IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Sr. No.210 Civil Writ Petition No. 11215 of 2021

Fidelity Information Services India Pvt. Ltd. .….Petitioner

Versus

Deputy Commissioner of Income Tax,
Circle 1(1), Chandigarh .....Respondent

1.	The date when the judgment is reserved	22.07.2026
2.	The date when the judgment is pronounced	12.08.2026
3.	The date when the judgment is uploaded	14.08.2026
4.	Whether only operative part of the judgment is pronounced or whether the full judgment is pronounced	Full
5.	The delay, if any of the pronouncement of full judgment, and reasons thereof	Not applicable

CORAM : HON'BLE MR. JUSTICE DEEPAK SIBAL
HON'BLE MS. JUSTICE RUPINDERJIT CHAHAL

Present: Mr. Vishal Kalra, Advocate
Mr. Rohit Chandel, Advocate and
Mr. Vicky Chauhan, Advocate for the petitioner.

Ms. Urvashi Dhugga, Senior Standing Counsel and
Mr. Vaibhav Gupta, Junior Standing Counsel
for the respondent-Income Tax Department.

* * * * *

DEEPAK SIBAL, J.

1. Through the instant petition, the petitioner challenges the assessment order dated 28.12.2019, pertaining to the assessment year 2016-17. Also under challenge are the consequent demand and penalty notices.

THE FACTS

2. The petitioner is a company incorporated under the Companies Act, 1956 and is a subsidiary of M/s Second Foundation Inc, a company incorporated in the United States of America. The petitioner is primarily engaged in providing

software development services to M/s Second Foundation Inc, USA.

3. On 29.04.2017, the petitioner filed its income-tax return for the assessment year 2016-17 which was subjected to scrutiny and in this regard a notice under Section 143(2) of the Income-tax Act, 1961 (for short, the Act) was served upon the petitioner. The petitioner filed a written response to such notice. The petitioner's income-tax return involved international transactions with a foreign associate enterprise and therefore, on 19.06.2018, the petitioner's Assessing Officer (for short, the AO), to get determined the arm's length price of such international transactions, referred the matter to the Transfer Pricing Officer (for short, the TPO). Through order of the TPO dated 20.02.2019, no variance was found in the petitioner's income-tax return and this was because on 06.02.2017, the petitioner had entered into an advance pricing agreement with the Central Board of Direct Taxes which agreement was applicable to the assessment year in question. After considering the order of the TPO dated 20.02.2019, the AO proposed to add to the petitioner's declared income Rs.13,73,32,347/- by disallowing foreign travelling expenses incurred by the petitioner. Accordingly, the AO passed a draft assessment order dated 28.12.2019, under Section 144C read with Section 143(3) of the Act. Such order was served upon the petitioner informing it with regard to its right under Section 144C(2) to either file, within 30 days, objections to the draft assessment order or to accept it. It was clearly stipulated in the draft assessment order that since it was only a draft order no demand notice or penalty notice was being issued and that adding of Rs.13,73,32,347/- to the petitioner's declared total income was also a proposal. The petitioner challenged the draft assessment order dated 28.12.2019 through filing of a petition before this Court being CWP-2334-2020-*Fidelity Information Service India Pvt. Ltd. vs. Commissioner of Income Tax-1, Chandigarh and*

another, which petition came up for preliminary hearing before a Division Bench of this Court on 29.01.2020 on which date notice was issued. At the time of accepting of notice, learned counsel appearing for the revenue stated that the draft assessment order dated 28.12.2019 was in fact the final assessment order passed under Section 143(3) of the Act. Nonetheless, the matter was adjourned to 06.02.2020 on which date learned counsel for the revenue reiterated that the draft assessment order dated 28.12.2019 was actually the final assessment order and in this regard the department was in the process of correcting such mistake. At that stage, learned counsel appearing for the petitioner reserved the petitioner's right to challenge any subsequent order which the respondent-authorities may pass in the future. On 06.02.2020, after noting the afore submissions, the petitioner's petition was disposed of while granting liberty to the petitioner to challenge any subsequent order which may be passed by the revenue. No subsequent assessment order was passed by the revenue but on 28.02.2020, the petitioner received a notice of demand under Section 156 of the Act requiring the petitioner to deposit Rs.4,37,55,114/- which was the payable income tax on account of addition of Rs.13,73,32,347/- to the petitioner's declared income. A notice dated 28.02.2020, under Section 274 read with Section 271(1)(c) of the Act, was also issued initiating penalty proceedings against the petitioner for having filed an inaccurate income-tax return for the assessment year in question. On 29.02.2020, the petitioner received an intimation informing it that a final assessment order under Section 143(3) of the Act, pertaining to the assessment year 2016-17, dated 28.02.2020, had been passed in the petitioner's case which order bore (DIN) ITBA/AST/M/143(3)/2019-20/1025906680(1). The petitioner wrote to the respondent-revenue authorities bringing to their notice that no order dated 28.02.2020, under Section 143(3) of the Act, had been served upon it and asked for a copy of the same. A request to the same effect was made by the petitioner on the Income of Tax Business Application Portal (for short-ITBA). On 17.03.2020, the petitioner received a notice, for the assessment year in question, under Section 274 read with Section 271(1)(c) of the Act through which the petitioner was now informed that for the assessment year 2016-17 no assessment order dated 28.02.2020, under Section 143(3) of the Act had been passed and that the final assessment order, for the assessment year 2016-17, had already been passed in the petitioner's case on 28.12.2019 which had also been served upon the petitioner on 28.12.2019. The assessment order dated 28.12.2019, pertaining to the assessment year 2016-17, alongwith the consequent notice of demand and notice initiating penalty proceedings, are under challenge through the present proceedings.

