IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 9765/DEL/2019
[Assessment Year: 2015-16]

BOEING India Pvt. Ltd., [Successor to Boeing International Corporation India Pvt Ltd 3rd Floor, DLF Centre, Sansad Marg New Delhi. PAN : AAHCB1218 P	Vs	The A.C.I.T Circle- 5(1) New Delhi.
[Appellant]		[Respondent]

Date of Hearing : 10.08.2020

Date of Pronouncement : 17.08.2020

Assessee by : ShriArvind Datar, Sr. Adv
Ms. Anuradha Dutt, Adv
Shri Sachit Jolly, Adv
Shri Tushar Jarwal, Adv
Shri Rahul Sateeja, Adv
Ms. Disha Jham, Adv

Revenue by : Shri Surender Pal, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 29.10.2019framed u/s 143(3) r.w.s 144C(5) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The first substantive grievance of the assessee is that the Dispute Resolution Panel[DRP] erred in upholding the action of the Assessing Officer in passing draft assessment order in the name of a non-existent company.

3. The other grievance relates to Transfer Pricing adjustment of Rs. 22.16 lakhs on account of outstanding receivables from Associates Enterprises [AEs] and under Corporate Tax, the assessee is aggrieved by the disallowance of Rs. 56,58,19,799/- for alleged failure in deducting tax u/s 195 of the Act by treating the said payments as Fees for Included Services [FIS].

3. Facts relating to first substantive grievance of the assessee are that on 19.01.2018, the Regional Director, u/s 233 of the Companies Act, notified a merger of BICIPL with the appellant from the effective

date. The effective date means the date on which certified copy of order u/s 233 of the Companies Act is filed with the Registrar of Companies, which was 15.02.2018. On 10.04.2018, a letter was filed before the Assessing Officer intimating that BICIPL was dissolved and all proceedings be transferred in the name of the appellant i.e. BIPL. On 19.10.2018, the TPO framed an order u/s 92CA(3) of the Act in the name of the amalgamated entity i.e. BIPL i.e. the appellant. However, on 25.12.2018, the Assessing Officer framed a draft assessment order u/s 144C of the Act in the name of a non-existent amalgamated company i.e. BICIPL.

4. On 25.01.2019, objections were raised before the DRP that the Assessing Officer has framed draft assessment order in the name of a non-existent entity. Surprisingly, the Assessing Officer filed remand report before the DRP accepting that the department was aware that the old company has merged into new. However, the DRP directed the Assessing Officer to rectify the mistake and pass final assessment order in the name of amalgamated company BIPL.

5. Section 144C(1) of the Act provides that "*The Assessing Officer shall forward a draft of the proposed order of assessment to the eligible assessee*". Sub-section (15)(b) defines "Eligible Assessee" as "*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 of the Act.*"

6. As mentioned elsewhere, the TPO has framed the order u/s 92CA(3) of the Act in the name of BIPL, the appellant and as per the definition of "Eligible assessee" BIPL is the eligible assessee. However, the Assessing Officer chose to pass the assessment order in the name of the non-existent company BICIPL, which was dissolved on 15.02.2018.

7. Section 2, sub-section (31) defines "Person" which includes a company. On the date of issuing draft assessment order, the company BICIPL did not exist. Moreover, as per the Scheme u/s 144C(1) and (3), the Assessing Officer becomes *Functus Officio*after passing draft assessment order which means that only the assessee can file objections or accept the said draft assessment order. If the assessee chose not to file objections, the Assessing Officer cannot alter the

assessment. In our understanding of the law, issuance of valid draft order is *sine qua non*for section 144C of the Act to apply. Only a valid draft assessment order will trigger further proceedings before the DRP. Meaning thereby, that passing a draft assessment order is a jurisdictional requirement and if the Assessing Officer passes such an order in the name of a non existing person, there can never be a valid draft order in the eyes of law, making thereby the entire proceeding inherently without jurisdiction.

