

(2025) 07 KL CK 1206

In the High Court Of Kerala

Case No : Writ Petition (C) No .1694 Of 2011

IBS Software Services Private Limited

APPELLANT

Vs

Commissioner Of Income Tax

RESPONDENT

Date of Decision : 15-07-2025

Acts Referred:

Income Tax Act, 1961 — Section 92CA, 92CA(3), 143(2), 143(3), 144C, 144C(1), 144C(15)(b), 153, 292B

Citation : (2025) 07 KL CK 1206

Hon'ble Judges : S.Manu, J

Bench : Single Bench

Advocate : E.K.Nandakumar, Benny P. Thomas, K.John Mathai, P.G.Jayashankar, P.K.R.Menon, Jose Joseph, G.Keerthivas, Navaneeth.N.Nath

Final Decision : Allowed

Judgement

S.Manu, J

1. The legal issue raised in these writ petitions being common, they are disposed of by this common judgment.

2. Petitioners, two companies incorporated under the Companies Act, 1956 are engaged in the business of software development. They are assesseees on the rolls of the 2nd respondent for the purposes of the Income Tax Act, 1961. For the assessment year 2007-08 they filed returns of income. Their cases were selected for scrutiny and pursuant to notices issued under Section 143(2) of the Act, the assessment was sought to be completed under Section 143(3).

3. Second respondent noticed that the petitioners had entered into international transactions with associated enterprises and hence the cases were transferred to the Transfer Pricing Officer under Section 92CA of the Act to determine the arm's length price. Thereafter, the Transfer Pricing Officer issued orders under Section 92CA(3) of the Act. The 2nd respondent, after receiving the orders from the Transfer Pricing Officer, proceeded to compute total income of the petitioners and

finalised the assessment under Section 143(3) of the Act on the basis of those orders.

4. Petitioners' prime contention is that though they were eligible assessee as per Section 144C(15)(b), the mandatory procedure under Section 144C was not followed and therefore the assessment orders are non est and void ab initio. According to the petitioners, the 2nd respondent, after receiving the orders from the Transfer Pricing Officer ought to have forwarded drafts of proposed orders of assessment to them.

5. Sri.Raja Kannan, learned counsel appearing for the petitioners invited my attention to Section 144C of the Act. The learned counsel submitted that under Section 144C(1), the assessing officer was bound to forward a draft of the proposed order of assessment to the petitioners if he proposed to make any variation prejudicial to the interest of the petitioners. The learned counsel pointed out that the language of the said provision is very clear and in case the assessing officer proposed to make any variation on or after the first day of October 2009, the procedure provided therein should have been followed. The learned counsel submitted that in the cases at hand reference was made after Section 144C came to force. The learned counsel argued that Section 144C(1) doesn't make any reference to any assessment years and in view of the mandate of the provision that in case of any variation intended by the assessing officer, it was necessary to forward draft of the proposed order of assessment to the assessee from first day of October, 2009. He further submitted that references in these cases were made only on 23.12.2009. He hence submitted that undoubtedly the 2nd respondent breached the mandate of Section 144C(1). The learned counsel referred to Circular No.9/2013 dated 19.11.2013 issued by the Central Board of Direct Taxes. He pointed out that by the said Circular, paragraph 45.5 of the Circular No.5/2010 dated 3.6.2010 was replaced clarifying that Section 144C was applicable to any order which proposed to make variation in the income or loss returned by an eligible assessee on or after first October 2009 irrespective of the assessment year to which it pertained. He therefore submitted that in view of the said Circular also the procedure adopted by the respondents was obviously illegal. The learned counsel submitted that the said mistake committed by the respondents has made Exts.P1 and P2 vitiated by an incurable jurisdictional error. He hence submitted that the impugned orders were liable to be set aside.

6. The learned counsel for the petitioners relied on the following reported judgments:-

1. Shl(India) Private Limited v. Deputy Commissioner of Income Tax and Ors [2021 SCC OnLine Bom 1312]

2. Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax [2017 SCC OnLine Del 12952].

