IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No.4405/Del/2011
निर्धारणवर्ष/Assessment Year:2003-04

A.T. Kearney Ltd., **India Branch Office,** **14th Floor, Tower D,** **Global Business Park,** **Gurgaon.**	बनाम **Vs.**	**ADIT** **Circle 1(1)** **International Taxation,** **New Delhi.**
PAN No. AADCA0861H		
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**

निर्धारितीकीओरसे **/Assessee by**	**Sh. Ajay Vohra, Sr. Adv.**
राजस्वकीओरसे **/Revenue by**	**Sh. Prabha Kant, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	20.05.2021
उद्घोषणाकीतारीख/Pronouncement on	25.05.2021

आदेश /O R D E R

PER N.K. BILLAIYA, A.M.

1. With this appeal the assessee has challenged the validity of the assessment order dated 19.08.2011 framed u/s 144C(13)/143(3)/254 of the Act.

2. The assessee has raised the following grounds of appeal:

1. Based on the facts and circumstances of the case and in law, the order passed by the Ld. Assistant Director of Income-tax (hereinafter referred to as 'the Ld. Assessing Officer') in pursuance to the directions of the Hon'ble Dispute Resolution Panel - 1 (hereinafter referred to as 'the Ld.

DRP') under section 143(3) read with section 144C of the Income Tax Act, 1961 ('Act'), is bad in law and void ab-initio.

2. *Based on the facts and circumstances of the case and in law, the Hon'ble DRP has erred in confirming the additions proposed by the Ld. Assessing Officer, determining the taxable income of the appellant for the subject assessment year at Rs. 197,829,055 as against loss of Rs. 5,030,030 returned in the return of income.*
3. *Based on the facts and circumstances of the case and in law, the Ld. Assessing Officer/Hon'ble DRP has erred in holding that the income earned by the appellant qualifies as ('fees for technical services') as per Article 13 of India – UK tax treaty and is taxable on presumptive basis under section 44D read with section 115A of Act, thereby not accepting the 'net income' returned by the appellant in accordance with the relevant provisions of the Act and India – UK tax treaty.*
4. *Based on the facts and circumstances of the case and in law, the Ld. Assessing Officer/Hon'ble DRP has erred in not following the binding rulings of the Hon'ble Courts and notifications/circulars issued by the CBDT while determining the assessed income of the appellant in India.*
5. *Without prejudice, based on the facts and circumstances of the case and in law, the Ld. Assessing Officer/Hon'ble DRP has erred in not allowing set off of brought forward business loss and unabsorbed depreciation while computing taxable income for the subject assessment year.*

5.1 *Based on the facts and circumstances of the case and in law, the Ld. Assessing Officer has erred in not allowing set off of brought forward business loss and unabsorbed depreciation while computing taxable income for the subject assessment*

year despite the fact that earlier the benefit of set off of losses/unabsorbed depreciation had been allowed by the Ld. Assessing Officer by way of rectification of original assessment order dated March 23, 2006.

6. *That on the facts and circumstances of the case and in law, the Ld. Assessing Officer/Hon'ble DRP has erred in levying interest under section 234B of the Act.*
7. *That on the facts and circumstances of the case and in law, the Ld. Assessing Officer/Hon'ble DRP has erred in levying interest u/s 234D of the Act.*
8. *That on the facts and circumstances of the case and in law, the Ld. Assessing Officer has erred in withdrawing interest u/s 244A of the Act.*
9. *That on the facts and circumstances of the case and in law, the Ld. Assessing Officer has erred in proposing to initiate penalty proceedings u/s 271(1)(c) of the Act.*

The grounds above are without prejudice to each other.

The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."

3. Vide application dated 12.01.2021 the assessee has requested the Bench for the admission of additional ground of appeal under Rule 11 of the ITAT Rules, 1963. The additional ground raised reads as under:

"That on the facts and circumstances of the case and in law, the assessment completed under section 144C(13)/143(3) of the Income Tax Act, 1961 is bad in law, void ab initio and barred by limitation."