8. Under similar circumstances, the co-ordinate bench in the case of FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. [2019] 108 taxmann.com 542 (Mumbai - Trib.) has held as under:

> "16. While the stand of the assessee is that a mistake in passing of the draft assessment order in the name of a non-existent entity is vital, being a jurisdictional defect, leading to nullification of the entire assessment proceedings, the stand of the Revenue is that it is only a procedural mistake and the same has also been cured by the Assessing Officer at the stage of the final assessment order, which is passed in the name of the correct entity, i.e. the amalgamated company which was in existence.

20. The next question which we are required to examine now is as to whether a valid draft assessment order is mandatory to assume jurisdiction under Section 144C of the Act. In other words, it would be appropriate to examine as to whether an invalid draft assessment order, as noted above in the earlier paras, can be construed as a jurisdictional defect meaning thereby that the same is incurable thereby making the subsequent assessment proceedings null and void in the eyes of law. The phraseology of Sec. 144C(1) of the Act itself shows that the Assessing Officer is required to forward a draft of the proposed order of assessment if he proposes to make a variation in the returned income or loss which is prejudicial to the interests of the assessee. Undoubtedly, the draft assessment order has legal connotations as it lays the foundation of any prospective reduction in the income of the assessee or creates a tax liability over and above the returned income. Thus, in that sense, it is not merely a procedural step in the assessment proceedings. Further, if we go a little deeper into the scheme of Sec. 144C of the Act and consider subsection (3) of Sec. 144C of the Act, which reads as under "(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if ……", it envisages that an assessment has to be completed on the basis of a draft assessment order, thereby making it apparent that the draft order is a core component of assessment. In fact, the assessee has an option to accept the draft order proposed by the Assessing Officer as per Sec. 144C(2) of the Act. In such a case, the Assessing Officer will proceed to pass the final assessment order under Section 143(3) r.w.s. 144C(13) of the Act

without making any further variation in income/loss as assessed by him in the draft assessment order. In such a situation, the Assessing Officer would not have the option to amend the draft order of assessment proposed by him. Thus, looked at from the angle of the Assessing Officer, the draft assessment order is in fact the final assessment of income/loss of the assessee since only the assessee has been accorded a right under Section 144C(2) to file objections before the DRP. Further, the fact that the Assessing Officer does not have any right to appeal against the final assessment order passed under Section 143(3) r.w.s. 144C(13) further proves the point that the draft assessment order proposed is a final order of assessment from the point of view of the Department.

26. We may now refer to the arguments set-up by the Ld. DR. Ostensibly, the Ld. DR admitted that draft assessment order being passed in the name of a non-existent entity is a mistake; but, the stand of the Ld. DR is that such a mistake is rectifiable in terms of Sec. 292B of the Act. In this context, we have already inferred in the earlier paras that the draft assessment order cannot be passed unless there is an 'eligible assessee' in terms of Sec. 144C(15)(b)(i) of the Act. We have also noted earlier that it is obligatory on the part of the Assessing Officer to pass a valid draft assessment order; failure to do so amounts to a jurisdictional defect, which in our view, cannot be cured under Section 292B of the Act or corrected by passing the final assessment order in the correct name, as canvassed by the Ld. DR. To emphasise, a draft assessment order

in the name of an 'eligible assessee' provides the requisite jurisdiction to the Assessing Officer under Section 144C(1) of the Act. If there is a mistake while complying with such a jurisdictional requirement, the same cannot be termed as a procedural irregularity or mistake rectifiable under Section 292B of the Act. Thus, the said stand of the Ld. DR is liable to be rejected. We hold so.

27. Before parting, we may also refer to the reliance placed by the Ld. DR on the judgment of the Hon'ble Delhi High Court in the case of Sky Light Hospitality LLP (supra) to canvass that the mistake in the draft assessment order by passing it in the name of a non-existent entity is a procedural mistake. We have carefully perused the said decision and find that in the case before the Hon'ble High Court, there was a mistake by the Assessing Officer only while issuing the notice under Section 148 of the Act. The notice was issued in the name of the erstwhile amalgamating company, so however, all other documents, namely, tax evasion report, reasons to believe, approval by the Principal Commissioner, order under Section 127 of the Act, etc. correctly recorded the name of the amalgamated company, i.e. the entity which was in existence. In the background of such peculiar circumstances, the Hon'ble High Court took a view that mere incorrect mentioning of the name in the notice was a defect curable in terms of Sec. 292B of the Act. However, the facts in the case before us are in complete contrast. In fact, in the course of hearing, the Ld. DR was specifically asked to point out any instance in the present case where the Department had correctly

