

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.756 OF 2023

Aldrin Alberto Araujo Soares
Aged about 54 years
Residing at No.432,
Porvorim, Bardez, Goa,
PIN : 403502

... Petitioner

Versus

1. Deputy Commissioner of
Income Tax,
Assessment Circle – 2(1),
BMTC Building, 80 Feet Road,
6th Block, Near KHB Games
Village Koraamangala, Bengaluru,
Karnataka, Pin Code: 560095.

2. The Dispute Resolution Panel-I,
Kendriya Sadan, Koramangala,
Bengaluru, Karnataka.

3. Union of India,
Through the Finance Secretary,
Having office at New Delhi.

... Respondents

Mr Hanumant D. Naik, Advocate for the Petitioner.

Ms Susan Linhares, Standing Counsel for the Respondent Nos.1
and 2.

**CORAM: M. S. SONAK &
VALMIKI SA MENEZES, JJ.**

DATE: 4th MARCH 2024

ORAL JUDGMENT : (Per M.S. Sonak, J.)

1. Heard Mr Hanumant D. Naik for the petitioner and Ms Susan Linhares, learned Standing Counsel for respondent nos.1 and 2.
2. Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.
3. The petitioner seeks the following substantive relief by instituting this petition:-

“(a) That this Hon’ble Court be pleased to issue a Writ of Certiorari or Writ in the nature Certiorari or any other Writ or Order or direction calling for the records of the case from the Respondent Nos.1 and 2 herein and upon examining the legality, propriety and reasonability of the impugned Draft Order No.ITBA/AST/F/144C/2022-23/1048245351(1) dated 26/12/2022 passed u/s 144C(1) of the Income Tax Act 1961 (copy being marked Exhibit ‘C’ hereto) issued by the Respondent No.1 and so also the impugned Order No.105/DRP-1/BNG/2022-23 dated 29/09/2023, passed by the Respondent No.2 herein (copy being annexed at ‘Exhibit I’ hereto) be pleased to quash and set aside the same.”

4. The petitioner’s main contention is that notwithstanding the petitioner’s claim in the revised return filed on 17.03.2022 about being a “non-resident”, the Draft Order dated 26.12.2022 issued under Section 144C(1) of the Income Tax Act (‘IT Act’ for short) has categorically held that the petitioner is a “resident in India” and not a “non-resident”. Mr Naik states that given this finding, it was not open to the respondents to apply the provisions of Section 144C of the IT

Act and issue the impugned Draft Order dated 26.12.2022. Mr Naik submits that the petitioner's without prejudice objections to the Draft Order dated 26.12.2022 were rejected on 29.09.2023, without considering this fundamental aspect that the entire procedure under Section 144C IT Act was not even applicable to the petitioner Assessee who was adjudged as a resident in India. Mr H.D. Naik relies on *Pankaj Extrusion Limited V/s. Assistant Commissioner of Income Tax*¹ and *Honda Cars India Limited V/s. Deputy Comm. Of Income Tax and Ors.*² in support of his contentions.

5. Mr Naik, on express instructions from the petitioner, states that in view of the finding that the petitioner was a resident in India and not a non-resident, the petitioner does not even press for any adjudication on the revised return filed by him on 17.03.2022. He points out that the petitioner had initially filed tax returns on 14.03.2022 based on the premise that he was a resident of India. He submits that based on these returns, the petitioner was entitled to a refund of ₹1,43,455/- (Rupees One Lakh Forty Three Thousand Four Hundred and Fifty-Five only). He submits that the petitioner will only claim for this refund and not claim for the refund of ₹62,69,263/- (Rupees Sixty Two Lakhs Sixty Nine Thousand Two Hundred and Sixty Three only) in terms of the revised return, which was *inter alia* based on the premise that the petitioner was a non-resident in India.

