

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2265/Del./2014
(ASSESSMENT YEAR : 2007-08)**

M/s. Globerian India Pvt. Ltd., vs. DCIT, Circle 12 (1),
C – 511, Chitranjan Park, New Delhi.
New Delhi – 110 019.

(PAN : AAACG2019N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : S/Shri Rahul Khare & Rohan Khare, Advocates
REVENUE BY : Shri H.K. Choudhary, CIT DR

Date of Hearing : 14.09.2017
Date of Order : 12.10.2017

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The appellant, M/s. Globerian India Pvt. Ltd. (hereinafter referred to as 'the assessee company'), by filing the present appeal, sought to set aside the impugned order dated 28.03.2014 passed by the DCIT, Circle 12 (1), New Delhi qua the assessment year 2007-08 on the grounds inter alia that :-

“1. The Learned DCIT erred in fact and in law in passing the order u/s 254 / 143 (3) rw 144C which is not only bad in law but void ab initio.

2. The Learned DCIT erred in fact and in law in making as disallowance of Rs.1,14,36,265/- on account of depreciation on computers.

3. The Learned DCIT erred in fact and in law in making an addition of Rs.4,12,04,919/- being a difference in Arms length Price.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : in compliance to the directions issued by ITAT vide letter F.No.DCIT/Cir 12 (1)/2013-14/714 dated 25.11.2013 AO/DCIT written to DRP-1, New Delhi for issuance of directions regarding the issue remitted back by the Tribunal. However, ITO/DRP-I written back that the matter is restored back to the AO and not to the DRP. Again, a letter F.No.DCIT/ Cir 12 (1)/2013-14/724 dated 03.03.2014 was written to DRP-1 for issuance of directions for ITAT order. However, ld. DRP has sent the copy of the previous reply issued by it. Consequently, AO passed assessment order without any direction issued by the DRP. AO in compliance to the order passed by the Tribunal computed the income of the assessee company as under :-

“Subject to the above, the total income of the assessee is computed at Rs.5,26,41,184/- as under :

	<i>Amount in Rupee</i>
<i>Income as per return of income</i>	<i>Nil</i>
<i>Add :</i>	
<i>i) Excess claim of depreciation (As per para 3 above)</i>	<i>1,14,36,265</i>
<i>ii) Addition under transfer pricing adjustment as discussed in para 4.3 above</i>	<i>4,12,04,919</i>
<i>TOTAL TAXABLE INOCME</i>	<i>5,26,41,184</i>

3. Aggrieved with the order passed by the AO, the assessee company come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. The Id. AR for the assessee challenging the impugned order contended that the impugned order is not only irregular but illegal and barred by limitation also because reassessment proceedings were required to be started from passing a draft assessment order u/s 144C of the Income-tax Act, 1961 (for short ‘the Act’) because the Tribunal while setting aside the order had held that the DRP has passed the order without providing an opportunity of being

heard to the assessee and the DRP should rehear the case and then AO to pass the draft assessment order u/s 144C of the Act and not writing a letter to the DRP and relied upon the judgments cited as under :-

- (i) Zuari Cement Ltd. vs. ACIT (WP No.5557 of 2012 dated 21.2.2013 (AP) and SLP filed by the department was dismissed by Hon'ble Supreme Court on 27.09.2013;
- (ii) M/s. Vijay Television Pvt. Ltd. vs. DRP 47 taxman 100 (Mad);
- (iii) Capsugel Health Care Ltd. – 152 ITD 142 (Delhi ITAT);
- (iv) ACIT vs. M/s. Getrag Hi Tech Gears Pvt. Ltd. – 69 taxmann.com 35 (Chd Tribunal);
- (v) Turner International India Pt. Ltd. vs. DCIT – WP 4260/2015 dated 17.05.2017 (Delhi High Court);
- (vi) JCB India Ltd. vs. DCIT – WP No.3399/2016 dated 07.09.2017 (Delhi High Court).

6. On the other hand, ld. DR to repel the arguments addressed by the ld. AR contended that since in the first round of litigation the draft assessment order was passed, there was no need to again pass the draft assessment order and the case laws relied upon by the assessee are not applicable to the facts and circumstances of this case.

7. To proceed further, we would like to reproduce operative part of the order passed by the Tribunal in the first round of litigation in this case for ready perusal as under :-

“9. So far as regards the issue of difference in arms length price, for the assessment year 2006-07, the matter is remitted to the AO, the DRP has approved the draft assessment order considering the various submissions made by the assessee and their validity. Herein also, similar is the position though for the year under consideration, the objections of the assessee were rejected for want of limitation, which was not the case for the assessment year 2006-07. Be that as it may, the fact remains that the submissions of the assessee with regard to this issue were not gone into, much less adjudicated upon. Being seized of the matter by way of ground No.2 raised by the assessee, we deem it appropriate to remit this matter also to the file of the AO to be decided afresh in accordance with law on providing due opportunity of hearing to the assessee. The AO shall, no doubt, keep in consideration, besides facts for the year under consideration, the decision to be arrived at on both the issues, for the assessment year 2006-07.”

8. No doubt, the Tribunal vide its order dated 15.03.2012 passed in the first round of litigation in this case remitted the matter back to the file of the AO to decide afresh but in accordance with the law by providing opportunity of being heard to the assessee.

9. In the backdrop of the aforesaid facts and circumstances of the case, the sole question for determination in this case is :-

“as to whether the impugned order passed by AO u/s 254/143 (3) read with section 144C is not sustainable being not bad in law only but void ab initio as contended by the assessee company?”

10. For facility of reference, relevant provisions contained u/s 144C are reproduced as under :-

“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 in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,—

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

11. The mandate of section 144C is categoric enough for the AO to pass a draft of the proposed assessment order so as to enable the assessee to file his acceptance of variation to the AO; or to file his objection to any of such variation before the Dispute Resolution Panel and the AO and only then the AO shall complete the assessment.

12. However, in the instant case, when the matter was remitted back to the AO, the AO was required to pass draft assessment order irrespective of the fact that in the first round of litigation he has already passed a draft assessment order for the sole reason that the first round of litigation comes to an end when the order has been set aside by the Tribunal and the issue was directed to be decided afresh after providing opportunity of being heard to the assessee.

13. Identical issue has come up before Hon'ble High Court of Delhi in case cited as ***JCB Limited vs. DCIT – WP (C) No.3399/2016 order dated 07.09.2017*** wherein question arises for determination is,

“Whether, after the remand proceedings, the AO could have, without issuing a draft assessment order under section 144C of the Act, straightway issued the final assessment order.”

14. Hon’ble High Court determined the issue in favour of the assessee by returning following findings :-

15. Mr Syali, learned Senior Counsel for the Assessee, referred to the decision of this Court dated 17th May 2017 passed in W.P.(C) No.4260/2015(Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax, Circle 25(2), New Delhi) to urge that the AO could not have passed the final assessment order without complying with the mandatory requirement under Section 144C of the Act whereby first a draft order had to be issued in respect of which an objection can be filed by the Assessee before the DRP. The failure to do so, according to Mr.Syali, was not a mere irregularity. He further referred to a decision of the Gujarat High Court dated 31st July 2017 in Tax Appeal No.542 of 2017 (Commissioner of Income Tax, Vadodara - 2 v. C- Sam (India) Pvt. Ltd.).

16. In response, Mr. Sanjay Jain, learned Additional Solicitor General of India appearing for the Revenue, submitted that there was an efficacious alternative remedy available to the Petitioner to file appeals against the impugned final assessment orders passed by the AO. It is denied that it was mandatory on the part of the AO to pass a draft assessment order since this was a second round before the TPO pursuant to remand by the ITAT. Moreover, it was not as if the ITAT had set aside the entire assessment order of the AO. The setting aside was only in respect of the transfer pricing adjustment and that too with a specific direction to the AO for determining the arms length price “after considering fresh comparables.” Since the assessment itself was not cancelled by the ITAT or completely set aside, it is the provisions of Section 153 (3) (ii) of the Act which would

apply. Mr Jain submitted that the requirement of passing a draft assessment order under Section 144C was only in the first instance and not after the remand by the ITAT.

17. The Court is unable to agree with the submissions made on behalf of the Revenue by Mr. Jain. Section 144C(1) of the Act is unambiguous. It requires the AO to pass a draft assessment order after receipt of the report from the TPO. There is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.

18. It was then contended by Mr. Jain that the assessment order passed by the AO should not be declared to be invalid because of the failure to first pass a draft assessment order under Section 144C of the Act. In this regard, reference is made to Section 292B of the Act.

19. As already noted, the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality. Section 292B of the Act would not protect such an order. This has been explained by this Court in its decision dated 17th July 2015 passed in ITA No. 275/2015 (Pr. Commissioner of Income Tax, Delhi - 2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.) where it was held :

“Section 292B of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act.”

20. The Court further observed that Section 292B of the Act cannot save an order not passed in accordance with the provisions of the Act. As the Court explained, “the issue involved is not about a mistake in the said order but the power of the AO to pass the order.”

21. In almost identical facts, in Turner International (supra), this Court held in favour of the Assessee on the ground that it was mandatory for the AO to have passed a draft assessment order under Section 144C of the Act prior to issuing the final assessment order. The following passages from said decision are relevant for the present purposes:

“11. The question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirements of first passing draft assessment order in terms of Section 144C(1) of the Act is no longer res integra. There is a long series of decisions to which reference would be made presently.

12. In Zuari Cement Ltd. v. ACIT (decision dated 21st February, 2013 in WP(C) No.5557/2012), the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under Section 144C (1) of the Act would result in rendering the final assessment order “without jurisdiction, null and void and unenforceable.” In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was affirmed by the Supreme Court by the dismissal of the Revenue's SLP (C) [CC No. 16694/2013] on 27th September, 2013.