SUBMISSIONS

4. Learned counsel for the petitioner submitted that as per the order of the TPO dated 20.02.2019 no variation had been found by the TPO in the petitioner's income-tax return with regard to international transactions and therefore, the petitioner would not be an "eligible assessee" in terms of Section 144C(15)(b) of the Act; resultantly, the draft assessment order dated 28.12.2019, passed under Section 144C read with Section 143(3) of the Act was illegal; if the afore draft assessment order was invalid, there was no question of validating the same through any subsequent proceedings especially without passing any subsequent corrected order; in the absence of a final assessment order no demand can made from the petitioner or penalty proceedings initiated against it; even if for the sake of arguments, the draft assessment order was valid, the same could not be made the basis for raising a demand or initiating penalty proceedings *qua* the petitioner as a plain reading of such order made it abundantly clear that through

the same only a proposal had been made with no final determination of any sum payable by the petitioner; in the case in hand, no separate final assessment order had been passed and in the absence thereof demands made and penalty proceedings initiated against the petitioner were *per se* illegal; the stand of the respondent-authorities that the impugned draft assessment order was a result of human error and that it was in fact the final assessment order under Section 143(3) of the Act cannot be accepted because there is no order passed subsequently by the respondent-revenue acknowledging such mistake; there is also no subsequent order passed by the respondent-revenue under Section 292B of the Act clarifying/modifying the draft assessment order to treat it as a final assessment order under Section 143(3) of the Act and that till date, there is no final assessment or sum determined to be payable by the petitioner as required under Section 143(3) of the Act.

5. In support of his afore submissions, learned counsel for the petitioner placed reliance on the following judgments: -

1. ESPN Star Sports Mauritius S.N.C. ET Compagnie vs. Union of India (2016) SCC OnLine Del 1848;

2. Honda Cars India Ltd. vs. Deputy Commissioner of Income Tax (2016) SCC OnLineDel 921;

3. Pankaj Extrusion Ltd. vs. Assistant Commissioner of Income-tax (OSD) (2011) SCC OnLine Guj 1309;

4. Assistant Commissioner of Income-tax, Media Circle-11, Chennai vs. Vijay Television (P) Ltd. (2018) SCC OnLineMadras 13752;

5. Aldrin Alberto Araujo Soares vs. Deputy Commissioner of Income-tax (2024) SCC OnLine Bom 1384;

6. Classic Legends (P) Ltd. vs. Assessment Unit (2025) SCC OnLine Bom 3331;

7. Hitachi Energy India Ltd. vs. Deputy Commissioner of Income-tax (2025) SCC OnLine Kar 30893

8. SHL (India) (P.) Ltd. vs. Deputy Commissioner of Income-tax (2021) SCC OnLine Bom 1312.

6. Per contra, learned counsel for the respondent-revenue submitted that it is clearly mentioned in the draft assessment order dated 28.12.2019 that such order has been passed under Section 143(3) of the Act; reference in the said order to Section 144C of the Act was only a result of human error at the time when such order was uploaded because at that time, by mistake, a wrong tab had been pushed by the AO; as the petitioner was not an "eligible assessee" there was no reason in the petitioner's case to pass a draft assessment order under Section 144C of the Act and that since the intention behind passing of the impugned order dated 28.12.2019 was it to be the final assessment order under Section 143(3) of the Act and not a draft assessment order under Section 144C,no approval prior to its passing had also been obtained by the AO from the her superior officer as required under Section 144C of the Act.