¹ (2011) 198 Taxman 6 (Gujarat)

² (2016) 240 Taxman 707 (Delhi)

6. Ms Linhares, learned Standing Counsel contests Mr Naik's contentions. She submits that the petitioner cannot take advantage of the circumstance that the Draft Order holds that he is a resident of India. She points out that in his revised return filed on 17.03.2022, the petitioner had categorically claimed that he was a non-resident. She submits that the petitioner submitted incorrect data regarding his stay in India and the income particulars. She submits that both the Draft Order as well as the order dated 29.09.2023, upon considering the correct position regarding the petitioner's residential status and income, have determined the tax payable at ₹3,69,47,296/- (Rupees Three Crores Sixty Nine Lakhs, Forty-Seven Thousand Two Hundred and Ninety-six only). She submitted that after adjusting the amount of ₹1,63,13,359/- (Rupees One Crore Sixty Three Lakhs Thirteen Thousand Three Hundred and Fifty-Nine only), this amount would come to ₹2,06,33,937/- (Rupees Two Crores Six Lakhs Thirty-Three Thousand Nine Hundred and Thirty-Seven only). She submits that the principle of estoppel is attracted in the present case, and the petitioner should not be allowed to approbate and reprobate.

7. The rival contentions now fall for our determination.

8. In this case, for the assessment year 2021-22, the petitioner filed his return on 14.03.2022 claiming the status of "resident in India" and declaring a total income of ₹3,95,25,500/- (Rupees Three Crores Ninety-Five Lakhs Twenty-Five Thousand Five Hundred only). A

necessary tax audit report was also filed to comply with the provisions of Section 44AB of the IT Act.

9. After about three days, i.e. on 17.03.2022, the petitioner filed a revised return under Section 139(5) of the IT Act, this time claiming the status of “non-resident” and declaring a total income of ₹2,55,94,000/- (Rupees Two Crores Fifty-Five Lakhs Ninety-Four thousand only). By the revised return, the petitioner only claimed a refund of ₹62,69,263/- (Rupees Sixty Two Lakhs Sixty Nine Thousand Two Hundred and Sixty-Three).

10. Based on the original and the revised return filed by the petitioner, correspondence ensued between the petitioner and the department. Finally, on 20.12.2022, the first respondent issued a show cause notice to the petitioner requiring him to submit certain documents on or before 26.12.2022, failing which the petitioner was informed that the assessment would be completed. The petitioner claims that he supplied such documents to the first respondent.

11. On 26.12.2022, the first respondent served the petitioner with a Draft Order under Section 144C(1) of the Income Tax Act. The Draft Order, after referring to several provisions of the Income Tax Act and the material on record, clearly held that the petitioner was a “resident in India” and not a “non-resident” as claimed by him in his revised return filed on 17.03.2022. Despite recording this categorical finding, the first respondent observed that since the petitioner, in his revised

return, had claimed that he was a non-resident, the Draft Order under Section 144C was being issued to him.

12. On receipt of the above Draft Order dated 26.12.2022, the petitioner filed objections as provided under Section 144C(2) of the IT Act on 25.01.2023. The petitioner objected to the proceedings under Section 144C by pointing out that such proceedings could be initiated only if the petitioner was an eligible assessee as defined under Section 144C(15)(b) of the IT Act.

13. The petitioner also filed Writ Petition no.328 of 2023, challenging the draft order dated 26.12.2022. However, since the petitioner had already filed objections, this petition was disposed of on 03.07.2023 directing the Dispute Resolution Panel (DRP) to decide on the objections raised by the petitioner after affording the petitioner an opportunity of hearing.

14. On 12.09.2023, the petitioner requested the DRP to rule on the issue of jurisdiction since the petitioner now claimed that he was not the eligible assessee as defined under Section 144C(15)(b) of the IT Act.

15. The DRP (Respondent no.2), by the impugned order dated 29.09.2023, rejected the petitioner's objections and maintained the Draft Order. Hence, this Petition.

16. Section 144C of the Income Tax Act is concerned with reference to DRP. Sub-clause 15 of Section 144C is relevant, and the same reads as follows:

“(15) For the purposes of this section, –

(a) “Dispute Resolution Panel” means a collegium comprising of three [Principal Commissioners or] Commissioners of Income-tax constituted by the Board for this purpose;

(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.”