3. Assistant Commissioner of Income-tax and Another v. Vijay Television Private

Ltd and Another [2018 SCC OnLine Mad 13752]

4. Hope Textiles Ltd and Another v. Union of India and Others [(1995 Supp (3) SCC 199 : (1994) 205 ITR 508].

7. Sri.P.G.Jayasankar, the learned Standing Counsel appearing for the respondents submitted that the assessment was done following Circular No.5/2010 dated 3.6.2010 in which it was stated by the Central Board of Direct Taxes that Section 144C will apply in relation to assessment year 2010-11 and subsequent assessment years. The learned counsel submitted that the respondents were bound to follow the Circular and therefore it cannot be said that they had committed any error. He submitted that Circular No.9/2013 was issued much later on 19.11.2013. The learned Standing Counsel further submitted that huge amounts are involved in these cases and if the assessments are held illegal on technical grounds it will cause severe loss to the revenue. The learned Standing Counsel also submitted that the purpose of assessment itself will be defeated if the contentions of the petitioners are accepted and the assessment is set aside. The learned Standing Counsel further submitted that, in case the Court finds that the assessment was vitiated for not following the provisions of Section 144C then the matters may be remitted for fresh assessment. The learned Standing Counsel relied on the judgment of the Hon'ble Supreme Court in Union of India and others v. Ashish Agarwal [(2023) 1 SCC 617]. He pointed out the observation made by the Hon'ble Supreme Court in paragraph 23 of the judgment that the revenue cannot be made remediless and the object and purpose of re-assessment proceedings cannot be frustrated.

8. Section 144C(1) reads as follows:-

"144C.(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee."

Plain reading of the above provision shows that the procedure stipulated thereunder was to be followed by the assessing officer in case he proposed to make any variation in the income or loss returned by an eligible assessee on or after the first day of October 2009. The provision contains a non obstante clause. Hence, the manifest intention was to provide overriding effect to the provision. There is no reference in the provision regarding the assessment year. Thus what is to be understood on a plain reading is that the provision was intended to govern all proceedings by the assessing officers regardless of the assessment year with respect to eligible assessees, when the officer proposed to make variations to the prejudice of such assessees in the income or loss returned. First day of October 2009 was stipulated as the date from which the procedure under Section 144C(1) had to be followed. In my considered view no other inference is possible from the unmistakable language of the provision. To say in simple

terms, the assessing officer had to follow the procedure under Section 144C(1) in the case of all assessments irrespective of the assessment year, from 1.10.2009.

9. Paragraph 45.5 of Circular No.5/2010 issued by the CBDT on 03.06.2010 reads as under:-

"45.5 Applicability – These amendments have been made applicable with effect from 1st October, 2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. The Dispute Resolution Panel Rules have been notified by S.O.No.2958(E), dated 20th November, 2009".

10. The above explanation given by the Board regarding applicability of Section 144C was beyond any doubt inconsistent with the provision. As noticed above, there is no mention about assessment years in Section 144C(1). The Board in fact misinterpreted the provision by stating as above in paragraph 45.5 of the Circular No.5/2010. The Board is certainly an authority under the Act. However, it is not open to any authority under the Act to misconstrue the provisions of the Act and thus defeat the legislative intention. Hence, the explanation regarding applicability of Section 144C given by the Board in Circular No.5/2010 was improper and illegal.

11. It is evident from Circular No.9/2013 issued on 19.11.2013 by the Board that it realised the mistake. Paragraph 45.5 of Circular No.5/2010 was replaced with the following:-

"45.5. Applicability -Section 144C has been inserted with effect from 1st April, 2009. Accordingly, the Assessing Officer is required to forward a draft assessment 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. In other words Section 144C is applicable to any order which proposes to make variation in income or loss returned by an eligible assessee, on or after 1st October, 2009 irrespective of the assessment year to which it pertains. Amendments to other Sections of the Income-tax Act referred to in para 45.3 of the Circular No.5 of 2010 dated 3rd June, 2010, shall also apply from 1st October, 2009."

12. This Court has already analysed the nature of the provisions of Section 144C of the Income Tax Act in the judgments in IBS Software Services Private Limited v. Union of India [2025 SCC OnLine Ker 3753] and Allianz Cornhill Information Services Private Limited, Rep. by its Chief Financial Officer v. Union of India rep. by Secretary, Ministry of Finance (Department of Revenue) and Others [2023 SCC OnLine Ker. 11076]. This Court has held that the provisions of Section 144C are compulsory. Legislative intention for incorporating the provision by way of an amendment was also adverted to by this Court in the above judgments.