4. We have carefully perused the aforementioned additional ground of appeal. By way of this additional ground the assessee seeks to challenge the validity and legality of the impugned assessment on the ground that the provisions of section 144C of the Act introduced by the Finance (No. 2) Act, 2009 w.e.f. 01.04.2009 has no application for the impugned assessment year.

5. We are of the considered view that the admission of the aforementioned additional ground does not require verification of any new fact. The section, date of the assessment order are very much there in the face of the assessment order itself, therefore, the additional ground raised by the assessee is admitted for adjudication.

6. Since the additional ground goes to the root of the matter, we proceed to decide it first.

7. Facts on record show that the original assessment for the year under consideration was completed by the AO vide order dated 28.03.2006 framed u/s 143(3) of the Act. The said assessment order was assailed in appeal before the Ld. CIT(A) but without any success. The matter travelled upto the Tribunal and the Tribunal vide order dated 31.08.2009 in ITA No. 2599/Del/2008 set aside the assessment for *denovo* consideration by the AO. In

the proceedings to give effect to the order of the Tribunal the Assessing Officer passed draft assessment order on 30.12.2010, the DRP issued Instructions on 10.08.2011 and culminating in final assessment order dated 19.08.2011, which is impugned in the present appeal.

8. The Hon'ble Madras High Court in the case of Vedanta Limited in writ petition no. 1729/2011 has categorically held that since the provisions of section 144C of the Act has been introduced by the Finance (No. 2) Act, 2009 w.e.f. 01.04.2009, the said amendment is applicable from AY 2011-12 onwards. Therefore, in the light of the decision of the Hon'ble Madras High Court (supra), we are of the considered view that the draft assessment order framed by the AO is null and void.

9. A similar quarrel was considered by this Bench of the Tribunal in the case of M/s Travelport L.P. USA in ITA Nos. 6499/Del/2012, 6500/Del/2012, 1480/Del/2012, 217/Del/2014 and 218/Del/2014 vide order dated 09.11.2020. The relevant findings of the coordinate bench read as under:

> *"Facts on record show that for AY 2007-08, draft assessment order is dated December 24, 2009 and final assessment order is dated 05.02.2010. For 2008-09, draft order is dated 24.12.2010, and final order is dated 28.01.2011. For 2009-10, draft order is dated 19.12.2011 and final assessment order is dated 30.01.2012. For AY 2010-11*

draft order is dated 15.03.2013 and final order is dated 06.05.2013.

It can be seen from the assessment orders that the Assessing Officer has framed draft assessment order and thereafter final assessment orders were passed. Provisions of section 144C of the Act which relates to reference to Dispute resolutions Panel were inserted vide Finance Act [No. 2]] Act 2009 w.e.f. 01.04.2009. The provisions read as under:

> *"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 (hereinafter 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."*

The aforesaid section 144C of the Act can only apply prospectively i.e. from AY 2011-12 and is not applicable to the captioned assessment years. The Hon'ble High Court of Madras in the case of M/s Vedanta Limited vs. ACIT Writ Petition No. 1729 of 2011 has categorically held that the provisions of section 144C of the Act can be held to be applicable prospectively, from AY 2011-12 only. The relevant findings read as under:

> *"26. Thus, where there is a change in the form of assessment itself, such change is not a mere deviation in procedure but a substantive shift in the manner of framing an assessment. A substantive right has ensured to the parties by virtue of the introduction of section 144C, that, bearing in mind the settled position*

that the law applicable on the first day of assessment year be reckoned as the applicable law for assessment for that year, leads one to the inescapable conclusion that the provisions of section 144C can be held to be applicable only prospectively, from AY 2011-12 only."

In all the AYs under challenge, on the proposition that they are barred by limitation, the Assessing Officer has framed draft assessment order when the provisions were not there in the statute. Therefore, the period of limitation, as prescribed u/s 153 of the Act were applicable and, therefore, the date of final assessment order makes the assessment barred by limitation.

Considering the facts in totality, in the light of the decision of the Hon'ble Madras High Court (supra), we have no hesitation in holding that the assessments for AYs 2007-08 to 2010-11 are barred by limitation and accordingly quashed."