issued any notice, etc. in the name of the successor company before passing of the transfer pricing order by the TPO under Section 92CA(3) of the Act or the draft assessment order by the Assessing Officer. Nothing was brought on record by the Department in this regard and, therefore, in our view, the ratio of the judgment of the Hon'ble Delhi High Court in the case of Sky Light Hospitality LLP (supra) is not attracted to the facts of the present case."

9. Again in the case of Nokia Solutions and Network India Pvt Ltd 402 ITR 21 [Delhi], the Hon'ble High Court has held as under:

"5. The assessee, which is represented on advance notice, urges that the DRP could not have directed assessments to be completed in the manner that it did, given that the remand order of the ITAT was confined to only requiring it to render findings as to whether the assessment originally framed was in respect of a non existing entity. It was submitted that the DRP exceeded its remand and consequently the ITAT was justified in holding that Spice Entertainment Ltd. (supra) applied.

6. It is evident from the narration of facts that in the first instance the assessment was conducted in the name of a non existing entity. The DRP to whom the matter was directed by the first remand of the ITAT, was not directed to, in turn, require the AO to "better" the original incurable illegality and here the DRP clearly did that. The fact that the matter was remitted at the instance of the assessee

who did not question the remand ipso facto does not, in any manner, further the Revenue's contentions. The Revenue had also urged that even in the first place when the assessee approached the DRP, the name of the old entity was invoked and that consequently it cannot now say that the assessment was a nullity. This Court is of the opinion that the ruling in Spice Entertainment Ltd. (supra) is categorical, in that, if the assessment is concluded in favour of a non existing entity, then notwithstanding Section 292B, the position does not improve. Applying Spice Entertainment Ltd. (supra), this Court had in Commissioner of Income Tax v. Dimension Apparels Pvt. Ltd. (2015) 370 ITR 288 also held that the position taken or urged by the assessee cannot be held against it if the primary jurisdiction does not exist i.e. to conclude an assessment in the name of a non existing entity."

10. The Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd 416 ITR 613 has held as under:

"19. …… (iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating 24 8 ITA No. 583/Del/2020 company ceased to exist. In Saraswati Industrial Syndicate Ltd., the principle has been formulated by this Court in the following observations: "5. Generally, where only one company is involved in change and the

rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more 30 [2019] 260 Taxman 412 (Del.) 31 (2019) 261 Taxman 137 (Guj) existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity." (iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed; (v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL,

which was followed by a notice to it under Section 142(1); (vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012; (vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio."

11. Strongly supporting the order of the DRP, the ld. DR stated that the Assessing Officer has merely framed a draft of the proposed order of assessment. Hence it cannot be equated with the draft of any order of assessment. Therefore, there is no order at that point of time and claim of an order in the name of non est entity cannot be made by the assessee.

12. Both these objections of the ld. DR do not hold any ground, in as much, as the first objection has been answered by judicial decisions discussed elsewhere,and in so far as non-intimation is concerned,

firstly, there is no obligation upon the assessee to intimate the Assessing Officer and secondly, as mentioned elsewhere, vide letter dated 10.04.2018, the assessee has intimated the Assessing Officer regarding the dissolution of BICIPL and to transfer all proceedings in the name of the appellant, BIPL.

13. Considering the factual matrix discussed elsewhere in the light of judicial decisions referred to hereinabove, we hold that the draft order framed u/s 144C(1) of the Act is in the name of a non-existent company and accordingly, *void ab initio*, making all subsequent proceedings non- est. First substantive grievance is, accordingly, allowed.

14. For the sake of completeness of the adjudication, we will now address to the issues on merits.

15, First issue is in respect of TP adjustment of Rs. 22.16 lakhs on account of outstanding receivables.