13. Procedure under Section 144C(1) is also therefore mandatory. The assessing officer ought to have in the first instance forwarded a draft of the proposed order of assessment to petitioner, as there was a proposed variation prejudicial to the

interest of the assessee. Failure to follow the said procedure by the assessing officer was therefore a fatal error. I find support for this view in various judgments of different High Courts, cited by the learned counsel for the petitioner.

14. In *Shl (India) Private Limited v. Deputy Commissioner of Income Tax and Ors* [2021 SCC OnLine Bom 1312] a Division Bench of the Bombay High Court concluded as under:-

"26. In our view, the following principles emerge from the above discussion:

(i) That the procedure prescribed under Section 144-C of the IT Act is a mandatory procedure and not directory.

(ii) Failure to follow the procedure under Section 144-C(1) would be a jurisdictional error and not merely procedural error or irregularity.

(iii) Therefore, Section 292-B of the IT Act cannot save an order passed in breach of the provisions of Section 144-C(1), the same being an incurable illegality.

27. It is important to note that Section 144-C(1) is a non obstante provision, which requires its compliance irrespective of the other provisions that may be contained in the IT Act. There is no dispute that petitioner is an eligible assessee and also there is no dispute as to the applicability of Section 144-C. It is also not in dispute that the final assessment order has been passed without the draft assessment order as contemplated under Section 144-C(1) of the IT Act. The assessing officer ought to have in the first instance forwarded a draft of the proposed order of assessment to petitioner, as there was a proposed variation prejudicial to the interest of the assessee. This important step has been completely omitted by the respondent taking away a very necessary right of petitioner to file objections to the proposed variation with the DRP and the assessing officer, which in our view, strikes to the root of the procedure contemplated by Section 144-C.

28. Applying the aforesaid principles to the facts of this case, we are of the view that the failure on the part of the assessing officer to follow the procedure under Section 144-C(1) is not a merely procedural or inadvertent error, but a breach of a mandatory provision. We are also not impressed with the arguments of the Revenue that the assessing officer was under pressure of two charges, as there were timelines to adhere to, since the said timelines from time to time have been extended, the most recent one being to 30-9-2021. The Revenue ought to have appreciated that the requirement under Section 144-C(1) to first pass a draft assessment order and to provide a copy thereof to the assessee is a mandatory requirement which gave substantive right to the assessee to object to any variation, that is prejudicial to it. In this case, the order under Section 92-CA(3) of the IT Act, proposed to make an adjustment of Rs 10,74,54,337 to the arm's length price considered as nil "by petitioner and to that extent the said adjustment was evidently prejudicial to the interest of petitioner depriving

petitioner of this valuable right to raise objection before DRP would be denial of substantive rights to the assessee, for which, in our view, the assessing officer has no power under the statute, as the provision clearly mandates the assessing officer to pass and furnish a draft assessment order in the first instance in such a case. The legislature, in our view, has intended to give an important opportunity to petitioner, who is an eligible assessee, which in our view, has been taken away. In our view, failure to follow the procedure under Section 144-C(1) would be a jurisdictional error and not merely procedural error or a mere irregularity. The assessment order has not been passed in accordance with the provisions of Section 144-C of the IT Act. This is not an issue, which involves a mistake in the said order, but it involves the power of the assessing officer to pass the order. By not following the procedure laid down in Section 144-C(1) to pass and furnish a draft assessment order to petitioner and directly passing a final assessment order and without giving petitioner an opportunity to raise objections before the DRP, there is a complete contravention of Section 144-C, the assessing officer having wrongly assumed jurisdiction to straight away pass the final order. This is not a mere irregularity but an incurable illegality. Even the provisions of Section 292-B of the IT Act would not protect such an order as Section 292-B of the IT Act cannot be read to confer jurisdiction on the assessing officer, where none exists. The Supreme Court decision in CIT v. M. Pirai Choodi [(2010) 15 SCC 283] : [(2011) 334 ITR 262] referred to in the Revenue's reply is also not applicable to the issue at hand as that was a case where the assessee was not given an opportunity to cross-examine the witness concerned and which assessee also had a statutory appellate remedy which the assessee had failed to avail of, whereas there is no such right available to petitioner in this case. In fact, petitioner has lost a substantive right due to the failure of the respondents to pass and forward a draft assessment order in the first instance on a variance, prejudicial to the interest of petitioner. In our view, this is clearly a case of jurisdictional error. The final assessment order passed by the assessing officer stands vitiated on account of lack of jurisdiction, which is incurable and deserves to be set aside as void ab initio."