7. Learned counsel for the respondent-revenue sought to support their submissions by relying on the following judgments: -

1. *Commissioner of Income-tax vs. Hargopal Bhalla & Sons (1970) SCC OnLine P&H 325;*

2. *Swaran Kanta vs. Commissioner of Income-tax (1988) SCC OnLineP&H 843;*

3. *Vr. C.R.M. Adaikkappa Chettiar vs. Commissioner of Income-tax, Madras (1969) SCC On Line Mad 309;*

4. *Commissioner of Income-tax vs. T.O. Abraham and Co. (2011) SCC OnLine Ker 4254; and*

5. *Sky Light Hospitality LLP vs. Assistant Commissioner of Income Tax, Circle-28(1), New Delhi (2018) SCC Online Del 7155.*

8. Learned counsel for the parties have been heard and with their able

assistance the record of the case has also been perused.

ANALYSIS AND DISCUSSION

9. The petitioner is a private limited company incorporated under the Companies Act, 1956 and is a subsidiary of M/s Second Foundation Inc, a company incorporated in the United States of America. The petitioner is primarily engaged in providing software development services to M/s Second Foundation Inc, USA.

10. On 29.04.2017, the petitioner filed its income-tax return for the assessment year 2016-17. Since in the petitioner's income-tax return there was reference to international transactions with a foreign associate entity, on 19.06.2018, the petitioner's AO referred the matter to the TPO to determine the arm's length price of such international transactions. On 20.02.2019, the TPO held that on 06.02.2017, the petitioner had entered into an advance pricing agreement with the Central Board of Direct Taxes and since assessment year 2016-17 would be covered by such agreement, he did not recommend any variance in the declaration of income made by the petitioner in its income-tax return with regard to its international transactions with the foreign associate enterprise. After considering the TPO's order dated 20.02.2019, the AO passed a draft assessment order dated 28.12.2019 under Section 144C read with Section 143(3) of the Act proposing therein to add to the petitioner's declared income Rs.13,73,32,347/- which were the expenses incurred by the petitioner on foreign travelling. The said draft assessment order dated 28.12.2019 was served upon the petitioner informing it about its right under Section 144C(2) of the Act to either file objections within thirty days against such order or to accept it. The petitioner challenged the draft assessment order before this Court through CWP-2334-2020-*Fidelity Information Service India Pvt. Ltd. vs. Commissioner of Income Tax-1,*

Chandigarh and another, which petition came up for preliminary hearing before a Division Bench of this Court on 29.01.2020 on which date notice was issued. At the time of accepting such notice, learned counsel for the revenue stated that the draft assessment order dated 28.12.2019 was in fact the final assessment order passed under Section 143(3) of the Act. Nonetheless, the matter was adjourned to 06.02.2020 on which date learned counsel for the revenue reiterated that the draft assessment order dated 28.12.2019 was actually the final assessment order and in this regard the department was in the process of correcting such mistake. At that stage, learned counsel appearing for the petitioner prayed for reserving the petitioner's right to challenge any subsequent order which the respondent-authorities may pass in the future. On 06.02.2020, after noting the afore submissions, the petitioner's petition was disposed of while granting liberty to the petitioner to challenge any subsequent order which may be passed by the revenue.

After 06.02.2020, two notices, pertaining to the assessment year 2016-17, both dated 28.02.2020, were received by the petitioner, one under Section 156 and the other under Section 274 read with Section 271(1)(c) of the Act. Such notices required the petitioner to deposit income tax @ Rs.4,37,55,114/- and also put the petitioner to notice as to why an order imposing penalty upon the petitioner should not be passed for having filed an incorrect return. On 29.02.2020, the petitioner was informed that a final assessment order, for the assessment year 2016-17, under Section 143(3) of the Act dated 28.02.2020 had been passed in the petitioner's case and the DIN number of such order was also brought to the petitioner's notice. The petitioner immediately represented to the respondent-authorities to inform them that no final assessment order dated 28.02.2020 had been served upon it and asked the respondent-revenue for a copy of the same. In response to its representation, the petitioner was then informed by the revenue-authorities that no order dated 28.02.2020 had in fact been passed and that in the petitioner's case the draft assessment order dated 28.02.2020 was the final assessment order under Section 143(3) of the Act. Accordingly, income-tax dues were demanded from the petitioner through notice dated 28.02.2020, issued under Section 156 of the Act as also penalty proceedings through another notice dated 28.02.2020, were sought to be initiated.