10. The Ld. DR in addition to his oral arguments also filed a written submission claiming that the additional ground taken by the assessee ought to be dismissed. In his written submission, the Ld. DR has stated as under:

"Single Member Judgment of Madras High Court in the case of M/s Vedanta Limited vs. ACIT Writ Petition No. 1729 of 2011 is not a good law because it has been passed ignoring Madras High Court previous division bench judgment in the case of Vijay Television Pvt. Ltd. Vs. DRP 369 ITR 130. While passing the said order the High Court ignored A.P. High Court Division Bench Judgment in the case of Zuari Cement Ltd. vs. ACIT (decision dated 21st February, 2013 in WP(C)

No. 5557/2012). SLP filed by Revenue against this order was rejected by S.C. in CC No. 16694/2013 on 27th September, 2013. Hence, the ratio given in Zauri Cement Ltd. has become law of the land. Therefore, the Madras High Court Judgment in the case of Vedanta Ltd. has no precedence value.

Consequently, ITAT judgment in the case of Travelport L.P. USA ITA No. 6499/Del/2012 [AY 2006-07], ITA No. 6500/Del/2012 [AY 2007-08], ITA No. 1480/Del/2012 [AY 2008-09], ITA No. 217/Del/2014 [AY 2009-10] is also not a good law and has no precedence value since it has followed Madras High Court in the case of M/s Vedanta Ltd. more so while passing the order the Tribunal has ignored binding Jurisdictional High Court judgment in the case of ESPN Star Sports Mauritus 388 ITR 383 (Delhi.).

In its recent judgment delivered on 24/12/2020 i.e. after the judgment of Travelport and Vedanta Ltd., in the case of PCIT vs. Headstrong Services India Pvt. Ltd. in ITA No. 77/2019 (copy enclosed) (Date of order 24/12/2020) has categorically held that any order involving international transaction and eligible assessee passed after 1/10/2009 which has not been passed as per section 144C of the IT Act, irrespective of assessment year involved, is bad in law and is void ab-initio. The Hon'ble HC has imposed cost of Rs. 10,000/- on AO for not following provisions of section 144C in an order for AY 2007-08 when the order was passed 31/03/2014. In this case also original Draft assessment order was passed on 31/10/2010, DRP confirmed the draft assessment order. AO passed final order. The assessee challenged final assessment order in ITAT Delhi. ITAT Delhi set aside the final assessment order and restored the matter

to AO to pass fresh assessment order. In the second innings, the AO did not follow the provisions of section 144C, he passed the final order dated 31/03/2014 without passing the draft assessment order. The assessee filed appeal with CIT(A). The CIT(A) partially allowed the appeal. Against the CIT(A) order the assessee again filed appeal in ITAT, Delhi. ITAT Delhi vide it's order dated 30/09/2015 quashed the assessment order dated 31/03/2014 holding it to be in violation of section 144C. Against the ITAT order Revenue filed appeal before Delhi High Court.

The facts of the present case are exactly the same as that of Headstrong Services India Pvt. Ltd. in ITA No. 77/2019 (Delhi HC). Assessment year here is 2003-04 where as in Headstrong case it was 2007-08 which was prior to introduction of section 144C (w.e.f. 1/4/2009). Here also the original order dated 23/3/2006 was challenged before CIT(A). CIT(A) order was challenged before ITAT, Delhi. ITAT Delhi vide it's order dated 31/08/2009 set aside the asstt. Order with a direction to pass a fresh order after considering the additional evidence filed by the assessee. Here AO passed draft assessment order as per section 144C on 30.12.2010 and DRP passed order on 10/08/2011, final order was passed by the AO on 19/8/2011. The assessee has filed this appeal against this order.

Thus, the facts of the present case are exactly same as that in the case of Headstrong Services India Pvt. Ltd.

Judgment of Delhi High Court in the case of PCIT vs. Headstrong Services India Pvt. Ltd. in ITA No. 77/2019 is binding.

In view of this the additional ground taken by the assessee ought to be dismissed."