16. Facts on record show that, according to the TPO, payment for invoices raised by the assessee were not received within the time

stipulated as per service agreement with the AEs which was 30 days. Therefore, according to the TPO, such outstanding amount/delayed payments are in the nature of unsecured loans/advances to the AEs and by treating the same as advance, the TPO imputed interest rate of 4.3405%, being six months interest rate of LIBOR plus 400 basis points on the outstanding receivables from AEs and, accordingly, proposed, an adjustment of Rs. 22,96,268/-.

17. Objections were raised before the DRP and the DRP was pleased,partially accepting the assessee's contention and allowed interest on outstanding payment to be netted off against interest on outstanding receivables and, accordingly, adjustment was reduced to Rs. 22,16,059/-.

18. Before us, the ld. counsel for the assessee vehemently stated that interest on receivables is not a separate international transaction. For this proportion, reliance was placed on the decision of the Bangalore Bench of the Tribunal in the case of Millipore India Ltd in ITA No. 327/Bang/2015. It is the say of the ld. counsel for the assessee that the assessee had sufficient cash balance to manage cash flow requirement and no interest earned from advances were paid to

unrelated parties. The ld. counsel for the assessee further stated that the appellant is a debt free company and no interest was paid to the creditor/supplier. The ld. counsel for the assessee concluded by saying that the facts of the appellant are identical to the facts considered by the Tribunal in the case of Bechtel India Pvt Ltd ITA No. 1478/DEL/2015,which was affirmed by the Hon'ble High Court of Delhi in ITA 379/2016 and SLP was dismissed by the Hon'ble Supreme Court vide CC No. 4956/2017.

19. Per contra, the ld. DR strongly supported the findings of the lower authorities.

20. We have carefully considered the orders of the authorities below. The undisputed fact is that the assessee is a debt free company. It is also not in dispute that no interest was paid to the creditor/supplier nor any interest has been earned from unrelated party. Moreover, being a 100% captive service provider, the revenue of the assessee is 100% from its AEs. In our considered opinion, the question of receiving any interest on receivables does not arise. Considering the facts of the assessee in hand, in totality, we do not find any merit in the TP

adjustment of Rs. 22.16 lakhs and the same is,accordingly,directed to be deleted.

21. Th next grievance relates to the disallowance of Rs. 56.58 crores for alleged failure of non-deduction of tax at source.

22. During the course of assessment proceedings, the Assessing Officer sought clarification of services performed by Boeing Company USA, Boeing Defence Australia Ltd, Boeing Korea LLC and whether the salary paid to expatriates has been included in the total salary. Further, the assessee was asked to explain the work performed by the expatriates. The assessee was asked to explain the reimbursement of expenses to Boeing company USA, Boeing International Corporation Korea and Boeing Defence Australia. The assessee furnished necessary details. It was explained that reimbursement of salary cost to expatriate employees is not taxable as FIS, both under the provisions of the Act and relevant DTAA, and no withholding tax was required on the same.

23. It was further explained that the assessee was a real and economic employer of expatriate employees, as these employees were

under the control of the company without any relation/connection with the AEs and salary expenses have been borne by the assessee on which the appropriate taxes were duly deducted and deposited u/s 192 of the Act. It was strongly contended that reimbursement of cost charges of salary of expatriate employees is not taxable as FTS/FIS.

24. The Assessing Officer was not convinced with the submissions of the assessee and referring to the terms of secondment agreement and drawing support from the decision of the Hon'ble High Court in the case of CentricaIndia Offshore India Ltd 364ITR 336 and further referring to various judicial decisions, the Assessing Officer finally came to the conclusion that the assessee has failed to deduct tax at source on the expenditure towards salaries and other allowances and invoking the provisions of section 40(a)(i) of the Act, the Assessing Officer made disallowance of Rs. 56,58,19,799/-.

25. Objections were raised before the DRP but were of no avail.

26. Before us, the ld. counsel for the assessee vehemently stated that the assessee has deducted tax at source/s 192 of the Act, and, therefore, there should not be any disallowance u/s 40(a)(i) of the Act.