11. At the outset, it would be apposite to refer to the relevant portions of the impugned assessment order dated 28.12.2019 and the same are reproduced below: -

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX
DCIT CIR 1(1), CHANDIGARH

To, FIDELITY INFORMATION SERVICES INIDA PRIVATE LIMITED S-405, LGF ,GREATER KAILASH PART II NEW DELHI 110048, Delhi India	

PAN:	AY:	DIN & Order No :	Dated:
AAGCS0395D	**2016-17**	**ITBA/AST/F/144C/2019-20/1023349922(1)**	**28/12/2019**

Name of the assessee	**FIDELITY INFORMATION SERVICES INIDA PRIVATE LIMITED**
Address of the assessee	**S-405, LGF ,GREATER KAILASH PART II ,NEW DELHI 110048 , Delhi, India**
Status	**COMPANY**
Range/Circle/Ward	**DCIT CIR 1(1), CHANDIGARH**
Resident/Resident but not Ordinary resident/ Non-resident	**Resident**
Date of Hearing	**18/07/2017, 29/09/2017, 24/06/2019, 25/07/2019, 23/08/2019, 03/09/2019, 12/11/2019, 04/12/2019**
Section/Sub-section under which assessment is made	**143(3) of the I.T. Act, 1961**
Date of Order	**28/12/2019**

Draft Order u/s 144C of the Income-tax Act 1961

1. *The assessee filed its original return of income for the A.Y. 2016-17 on 30.11.2016 declaring a total income of Rs. 57,57,85,770/-. The assessee* *company revised its ITR on 29.04.2017 for the AY 2016-17 declaring total income of Rs. 62,14,07,780/-. The case was selected for scrutiny through CASS. Statutory notice under section 143(2) was issued on 03.07.2017 which was duly served on the assessee. Subsequently, questionnaire alongwith statutory notice u/s 142(1) was issued on 17.06.2019 and further from time to time as per the case history on ITBA portal. In response to the said notices requisite details were furnished on ITBA Portal by the assessee company.*

1.1 M/s Second foundation India Pvt. Ltd. (now known as Fidelity Information Services India Pvt. Ltd.) was incorporated on 15.04.2002 as a private limited company in New Delhi, India. The company is a subsidiary company of M/s Second foundation Inc, USA, a company incorporated in United States of America. The company is primarily engaged in providing software development services to M/s Second foundation Inc, USA. The company renders software development services from India. This unit is registered under the software technology park of India (STPI) Scheme formulated by Govt. of India.

1.2 While examining the case, it was noticed that the assessee had entered into international transactions during the year under consideration and having large value of international transactions in services. After taking approval from the Worthy Pr. Commissioner of Income Tax-I, Chandigarh vide letter No. Pr. CIT-1/Chd/Judl./2018- 19/791 dated 19.06.2018, the case was referred to the Transfer Pricing Officer (TPO), New Delhi, vide letter F. No. DCIT/Circle 1(1)/Chd./2018-19/1698 dated 28.06.2018 as one of the reasons of the selection of the case was based on TP Risk Parameter, for determining the arm's length price in relation to the international transactions u/s 92CA of the I.T Act, 1961.

1.3 The Deputy Commissioner of Income-Tax (Transfer Pricing)-1(3)(1), New Delhi passed order u/s 92CA(3) of the Income Tax Act, 1961 on 20.02.2019, wherein no adverse inference was drawn by the TPO as the assessee company had entered into Advance Pricing Agreement (APA) with the Central Board of Direct Taxes on 06.02.2017 and the A.Y. 2016-17 is covered as APA year. The order of the TPO is reproduced hereunder:

"OFFICE OF THE
DEPUTY COMMISSIONER OF INCOME TAX
TRANSFER PRICING OFFICER-1(3)(1)
ROOM NO. 510, 5th FLOOR, E-2 BLOCK,
CIVIC CENTER, NEW DELHI,

ORDER U/S 92 CA (3) OF THE INCOME TAX ACT, 1961

1	Name of the Assessee	:	M/s Fidelity Information Services India Pvt. Ltd. S-405, Greater Kailash, Part-II, New Delhi-110048.
2	Permanent Account No.	:	AADGC50395D
3	Status	:	Company
4	Assessment Year	:	2016-17
5	Previous Year	:	2015-16
6	Order U/S	:	92CA (3)
7	Dates of Hearing	:	As per record

8 Date of Order : 20/2/19

1. A reference u/s 92CA(1) of the I.T. Act, 1961 was received from DCIT, Circle-1(1), Chandigarh, to determine the 'Arm's Length Price' in respect of International transactions entered into by M/s Fidelity Information Service India Private Limited (here-in-after called as "the assessee") with its Associate Enterprises (AEs) during the FY 2015-16. In response to notice u/s 92CA(2) of the I.T. Act, 1961 Mr. Chirag Aggarwal, the authorized representatives of the Company, appeared from time to time. The Transfer pricing documentation containing functional and economic analysis prescribed under Rule 10D of the Income Tax Rules was submitted and placed on record.

2. **Business Profile of the Assessee**

The assessee company was incorporated on 15th April 2002 as a private limited company in New Delhi, India. The assessee company acts as a captive service provider and is engaged in the provision of software services primarily comprising custom application development, Integration, maintenance, support and testing. The assessee provides these services from its units in Chandigarh (to be moved to Mohall shortly) and Bangalore.

3. During the F.Y.2015-16, the taxpayer has reported the following International transactions in Form 3CEB:-

S. No.	AEs	Nature of Transaction	Amount (in Rs.)	Method
1	Fidelity Information service Inc US	Sales of services	3041212728	TNMM
2	Second Foundation Inc US	Sales of services	119664402	TNMM
3	Fidelity National information services Inc US	ESOP-RSU expense	24012960	TNMM
4	Fidelity National information services Inc US	ESPP Expense	7061021	TNMM
5	Fidelity Information service Inc. US	Unbilled Revenue	264889523	TNMM
6	Fidelity National information services Inc US	Trade Payables	21690766	TNMM

4. It was intimated by the AR during the TP proceedings that the assessee has already entered into Advance Pricing Agreement (APA) with the Central Board of Direct Taxes on 06.02.2017 and the A.Y.2016-17 is covered as APA Year. Further, the assessee modified return in view of section 92CD of the I.T Act, 1961 read with the rule 10RA of the I.T. Rules, 1962 on 29.04.2017 and the annual compliance report was filed on 05.05.2017 as per rule 10(D) of IT. Rules, 1962. The assessee in this regard filed the Copy of abovesaid APA as well as other submissions.

5. In view of the functional and economic analysis of assessee, no adverse inference is drawn in respect of the international transactions undertaken by the assessee during the F.Y. 2015-16.

(Saddik Ahmed)
Deputy Commissioner of Income Tax, Transfer Pricing Officer-1(3)(1), New Delhi

Copy to
1. The CIT (Transfer Pricing)-1, New Delhi for information please.
2. The Addl. CIT, TPO-1(3), New Delhi for information please.
3. The DCIT, Circle-1(1), Chandigarh for necessary action.
4. The Assessee

(Saddik Ahmed)
Deputy Commissioner of Income Tax, Transfer Pricing Officer-1(3)(1), New Delhi"

1.4 In response to statutory notices under section 143(2)/142(1), Ms. Divya Shingari, CA submitted the reply on ITBA from time to time.

2. Addition on account of foreign travelling expenses:

2.1 The assessee company, during the year under consideration, has debited travelling expenses amounting to Rs.18,69,28,806/- in the profit and loss account. Out of this, the foreign traveling expenses were Rs.13,73,32,347/-. As per the assesse these travelling expenses have been incurred for providing services to M/s Second Foundation Inc., USA and Fidelity information Services Inc., USA. As per the agreement with M/s Second Foundation, Inc. USA, a copy of which is already on record in earlier years, the assessee company is not required to incur any expense on account of foreign travelling for servicing of the clients of M/s Second Foundation Inc., USA. During the course of assessment proceeding, the assessee company vide notice u/s 142(1) dated 30.11.2019 was asked to justify foreign traveling expenses incurred by the assessee company amounting to Rs. 13,73,32,347/-.

2.2 In response thereto, the assessee company vide letter dated 11.12.2019 stated as under on this issue:

xxxx xxxx xxxx xxxx

2. After considering the facts of the case, it is held that providing of service to the foreign clients on behalf of M/s SF USA and M/s Fidelity Information Services Inc, USA was not the responsibility of the assessee company, therefore, the expenditure incurred on foreign traveling amounting to Rs.13,73,32,347/- is treated as expenditure pertaining to M/s SF Inc, USA and M/s Fidelity Information Services Inc. USA and is disallowable in the hands of the assessee company.

2.1 In this regard, it is important to mention that no new fact has been brought out by the assessee company while giving its submissions on this issue. That the assessee company has new service agreements with both the said customers under which the assessee company is rendering services to the said customers and that the customers remunerate the assessee on cost + 16.60% and further that the cost which is charged by the assessee to its respective customers includes interalia the travel cost, does not in any way make this an eligible business expenditure of the assessee company.