11. We have given a thoughtful consideration to the submissions of the DR and the judicial decisions referred by him in his written submission. We find that none of the decision relied upon by the DR has considered the present quarrel and in fact all the decisions have answered the questions which were posed before the Hon'ble High Court and none of such quarrel is similar to the present quarrel.

12. The Principle of law laid down in the judgments relied upon by the DR is to the effect that failure to pass draft asstt. order u/s 144C(1) of the Act, whereever mandated in law, would result in rendering the final assessment order without jurisdiction to the null and void and enforceable.

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

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*

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).

16. In the light of the above judicial backdrop, the facts of the present case are that the original assessment was framed u/s 143(3) of the Act vide order dated 28.03.2006 and when the dispute travelled up to the Tribunal the Tribunal set aside the matter back to the files of the AO to frame *denovo* assessment. While giving effect to the order of the Tribunal the AO has erroneously framed a draft assessment order following the provisions of section 144C(1) of the Act which was clearly not applicable on the facts of the case in hand. After receiving the directions from the DRP the final assessment order was framed on 19.08.2011 which is definitely barred by limitation in the

light of the provisions of section 153(2A) as applicable during the year under consideration and the same reads as under:

> *"(2A) Notwithstanding anything contained in sub-sections (1), (1A), (1B) and (2) in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order u/s 150 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order u/s 250 or section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commission or Commissioner or, as the case may be, the order u/s 263 or section 264 or section 264 is passed by the Pr. Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner."*

17. In the light of the judicial discussion mentioned elsewhere on the facts of the case discussed hereinabove, we have no hesitation in holding that the assessment order dated 19.08.2011 is barred by limitation.

18. Before parting, the DR has placed strong reliance on the decision of the Hon'ble Delhi High Court in the case of Headstrong Service India P. Ltd. in ITA No. 77/2019 order dated 24.12.2020. This decision is not applicable to the dispute under consideration because in that case, the Revenue had contended that the procedure in section 144C of the Act would not apply in

the remand proceedings considering that sub section (1) of the said section uses the expression 'in the first instance'. Repelling the aforesaid argument on the side of the Revenue, the Hon'ble High Court observed that since the original assessment in that case had been completed by following the procedure prescribed u/s 144C of the Act, in the remand proceedings, the AO could not by pass the provisions of the said section. Kind attention in this connection is invited to the observations in paras 13, 14 and 15 of the said judgment to the following effect:

> *"13. The ITAT while remanding the matter of transfer pricing adjustment to the AO vide order dated 17th July, 2012 had not only 'restored' the matter "to the file of the AO for following proper procedure" but also to "decide the matter denovo".*
>
> *14. This Court is of the view that once the ITAT directed the Assessing Officer to decide the matter de novo, it meant that a new hearing of the matter had to be conducted, as if the original hearing had not taken place.*
>
> *15. Consequently, the Assessing Officer had to decide the matter in accordance with the elaborate procedure mentioned in section 144C and not dehors it."*

Further attention is also invited to the specific observations in paras 19 to 20 of the judgment to the following effect:

> *"19. The expression 'in the first instance' has been used in section 144C to signify the first step to be taken by the Assessing Officer in a series of acts contemplated by the said*

section while dealing with the case of an eligible assessee. This Court is further of the view that if the Assessing Officer u/s 144C can prepare a draft assessment order only, then by virtue of a remand order which directs the AO to decide the matter de novo, the Assessing Officer cannot get the power to pass an assessment order, when there is an objection by the Assessee like in the present case, without reference to the Dispute Resolution Panel which comprises of three Principal Commissioners or Commissioners of Income tax constituted by the Board.

20. Now to accept the appellant's argument would be to permit the Assessing Officer to decide the objections filed by the assessee – which power has been specifically denied by the statute."

19. Considering the facts in totality in the light of the judicial decisions the additional ground is decided in favour of the assessee and against the Revenue the assessment order is barred by limitation. Since we have quashed the assessment order as *null and void,* we do not find it necessary to dwell into the merits of the case.

20. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on 25/05/2021.

Sd/-	**Sd/-**
(KULDIP SINGH)	**(N.K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25th May, 2021
**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi