

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI '1-2' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI LALIET KUMAR, JUDICIAL MEMBER**

ITA No. 7733/DEL/2017 [A.Y 2003-04]

The Dy. C.I.T.
Circle - 24 (2)
New Delhi

Vs.

M/s Sumitomo Corporation India
302 & 303, 3rd Floor, World Mark 2
Asset No. 8, Aerocity Hospitality
District, New Delhi

PAN : AABCS 1887 M

[Appellant]

[Respondent]

**Date of Hearing : 28.09.2021
Date of Pronouncement : 28.09.2021**

Assessee by : Shri Himanshu S. SDinha, Adv.
Shri Bhuwan Dharopar, Adv

Revenue by : Shri M. Barnwal, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the Revenue is preferred against the order of the
ld. CIT(A) - 44, New Delhi dated 30.10.2017 pertaining to A.Y. 2003-04

2. The grievances of the Revenue read as under:

"1. "Whether the Ld. CIT(A) was justified in holding that the order passed by the AO on 28.09.2016 in pursuance of the directions of ITAT wherein the issue of TP was set aside to the AO/TPO with a specific direction, was without jurisdiction on the ground that no draft order was issued to the assessee u/s 144C by ignoring the fact that the whole assessment order was not set aside by the ITAT to the file AO/TPO

2. The Ld. CIT(A) erred in not adjudicating the issue on merit."

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

4. Briefly stated, the facts of the case are that in the first round of litigation, the quarrel travelled upto the Tribunal and the Tribunal, inter alia, considered the quarrel against the inclusion of the case of Samrat Clearing in the list of comparables.

5. While restoring the issue to the file of the TPO/Assessing Officer, the Tribunal in ITA No. 2307/DEL/2006 & 6719/DEL/2013 held as under:

"7.3 Coming to the merits of the exclusion or otherwise of this case, we find that there is no discussion in the order of the TPO about the comparability or otherwise of this case with the assessee. In our considered opinion, the ends of justice would meet adequately if the impugned order is set aside to this extent and matter is restored to the TPO/AO for first deciding the comparability or otherwise of Samrat Clearing with the assessee and then accordingly recomputing the ALP of this set of international transactions. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such proceedings".

6. Pursuant to the directions of the Tribunal, vide order dated 28.09.2016, the Assessing Officer framed assessment order u/s 254/143(3) r.w.s 144C of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

7. Quarrel is this assessment order framed by the Assessing Officer without passing a draft assessment order which is a mandatory requirement in terms of section 144C of the Act. This issue is well

settled in favour of the assessee and against the Revenue by the decision of the Hon'ble High Court of Delhi in the case of JCB India Ltd 398 ITR 189. The relevant findings of the Hon'ble Jurisdictional High Court read as under:

"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."

8. Similar view was taken by the Hon'ble High Court of Bombay in the case of Dimension Data Asia Pacific PTE Ltd 257 Taxman 442. The relevant findings read as under:

"8. The contention of the Revenue that the requirement of passing a draft Assessment Order under [Section 144C](#) of the Act would only extend to the orders passed in the first round of proceedings or in respect of an order passed by the Assessing Officer in

remand proceedings by the Tribunal which has entirely set aside the original assessment order. This distinction which is sought to be drawn by the Revenue is not borne out by [Section 144C](#) of the Act. In fact, the Delhi High Court in JCB (India) Ltd.

ITA No s . 1 63 5 & 1 63 6 / Mu m/ 2 01 7 (supra) held that, even in partial remand proceedings from the Tribunal, the Assessing Officer is obliged to pass a draft assessment order under [Section 144C\(1\)](#) of the Act. According to us, the Assessing Officer, is obliged to, in terms of [Section 144C](#) of the Act to pass a Draft Assessment Order in all cases where he proposes to assess the Foreign Company under the Act by making a variation in the returned income. In this case, the impugned order dated 31st January, 2018 has been passed in terms of [Section 143\(3\)](#) read with [Section 144C](#) read with [Section 254](#) of the Act and it certainly makes a variation to the returned income filed by the petitioner. This even if, one proceeds on the basis that the returned income stands varied by the order of the Tribunal in the first round, to the extent the petitioner accepts it. Therefore, the Assessing Officer correctly invokes [Section 144C](#) of the Act in the impugned order. Once having invoked [Section 144C](#) of the Act, the Assessing Officer is obliged to comply with it in full and not partly. This impugned order was passed consequent to the order of the Tribunal dated 5th May, 2017 restoring some of the issues before it to the Assessing Officer for fresh adjudication.