2.2 No details have been provided regarding the inclusion of the said expenses in the cost charged by the assessee company to its clients. Further, as per para 3.1 of Article 3 of the said settlement agreement filed by the assessee, cost shall include the allocable portion of all normal and ordinary course operating expenses including travel cost. However, the assessee has *failed to prove that the said foreign travel cost is a normal and ordinary course business expense and thus the foreign travel expense are not allowable u/s 37(1) of the I.T. Act, 1961.*

2.3 For the A.Y. 2006-07 the case of the assessee is pending for adjudication before the Hon'ble ITAT in second round. During the A.Y. 2011-12 the Hon' ble DRP' s vide its order dated 23.12.2015 directed to verify whether the foreign travelling expenses have been reimbursed by the customers. On verification as per the directions of Hon'ble DRP for A.Y. 2011-12, it was noticed that the bill of re-imbursement pertained to 'Software Development Charges'. The assessee was asked to produce documentary evidence regarding approval granted by the customers i.e. 2nd foundations Inc. USA & Fidelity Information Services, Inc. USA for reimbursement of foreign travelling expenses. However the assessee expressed his inability to produce the same. Thus, the assessee failed to establish that the foreign travelling expenses were re-imbursed by its customers i.e. 2nd foundations Inc. USA & Fidelity Information Services, Inc. USA. Accordingly the foreign travelling expenses were added back during the A.Y. 2011-12. However, ***the Hon'ble ITAT has deleted the addition made on foreign travelling expense but the order was not acceptable to the Department but further appeal u/s 260A of the Act was not filed as the tax effect involved was below the monetary limits prescribed.***

2.4 Further, the assessee has not been successful to explain how these expenses related to the normal business of the assessee. It is also pertinent to mention here that the reason for the disallowance is not based on whether the expenses have been incurred by the assessee or not, but on the allowability of the expense as such.

2.5 The assessee company had to provide the services for development of computer software and allied products on specific orders and specifications provided from time to time by M/s SF Inc. USA. Further, M/s. SF Inc USA was to provide technical support for the development of the software to the assessee company. It was further seen from the various clauses of the agreement that the assessee company was to develop specific software as per the direction of the company M/s SF Inc USA. Therefore, the assessee company was only engaged in development of computer software and allied products for M/s SF Inc USA and was not required to do any servicing on behalf of M/s SF Inc. USA.

2.6 It has further been observed that as per terms of agreement, the responsibility for servicing of clients' of M/s SF Inc. USA is that of M/s SF Inc. USA only. The responsibility of the assessee company was limited to the development of the software as per the technical specifications provided by M/s SF Inc. USA. In fact, the assessee company was not receiving any servicing income for servicing the clients of M/s SF Inc. USA. The expenses incurred for servicing of the clients of M/s SF Inc. USA were not the responsibility of the assessee company, as per the terms of the agreement. Further, all the expenses for the stay of the visiting employees of the assessee company to foreign companies were being met by M/s SF Inc. USA. The assessee company was bearing only the foreign traveling expenses and visa expenses of the visiting employees. In fact, the cost of foreign traveling expenses and visa expenses of the visiting employees was to be borne by M/s SF Inc. USA, as during the foreign visits by the assessee's employees, they were basically rending services to M/s SF Inc. USA and not to the assessee company. Thus, the copy of communication is respect of the employees is no way challenges the arguments taken by the AO for disallowing the expenses.

2.7 The assessee had also furnished sample invoices raised to customers Second foundation Inc and Fidelity Information Services, LLC. The assessee had once again tried to establish that the persons had actually travelled abroad to work on the projects. These invoices in description of charges only *mentions month-wise software development charges. No segregation whatsoever is provided with regard to foreign travelling expenses. Further, the main question is not whether the person had travelled abroad or not. The main issue at hand is whether the expenses were allowable in the business of the assessee. The invoices also do not establish that the expense was an allowable expense.*

2.8 The assessee has mentioned in its reply dated 11.12.2019 that the issue of allowability of foreign travelling expenses has been decided by the Hon'ble ITAT in favour of assessee for the AY 2011-12 and 2012-13 and further, for the AY 2014-15 the Ld. CIT(A) has allowed this issue in favour of the assessee. In this regard, it is pertinent to mention that the department has not accepted the decision of the Hon'ble ITAT for the AY 2011-12 and 2012-13 but further appeals u/s 260A were not filed due to tax effect being less than monetary limits prescribed. Further, it is worthwhile to mention here that the Ld. CIT(A) in the case of the assessee for the A.Y. 2014-15 has deleted the addition made on the issue of foreign travelling expenses by simply relying upon the order of Hon'ble ITAT in the case of the assessee for the A.Y. 2011-12 & 2012-13. The said order of the Ld. CIT(A) has not been found acceptable and the department has filed further appeal which is pending for adjudication before the Hon'ble ITAT.