Reliance was placed on the decision of the co-ordinate bench in the case of Neemrana Hotels Pvt Ltd ITA No. 98/DEL/2017 order dated 10.07.2019. It is the say of the ld. counsel for the assessee that since tax has been deducted u/s 192 of the Act, provisions of section 195 will not apply.

27. Distinguishing the decision of Centrica India Offshore India Ltd [supra], the ld. counsel for the assessee vehemently stated that the decision in the case of Centrica India Offshore India Ltd was based upon entirely different set of facts wherein in that case,the Indian company was a newly formed entity and did not have necessary trained human resources and scope of work emerging from service agreement and secondment agreement clearly shows that secondees were sent to India with the knowledge of various processes and practices and also with experience in managing and applying such processes and practices.

28. On these facts, the Hon'ble High Court was satisfied that the secondary employees are making available their experience and skill in managing and applying the processes. It is the say of the ld. counsel for the assessee that in so far as the assessee is concerned, it is in

existence since 2003 and the employees recruited outside India do not possess any specific skill set that is not available with Indian employees. The ld. counsel for the assessee explained that in in-house administration support division, the appellant has 58 employees out of which only 6 are expatriate employees. This division renders travel logistics, finance and accounting support etc and the qualifications and role show that such expatriateemployees cannot make available any knowledge. Further reliance was placed on the decision of the co-ordinate bench in the case of AT & T Communication Services India Pvt Ltd 101 TAxmannn.com 105 [Delhi Trib]

29. Per contra, the ld. DR strongly supported the findings of the lower authorities and placed strong reliance on the decision of the Hon'ble High Court in the case of Centrica India Offshore Pvt Ltd [supra].

30. We have given thoughtful consideration to the orders of the authorities below. We have also carefully perused the salary reimbursement agreement, which is placed at pages 296 onwards of the paper book, and as per clause1.1, it is provided that the secondees have expressed their willingness to be deputed to BIPICL [the

appellant] and TBC [AE] have agreed to release these employees to BIPICL. It is provided that TBC will facilitate payment of salaries in secondees home country on behalf of BICIPL. Under the head employment status, it is provided that the secondees shall be working for BICIPL and will be under supervision, control and management of BICIPL as an employee of BICIPL.

31. It is clear from the afore-stated relevant clauses that the secondees were, in fact, in employment of the appellant and as per the terms, the 'A' was paying salaries at the home country of the secondees and, therefore, there was reimbursement by the appellant. These facts clearly show that the assessee has been paying to its own employees and this fact alone clearly distinguishes the facts of the decision in the case of Centrica India Offshore Ltd [supra].

32. The co-ordinate bench in the case of AT & T Communication Services India Pvt Ltd. [supra], distinguishing the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt Ltd [supra], has held as under:

"30. The DRP has affirmed the decision of the Ld. AO by holding that the assessee has deducted withholding tax on

substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

31. The DRP has affirmed the decision of the AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

32. The Special Auditors in their Audit Report have worked out particulars of payments in respect of which no TDS was deducted u/s 40(a)(ia) of the Act. Consequently, an amount of Rs. 54,06,328/- was not to be allowed as expenditure."

33. We have also perused the TDS certificates, Forms 15CA and 15CB, tax deducted by the assessee and all these documents are part of the paper book. There is no dispute that the assessee has deducted tax at source u/s 192 of the Act. On the given facts of the case, we are of the considered opinion that the provisions of Section 195 of the Act do not apply. Considering the facts of the case in totality, in light of judicial decisions referred to hereinabove, we do not find any merit in

the disallowance made by the Assessing Officer/DRP. We, accordingly, direct for deletion of addition of Rs. 56.58 crores.

34. The other grievance relates to non granting of credit to pre paid taxes.

35. We direct the Assessing Officer to give credit of pre paid tax as per provisions of law.

36. On merits also, the appeal of the assessee is allowed.

37. For the sake of clarity, merits of the appeal have been discussed for completeness of the order. Otherwise, as mentioned elsewhere, the assessment order framed u/s 144C is void ab initio.

38. In the result, the appeal of the assessee in ITA No. 9765/DEL/2019 is allowed.

The order is pronounced in the open court on 17 .08.2020.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th August,2020.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

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ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	