9. This "fresh adjudication" itself would imply that it would be an order which would decide the lis between the parties, may not be entire lis, but the dispute which has been restored to the Assessing Officer. According to us, the order dated 31st January, 2018 is not an order merely giving an effect to the order of the Tribunal, but it is an ITA No s . 1 63 5 & 1 63 6 / Mu m/ 2 01 7 assessment order which has invoked [Section 143\(3\)](#) of the Act and also [Section 144C](#) of the Act. This invocation of [Section 144C](#) of the Act has taken place as the Assessing Officer is of the view that it applies, then the requirement of [Section 144C\(1\)](#) of the Act has to be complied with before he can pass the impugned order invoking [Section 144C\(13\)](#) of the Act. In fact, [Section 144C\(13\)](#) of the Act can only be invoked in cases where the assessee has approached the DRP in terms of sub- [Section 144\(C\)\(2\)\(b\)](#) of the Act and the DRP gives direction in terms of [Section 144C\(5\)](#) of the Act. In this case, the assessment order has invoked [Section 144C\(13\)](#) of the Act without having passed the necessary draft Assessment Order under [Section 144C\(1\)](#) of the Act, which alone would make an direction under [Section 144C\(5\)](#) of the Act by the DRP possible. Thus, the impugned order is completely without jurisdiction.

10. Moreover, so far as a Foreign Company is concerned, the Parliament has provided a special procedure for its assessment and appeal in cases where the Assessing Officer does not accept the returned income. In this case, in the working out of the order dated 5th May, 2017 of the Tribunal results in the returned

income being varied, then the procedure of passing a draft assessment order under [Section 144C\(1\)](#) of the Act is mandatory and has to be complied with, which has not been done.

11. In the above view, the impugned order is without jurisdiction. Thus, the plea of alternate remedy ITA No s . 1 63 5 & 1 63 6 / Mu m/ 2 01 7 advanced by the Revenue so as to not entertain this petition, does not merit acceptance in the present facts.

12. In the above view, the impugned order dated 31st January, 2018 has been passed without complying with the mandatory requirements of [Section 144C](#) of the Act which is applicable to a Foreign Company such as the petitioner. Therefore, the impugned order is quashed and set aside.

Needless to state, this order would not, in any way, stop the Revenue from taking such steps as are available to it in law and the petitioner also from contesting the action of the Revenue in accordance with law, if it so desires."

9. The ld. DR relied upon two decisions of the Hon'ble High Court of Delhi, namely, BSC C&C Joint Venture WCC 7623 of 2017 and CM 31553 of 2017 and Strycar Pvt Ltd 103 Taxman 267. In so far as the decision of the Hon'ble High Court of Delhi in the case of BSC-C&C [supra] is concerned, the Hon'ble High Court has decided on the consent of both parties. Therefore, the same is not applicable on the facts of the case

in hand and the decision in the case of Strycar Pvt Ltd [supra] is, in fact, in favour of the assessee, therefore, would do no good to the Revenue.

10. Since the ld. CIT(A) has followed the decision of the Hon'ble Jurisdictional High Court in the case of JCB India Ltd [supra], we do not find any error or infirmity in the findings of the ld. CIT(A).

11. In the result, the appeal of the Revenue in ITA No. 7733/DEL/2017 is dismissed.

The order is pronounced in the open court on 28.09.2021.

Sd/-

[LALIET KUMAR]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 28th September, 2021

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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