2.9 Keeping in view above and in the facts and circumstance in the case, it is found that the expenditure on account of foreign travelling of Rs. 13,73,32,347/-for A.Y. 2016-17 is not allowable to the assessee and therefore an amount of ***Rs. 13,73,32,347/-****is proposed to be added to the returned income of the assessee.* ***I am satisfied that the case of the assessee is fit for initiating penalty u/s 271(1)(c) for furnishing inaccurate particulars of income.***

3. Computation of Income

3.1 With these comments, the total income of the assessee is computed as under:-

Particulars	***Amount Rs.***
Profits and gains from the business	***Rs.62,14,07,780/-***
Add: Addition on account of foreign travelling expenses as discussed in Para 2.9 above	*Rs. 13,73,32,347/-*
Total Assessed Income	***Rs. 75,87,40,127/-***

3.2 Since this is a draft order u/s 144C(1) r.w.s. 143(3) of the Income Tax Act, 1961, no demand notice, penalty notice u/s 271(1)(c) of the Act, interest u/s 234A, 234B and 234C of the act or challan is being issued to the assessee company. As per provision of section 144C(2) of the Act, the assessee company is given period of 30 days from the receipt of this draft order to file its acceptance or objections of the variations made in the draft assessment order."

(emphasis supplied)

12. By treating or deeming the afore quoted draft assessment order dated 28.12.2019 to be the final assessment order under Section 143(3) of the Act, the respondent-Income Tax authorities seek to demand the impugned income tax dues

from the petitioner with regard to the assessment year 2016-2017. Whether such action is sustainable in law is the question posed for our determination.

13. A perusal of the afore quoted assessment order clearly reveals that it was a draft assessment order; the addition of income to the petitioner's declared income, on which is based the impugned demand, was only a proposal; in the operative part of such order it was clearly mentioned that since the said order was only a draft assessment order, the consequent demand or penalty notices were not being issued; through such order, the petitioner was further informed that since the order was only a draft assessment order, passed under Section 144C(1) of the Act, against the same the petitioner had a right to file objections under Section 144C(2) of the Act or accept it so that thereafter the final assessment order could be passed and that through such order there was also no final determination of the income-tax payable by the petitioner.

14. In the light of the above and in the absence of any final determination of the sum payable by the petitioner-assessee, as required under Section 143(3) of the Act, on the basis of a draft assessment order, the impugned demand of income-tax dues sought to be made from the petitioner is unsustainable.

15. Before raising of a demand under Section 156 of the Act, Section 143(3) of the Act clearly provides for the determination of a sum payable by the assessee through passing of a final assessment order which in the case in hand is found missing. In this regard Section 143(3) of the Act may usefully be referred to. The same reads as follows:-

> ***"143(3)*** *On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such order evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the <u>Assessing Officer</u>*

> *shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him on the basis of such assessment."*
>
> (emphasis supplied)

16. As per learned counsel appearing for the respondent-revenue the impugned draft assessment order dated 28.12.2019 was a result of a mistake resulting from pressing of a wrong tab by the petitioner's AO at the time of uploading of such order on the ITBA portal and keeping in view the intent behind passing of such order the same should be treated as the final assessment order and to support its case the revenue presses into the service Section 292B of the Act. Such submission is required to be considered only to be rejected because a reading of the impugned assessment order reveals that the "mistake" could not have been committed at the time of uploading of such order by pressing of a wrong tab by the petitioner's AO because the said order starts with "Draft Order u/s 144C of the Income-tax Act, 1961". In the operative part of such order also it is clearly mentioned that the additions made therein to the petitioner's declared income are only by way of a proposal. Even for the sake of repetition, the relevant portions of the impugned draft assessment order are reproduced below for reference:-

> "*2.9 Keeping in view above and in the facts and circumstance in the case, it is found that the expenditure on account of foreign travelling of Rs. 13,73,32,347/-for A.Y. 2016-17 is not allowable to the assessee and therefore an amount of* ***Rs. 13,73,32,347/-****is proposed to be added to the returned income of the assessee.* ***I am satisfied that the case of the assessee is fit for initiating penalty u/s 271(1)(c) for furnishing inaccurate particulars of income.***
> *3. xxxx xxxx xxxx xxxx*
> *3.1 xxxx xxxx xxxx xxxx*
> *3.2 Since this is a draft order u/s 144C(1) r.w.s. 143(3) of the Income Tax Act, 1961, no demand notice, penalty notice u/s 271(1)(c) of the Act, interest u/s 234A, 234B and 234C of the act or challan is being issued to the assessee company. As per provision of section 144C(2) of the Act, the assessee company is given period of 30 days from the receipt of this draft order to file its acceptance or objections of the variations made in the draft assessment order."*

(emphasis supplied)

17. Even otherwise, if the passing of the impugned draft assessment order was the result of a mistake then the mistake, if any, should have been corrected or modified or clarified by the revenue through passing of a subsequent order after acknowledging such mistake, which was never done.

