**

**PER SAKTIJIT DEY. J.M.**

Aforesaid appeal filed by the assessee is directed against the assessment order dated 27<sup>th</sup> January 2017, passed under section 143(3) r/w section 144C(13) of the Income-tax Act, 1961 (for short "*the Act*"), pertaining to the assessment year 2013-14 in pursuance to

the directions of the Dispute Resolution Panel-3 (WZ), Mumbai, (herein after called "*the DRP*").

2. In addition to the main grounds raised in the memorandum of appeal, the assessee has raised the following additional grounds: –

*"The appellant craves leave to raise the following additional ground of appeal without prejudice to the grounds raised in the original appeal:*

*Ground No. 1*

*On the facts and circumstances of the case and in law, the appellant not being an 'eligible assessee' within the meaning of section 144C(15)(b) of the Income-tax Act, 1961 (the Act), the learned Assessing Officer erred in passing a draft order under section 143(3) r.w.s. 144C(1) of the Act instead of an assessment order under section 143(3) of the Act.*

*The appellant therefore submits that the order issued under section 143(3) r.w.s. 144C(13) of the Act, is, invalid, bad in law and ought to be quashed*

*The appellant craves leave to add to, amend, alter, vary, omit or substitute the aforesaid additional ground of appeal or add a new ground or grounds at any time before or at the time of hearing of the appeal as they may be advised."*

3. We have heard the learned Counsels appearing for the rival parties on admission of additional grounds. The additional ground raised by the assessee involves important legal and jurisdictional issue going to the root of the matter and does not require investigation into fresh facts. Therefore, following the decision of the Hon'ble Supreme Court in National Thermal Power Corporation Ltd. v/s CIT, 229 ITR 383 (SC) and the decision of the Hon'ble Jurisdictional High Court in CIT

v/s Pruthvi Brokers and Shareholders Ltd., 349 ITR 336 (Bom.), we admit the additional ground for adjudication.

4. Brief facts relating to the aforesaid issue are, the assessee claiming itself to be a limited liability partnership (LLP) was incorporated in Germany on 4<sup>th</sup> September 2012. It is a subsidiary of Maquet Verwaltungs B.V., Netherlands. The assessee is generally in the business of medical systems it developed and infrastructure functions for hospital departments including operating room, hybrid operating room, catheter laboratories and intensive care units. In the course of its business, it has provided various services to its group entity in India. For the assessment year under dispute, the assessee filed its return of income on 30<sup>th</sup> November 2013 declaring total income of ₹ 4,351. In the course of assessment proceedings, the Assessing Officer after calling for necessary details and examining them found that as per the software licensing agreement, the amount received from its Indian Group entity for use of software license and training fees is in the nature of fees for technical services. Therefore, he called upon the assessee to show cause why the amount received should not be treated as royalty/fees for technical services and brought to tax in India. Though, the assessee relying upon various clauses of the double taxation avoidance agreement (DTAA) between India and Germany submitted that the amount received cannot be

treated as royalty or fees for technical services, however, the Assessing Officer rejecting the submissions of the assessee ultimately concluded that the amount of ₹ 68,19,769, received by the assessee from the Indian Group company has to be treated as royalty under Article-12 of India-Germany Tax Treaty. Accordingly, he added back the same to the income of the assessee along with training fees of ₹ 43,509. Accordingly, he passed the draft assessment order.

5. Though, assessee raised objection before learned DRP against the addition made in the draft assessment order, however, learned DRP refused to interfere with the addition made in the draft assessment order. Accordingly, the Assessing Officer passed the impugned assessment order.

6. The basic contention of the learned Authorised Representative is, the assessee not being an "**eligible assessee**" as defined under section 144C(15) of the Act, the Assessing Officer could not have passed the draft assessment order under section 144C(1) of the Act. He submitted, the Assessing Officer can pass a draft assessment order under sub-section (1) of section 144C of the Act only in respect of an eligible assessee. He submitted, as per the definition of eligible assessee under section 144C(15)(b) of the Act, it means any person in whose case there is a variation in income as a consequence of order passed by the Transfer Pricing Officer under section 92CA(3) of the

Act, and any foreign company. He submitted, **in assessee's case** neither any variation has arisen as a consequence of an order passed by the Transfer Pricing Officer under section 92CA(3) of the Act nor the assessee is a foreign company as it is a limited liability partnership. He submitted, the Department has also accepted the status of the assessee as partnership firm by issuing PAN as a firm. He submitted, the assessee has also filed its return of income showing its status as a partnership firm. In this context, he drew our attention to the copy of the return of income as well as computation of income for the impugned assessment year as submitted in the paper book. Further, he drew our attention to the residency certificate issued in Form no.10F showing the status of the assessee as limited liability partnership. He also drew our attention to the order passed by the Assessing Officer the draft assessment order passed by the Assessing Officer for the assessment year 2016-17, showing status of the assessee as "***firm***". Thus, he submitted, the assessee not being an eligible assessee as per section 144C(15)(b) of the Act, the Assessing Officer could not have passed the draft assessment order under section 144C(1) of the Act. Therefore, the draft assessment order as well as the final assessment order passed in consequence thereof is void ab initio.

7. Further, he submitted, as per section 153(1) of the Act, the limitation to pass the assessment order under section 143(3) of the Act expired in January 2016. Therefore, the final assessment order passed on 27<sup>th</sup> January 2017, is also not saved by limitation. In support of his contention, learned Authorised Representative relied upon the following decisions: –

- i) *ESS Advertising (Mauritius) S.N.C. et Compagnie v/s ADIT, ITA no.5131, 5132/Del./2010, dated 20.08.2018;*
- ii) *Honda Cars India Ltd. v/s DCIT, [2016] 67 taxmann.com 29 (Del.);*
- iii) *Pankaj Extrusion Ltd. v/s ACIT, [2011] 198 taxman 6 (Guj.)*
- iv) *ESS Distribution (Mauritius) SNC ET Compagnie v/s DIT, [2018] 93 taxmann com 53 (Del.);*
- v) *ESPN Star Sports Mauritius S.N.C. ET Compagnie v/s Union of India, [2016] 68 taxmann.com 377 (Del.); and*
- vi) *CTBC Bank Co. Ltd. v/s DCIT, [2017] 88 taxmann. com 141 (Del. Trib.).*

8. The learned Departmental Representative opposing the contentions of the assessee submitted that the assessee being a foreign company is an eligible assessee as per section 144C(15)(b) of the Act. He submitted, as per the definition of company under section 2(17) of the Act, anybody corporate incorporated by or under the laws of a country outside India or any institution, association or body can be treated as company. Thus, he submitted, the Assessing Officer has

correctly passed the draft assessment order under section 144C(1) of the Act.

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 (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.]”*

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 it 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(1) 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, it 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,

from 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 144C of the Act for the assessment year 2016-17, 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 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 subsection (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 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.*

*10.....*

*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).*

*13.....*

*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."*

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.

12. In the result, appeal is partly allowed

Order pronounced in the open Court on 12.04.2019

**Sd/-**  
**MANOJ KUMAR AGGARWAL**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 12.04.2019**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

(Sr. Private Secretary)  
ITAT, Mumbai