

ITAT quashed draft assessment order as 'ESPN', being NR partnership firm, wasn't an eligible assessee u/s 144C

Summary – The Delhi ITAT in a recent case of ESPN Star Sports Mauritius SNC et Companie., (the Assessee) held that where assessee is not a foreign company and TPO has not proposed any variation to return filed by assessee, assessee for purposes of section 144C(15)(b) is not an 'eligible assessee'; consequently, DRP would have no jurisdiction to pass draft assessment order

Facts

- The assessee was a partnership firm established under the laws of Mauritius having 99.9 per cent share and ESS Asian Networks Pte. Ltd. having 0.1 per cent share in profits. It was engaged in the business of acquiring and allotting advertisement time and program sponsorship of ESPN Channels. It entered into an agreement with ESPN India whereby ESPN India acquires advertisement time from the assessee and allots it to various India advertisers and advertising agencies.
- ESPN India has deducted tax while making payment to the assessee. This withholding tax was claimed as refund in its Return of Income (RoI) by the assessee. The assessee, by assuming that it did not have any Permanent Establishment (PE) in India, showed NIL business income in its RoI. However, the assessee has shown interest income (interest under section 244A worked out by the Assessing Officer in respect of the withholding tax of preceding year) in its RoI. The case was picked up for scrutiny.
- Since the assessee had undertaken international transactions with its Associated Enterprises (AE), the Assessing Officer made a reference under section 92CA(1) to the Transfer Pricing Officer (TPO).
- The TPO, proposed NIL variation in the returned income. However, the Assessing Officer held the income of the assessee taxable under section 9(1) consequent to his finding that the assessee has a PE in India. Accordingly, the Assessing Officer, vide his draft assessment order, proposed to tax the income of the assessee.
- On appeal, the DRP held that the assessee is not an 'eligible assessee' in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee is a foreign company. Thus, the DRP held that it had no jurisdiction over the case and accordingly declined to issue any direction in this case and dismissed the proceedings in limine.
- Thereafter, the Assessing Officer passed the final assessment order under section 143(3), read with section 144C(13).
- On appeal to the Tribunal:

Held

- Having heard both the parties and perused the records especially the DRP Directions as well as the Tribunal's order dated 20-8-2018 passed in the case of sister concern of assessee i.e. *Ess Advertising*

(Mauritius) SNC et Compagnie v. Dy. DIT (International Taxation) [[2019](#)] [101 taxmann.com 312](#) (earlier known as ESPN Star Sports Mauritius SNC Et. Compagnie). It is found that the DRP has elaborately adjudicated the issue vide its directions dated 26-12-2014. The DRP in its directions has held that a perusal of section 144C which lays down the legal framework for the operation of the Dispute Resolution Panel (DRP) shows that only the 'eligible assessee' can come before the DRP. The sub-section (1) of section 144C which opens with a non-obstante clause lays down that the Assessing Officer, in the first instance, is required to forward a draft of the proposed assessment order to the assessee if he proposes to make any variation to the income or loss of the 'eligible assessee'. In other words, no draft assessment order is legally required to be sent to any assessee other than the 'eligible assessee'. The 'eligible assessee' has been defined in sub-section 15(b) of section 144C to mean 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 92C; and any foreign company. In view of the above, it is opined that the assessee is not an 'eligible assessee' in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee is a foreign company. Thus, TPO does not have the jurisdiction over the case.

- It is further noted that the Tribunal vide its order dated 20-8-2018 in *ESS Advertising (Mauritius) SNC et Compagnie's* case (*supra*) has adjudicated the similar issue in dispute i.e. assessee is not an 'eligible assessee' in accordance with section 144C(15)(b).
- Thus, there is no infirmity in the Directions of the DRP. Hence, by respectfully following the Tribunal's order dated 20-8-2018, as aforesaid, the Directions of the DRP are upheld.
- In the result, the appeal of the revenue stands dismissed.