13. In Vijay Television (P) Ltd. v. Dispute Resolution Panel [2014] 369 ITR 113 (Mad.), a similar question arose. There, the Revenue sought to rectify a mistake by issuing a corrigendum after the final assessment order was passed. Consequently, not only the final

assessment order but also the corrigendum issued thereafter was challenged. Following the decision of the Andhra Pradesh High Court in Zuari Cement Ltd. v. ACIT (supra) and a number of other decisions, the Madras High Court in Vijay Television (P) Ltd. v. Dispute Resolution Panel (supra) quashed the final order of the AO and the demand notice. Interestingly, even as regards the corrigendum issued, the Madras High Court held that it was beyond the time permissible for issuance of such corrigendum and, therefore, it could not be sustained in law.

14. Recently, this Court in ESPN Star Sports Mauritius S.N.C. ET Compagnie v. Union of India [2016] 388 ITR 383 (Del.), following the decision of the Andhra Pradesh High Court in Zuari Cement Ltd. v. ACIT (supra), the Madras High Court in Vijay Television (P) Ltd. v. Dispute Resolution Panel, Chennai (supra) as well as the Bombay High Court in International Air Transport Association v. DCIT (2016) 290 CTR (Bom) 46, came to the same conclusion.”

22. In the decision of the Gujarat High Court in C-Sam (India) (supra), the Court negated the plea that non-compliance with the terms of Section 144C of the Act is merely an ‘irregularity’. The Gujarat High Court held that it was of ‘great importance and mandatory’. The following passages of the said decision of Gujarat High Court are relevant for the present purposes:

“6. These statutory provisions make it abundantly clear that the procedure laid down under Section 144C of the Act is of great importance and is mandatory. Before the Assessing Officer can make variations in the returned income of an eligible assessee, as noted, sub-section (1) of Section 144C lays down the procedure to be followed notwithstanding anything to the contrary contained in the Act. This non-obstante clause thus gives an overriding effect to the procedure 'notwithstanding anything to the

contrary contained in the Act'. Sub-section (5) of Section 144C empowers the DRP to issue directions to the Assessing Officer to enable him to complete the assessment. Sub-section (10) of Section 144C makes, such directions binding on the Assessing Officer. As per Sub-Section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.

7. The procedure laid down under Section 144C of the Act is thus of great importance. When an Assessing Officer proposes to make variations to the returned income declared by an eligible assessee he has to first pass a draft order, provide a copy thereof to the assessee and only thereupon the assessee could exercise his valuable right to raise objections before the DRP on any of the proposed variations. In addition to giving such opportunity to an assessee, decision of the DRP is made binding on the Assessing Officer. It is therefore not possible to uphold the Revenue's contention that such requirement is merely a procedural. The requirement is mandatory and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the Assessing Officer but by the DRP. Interestingly, once the DRP gives directions under sub-section (5) of Section 144C, the Assessing Officer is expected to pass the order of assessment in terms of such directions without giving any further hearing to the assessee. Thus, at the level of the Assessing Officer, the directions of the DRP under sub-section (5) of Section 144C would bind even the assessee. He may of course challenge the order of the Assessing Officer before the Tribunal and take up all contentions. Nevertheless at the stage of assessment, he has no remedy against the directions issued by the DRP under sub-section (5). All these provisions amply demonstrate that the legislature desired to give an important

opportunity to an assessee who is likely to be subjected to upward revision of income on the basis of, transfer pricing mechanism. Such opportunity cannot be taken away by treating it as purely procedural in nature.”

23. In the present case, just as in Turner International (supra), it is submitted that, at the most, failure to pass a draft assessment order under Section 144C of the Act is a curable defect and that the Court should now delegate the parties to a stage as it was when the TPO issued a fresh order after the remand by the ITAT.

24. This very argument of the Revenue has been negated by the Court in Turner International (supra) where it was observed in paras 15 and 16 as under:

“15. Mr. Dileep Shivpuri, learned counsel for the Revenue sought to contend that the failure to adhere to the mandatory requirement of issuing a draft assessment order under Section 144C (1) of the Act would, at best, be a curable defect. According to him the matter must be restored to the AO to pass a draft assessment order and for the Petitioner, thereafter, to pursue the matter before the DRP.

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 AO 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.”

25. For all of the aforementioned reasons, the Court finds no difficulty in holding that the impugned final assessment orders dated 30th March 2016 passed by the AO for AYs 2006-07, 2007-08 and 2008 -09 are without jurisdiction on account of the failure, by the AO, to first

pass a draft assessment order and thereafter, subject to the objections filed before the DRP and the orders of the DRP, to pass the final assessment order. The Court also sets aside the orders of the TPO dated 30th March 2016 issued pursuant to the remand by the ITAT.”

15. Decisions rendered by Hon’ble High Court in case cited as ***JCB Limited vs. DCIT*** (supra) is applicable to the facts and circumstances of this case. Even otherwise, passing assessment order straightway without passing the draft assessment order would take away the enforceable right of the assessee company to approach the ld. DRP by way of filing objection to the draft assessment orders. Since the factum of not passing a draft assessment order by the AO as required u/s 144C is a curable defect, the case is again remitted back to the file of AO to decide afresh in the light of the order passed by the Tribunal dated 15.03.2012 in accordance with provisions contained u/s 144C of the Act, and also after providing an opportunity of being heard to the assessee. In view of what has been discussed above, present appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in open court on this 12th day of October, 2017.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 12th day of October, 2017/TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT
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