17. Thus, unless it was established that an assessee is an “eligible assessee” as defined under Section 144(15)(b) of the IT Act, there was no question of any reference to any DRP. There can be no estoppel against the law.

18. Admittedly, this is not a case where the petitioner is a person in whose case variation referred to in sub-section 1 of Section 144C arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of Section 92CA. Secondly, though the petitioner in his revised return had claimed that he was a non-resident, the Draft Order made by the first respondent upon considering the material on record has categorically held that this claim was incorrect and the petitioner was a “resident in India” and not a “non-resident”. This is the Department’s finding, and the Department cannot distance itself from it merely because the Petitioner may have claimed otherwise in his revised returns.

19. The petitioner has also now accepted the position that he is a “resident in India” and, based upon such acceptance, submitted that the authorities need not consider his revised return because the same proceeded on an erroneous premise that the petitioner was a “non-resident”.

20. Accordingly, the petitioner cannot now be held as an “eligible assessee” as defined under Section 144C(15) of the IT Act. If the petitioner is not an eligible assessee, then there is no question of applying the procedure under Section 144C to the petitioner.

21. In *Pankaj Extrusion Limited* (supra), the Division Bench of the Gujarat High Court in somewhat similar circumstances held that on a plain reading of clause (b) of sub-section 15 of Section 144C, it would be evident that an assessee can be stated to be the eligible assessee as referred to in sub-section (1) of Section 144 C in whose case the variation arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of Section 92CA. Since, in the said case, there was no such variation in income by virtue of an order of the Transfer Pricing Officer and since it was not even the contention of the department that the assessee was a non-resident, proceedings under Section 144C of the IT Act were incompetent.

22. Similarly, in the case of *Honda Cars India Limited* (supra), the Division Bench of the Delhi High Court, following *Pankaj Extrusion Limited* (supra), held that since the ingredients of Section 144C(15)(b) were not fulfilled in case of the assessee such assessee could not be

regarded as an “eligible assessee”. As a consequence, the Court held that proceedings under Section 144C against such an assessee who was not an eligible assessee were incompetent.

23. Therefore, considering the clear and categorical conclusion recorded in the draft order that the Petitioner was not a non-resident in India, the provisions of Section 144C, including in particular the provisions of Section 144C(15)(b) and the above two precedents, we will have to hold that the proceedings under Section 144C against the petitioner who was a resident in India, are incompetent. As a consequence, the Draft Order dated 26.12.2022 (to the extent it initiates proceedings under 144C of the IT Act) and the order dated 29.09.2023 will have to be set aside and are hereby set aside.

24. As noted above, the petitioner has already withdrawn/abandoned his revised return dated 17.03.2022, in which he had claimed the status of non-resident. There is now a dispute about whether the petitioner’s original return dated 14.03.2022 before the AO (Circle-I), Panaji Goa, is to be accepted or not. Mr Naik submits that the particulars disclosed therein are correct, but Ms Linhares submits that they are incorrect.

25. At this stage, we cannot go into the above controversy. The ~~AO~~ **Assessing Officer, Income Tax Department** ~~(Circle-I), Panaji Goa,~~ will now have to assess the original return dated 14.03.2022 in terms of Section 143(1) or other relevant provisions of the IT Act and make an appropriate assessment order in accordance with law on the said return. Since we had granted interim relief in this

Corrections
carried out as
per order
dated
03.04.2024.
Sd/-
PS

matter, the same will protect the Assessing Officer in so far as the issue of limitation is concerned.

26. The above clarification is because the Petitioner, based on the claim made in his revised return, which claim is now abandoned, cannot prevent the AO from assessing the initial returns and making an assessment order on the premise that the Petitioner is a resident in India. Therefore, just as the Petitioner cannot have the worst of both worlds, he equally cannot have the best of both worlds.

27. The rule is accordingly disposed of in the above terms. There shall be no order for costs.

28. All concerned to act on an authenticated copy of this order.

VALMIKI SA MENEZES, J.

M. S. SONAK, J.

NITI KISHOR
HALDANKAR

Digitally signed by NITI
KISHOR HALDANKAR
Date: 2024.04.05
15:42:15 +05'30'