18. In the light of the afore factual position, Section 292B of the Act would have no application to the petitioner's case and consequently, the judgments cited by the revenue on this issue would also be distinguishable on facts.

19. Viewed from yet another angle, the impugned demand made from the petitioner on the strength of the impugned assessment order dated 28.12.2019 would be unsustainable in law.

It is not disputed that the petitioner was not an "eligible assessee" in terms of Section 144C(15)(b) of the Act. This is for the reason that there was no variance found by the TPO in the income tax return furnished by the petitioner with regard to its international transactions with its associate enterprise because on 06.02.2017, the petitioner had entered into an advance pricing agreement with the Central Board of Direct Taxes which agreement was applicable to the assessment year in question. Thus, in the petitioner's case there was no occasion to pass a draft assessment order under Section 144C(1) of the Act.

20. In this regard, reference can usefully be made to the following observations made by a Division Bench of the Delhi High Court in ***Honda Cars India Ltd.'s case*** *(supra): -*

> ***"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 at*

variance in the income or loss return. The Transfer Pricing Officer has accepted the return filed by the petitioner. In view of 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).

(emphasis supplied)

21. To the same effect are the following findings by a Division Bench of the Gujarat High Court in ***Pankaj Extrusion Ltd.'s case*** *(supra)*: -

"8. From the above, it is clear that for assessment year relevant for our purposes, on account of procedure undertaken in section 92CA of the Act, there was no variation in the income by virtue of order of Transfer Pricing Officer. That being the position, the petition cannot be stated to be an eligible assessee as defined in clause(b) of sub-section (15) of section 144C of the Act. Procedure for issuance of draft order calling for his objection and taking further steps as laid down under section 144C therefore, would not apply."

(emphasis supplied)

22. A Division Bench of the Bombay High Court in ***Classic Legends (P) Ltd.'s case (supra)*** has also held as follows: -

6. In the facts of the present case, it is not in dispute that the petitioner is not a non-resident or a foreign company as contemplated under section 144C(15)(b)(ii). The question is whether the petitioner would fall within the definition of "eligible assessee" as contemplated under section 144C(15)(b)(i). On a plain reading of the said provision, the petitioner can be stated to be an "eligible assessee" only if there is a case of variation referred to in the said sub-section (1) and which arises as a consequence of the order passed by the Transfer Pricing Officer under sub-section (3) of section 92CA. In the facts of the present case, it is an admitted position that there was no variation in the income of the petitioner by virtue of the order of the Transfer Pricing Officer. That being the position, the petitioner cannot be stated to be an "eligible assessee" as defined in clause (b) of sub-section (15) of section 144C of the Income-tax Act. Once this is the case, the entire procedure for issuance of a draft order calling for the petitioner's objections thereon and taking further steps as laid down under section 144C would, therefore, not apply.

7. xxxx xxxx xxxx xxxx
8. xxxx xxxx xxxx xxxx
9. xxxx xxxx xxxx xxxx

10. In view of the above discussion, it is clear that the petitioner in the present case, not being an "eligible assessee" in terms of section

> *144C(15)(b) of the Income-tax Act, the Assessing Officer was not competent to pass the draft assessment order under section 144C(1) of the Income-tax Act. Consequently, there was no occasion for him to thereafter pass a final assessment order under section 143(3) read with section 144C(3) read with section 144B of the Income-tax Act. Accordingly, the draft assessment order dated March 8, 2025; the final assessment order dated April 7, 2025 and the demand notice dated April 7, 2025 as well as the show-cause notices dated April 7, 2025 seeking to impose penalty, are all hereby quashed and set aside."*

(emphasis supplied)

23. In the light of the above discussion, the impugned draft assessment order dated 28.12.2019 alongwith the notice of demand dated 28.02.2020 as also the notice dated 28.02.2020 initiating penalty proceedings against the petitioner are set aside.

24. The petition is allowed in the above terms.

[DEEPAK SIBAL]
JUDGE

12.08.2026 [RUPINDERJIT CHAHAL]
shamsher JUDGE

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No