15. A Division Bench of the Madras High Court in Assistant Commissioner of Income-tax and Another v. Vijay Television Private Ltd and Another [2018 SCC OnLine Mad 13752] held as follows:-

"39. From the above it is unambiguously clear that the Assessing Officer is duty bound to adhere to the mandatory requirement mandated under section 144C(1) of the Act by first passing a draft assessment order, the failure of which would invalidate the final assessment order and the consequent demand notices and penalty proceedings.

.....

47. The necessity for Parliament to incorporate section 144C is not only to safeguard the Revenue, but also the assessee and any mistake committed by any one of them, the said party is supposed to face the consequences and

cannot put the hands of the clock back and start afresh.

48. Though it is the submission of the Revenue that it is a procedural irregularity, which can be corrected through issuance of a corrigendum and no prejudice would be caused to the assessee, however, it is to be pointed out that the act committed by the Revenue is an incurable illegality, which cannot stand protected by section 292B of the Act. If the contention of the Revenue is accepted, then it would literally render all the provisions of the Income-tax Act subservient to section 292B. In effect, any error or omission or mistake committed by the Revenue at any stage of a proceeding cannot be sought to be cured by taking umbrage under section 292B. Allowing such a contention would be misreading the intention of Parliament in enacting section 292B and section 144C.

49. The question of limitation raised by the Revenue would in no way save the Revenue from the non-compliance of section 144C of the Act. The non-compliance of the mandatory provisions of section 144C of the Act, being an incurable illegality, renders the assessment order null and void. Learned single judge has taken into account all the relevant facts and laws and has given a well considered finding and we are of the considered opinion that no interference is called for with the order passed by the learned single judge.”

16. A Division Bench of the Delhi High Court in *Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax* [2017 SCC OnLine Del 12952] held thus:-

“16. The court is unable to accept the above submission. The legal position as explained in the above decisions is unambiguous. The failure by the Assessing Officer to adhere to the mandatory requirement of section 144C(1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings.”

17. Now I shall address the contention of the learned Standing Counsel that the assessing officer was bound by the explanation regarding applicability of Section 144C in Circular No.5/2010 while he undertook the impugned assessment. Though the said contention is factually correct, as found above, the explanation in the said Circular issued by the Board was contrary to the provisions of Section 144C(1). The explanation was therefore incorrect and illegal. Even the Board has no authority to violate the provisions of the Act. Breach of the mandate of the provision cannot be sought to be condoned by relying on an incorrect interpretation of the provision by the Board. The assessee cannot be put to disadvantage by accepting the contention that the mistake committed by the assessing authority was only a bonafide mistake. Hence, the said contention of the learned Standing Counsel is rejected. Moreover, it is to be noted that these writ petitions were filed even before issuance of Circular No.9/2013. During the pendency of these cases the Board realised the mistake and replaced paragraph 45.5 of Circular No.5/2010. Another contention of the learned Standing Counsel was that the Revenue cannot be rendered remediless and the matter may be

remitted for fresh assessment, if the contention regarding non-compliance with the procedure under Section 144C(1) was found correct by this Court. This was opposed by the learned counsel for the petitioner who argued that the period of limitation under Section 153 of the Act being over, no fresh assessment can be done now. In view of the judgment of the Hon'ble Supreme Court in Hope Textiles Ltd and Another v. Union of India and Others [(1994) 205 ITR 508], remitting the matter for fresh assessment would be an impermissible course, as the period of limitation under the Act is already over.

In the result, these writ petitions are allowed. Impugned assessment orders are quashed.