

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-1', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SH. YOGESH KUMAR US, JUDICIAL MEMBER**

ITA No.6748/Del/2018  
Assessment Year: 2011-12

<b>DCIT Circle – 10 (2) New Delhi</b>	<b>Vs</b>	<b>Gruner India Pvt. Ltd. 15, DSIDC, Okhla Industrial Area, Phase-II, Scheme-1, New Delhi PAN No.AADCG2938H</b>
<b>(APPELLAN</b>		<b>(RESPONDENT)</b>

<b>Appellant</b>	<b>Sh. Mrinal Kumar Das, Sr. DR</b>
<b>Respondent</b>	<b>Sh. Pancham Sethi, CA</b>

Date of hearing:	07/04/2022
Date of Pronouncement:	25/05/2022

**ORDER**

**PER N.K. BILLAIYA, AM:**

This appeal by the revenue is preferred against the order of the CIT(A)-44, New Delhi dated 24.08.2018 pertaining to A.Y. 2011-12.

2. The grievance of the revenue read as under :-

1. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred holding that the assessment order passed u/s 143(3)/144C in pursuance of the order of ITAT directing fresh determination by the AO/TPO of the ALP of the international transaction was invalid on account of failure by the AO to adhere to the requirement of first passing draft assessment order in terms of section 144C(1) of the Income tax Act, 1961 ('the Act')
2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in holding that the failure to adhere to the procedural requirement of passing the draft assessment order u/s 144C(1) was not a curable defect u/s 292B of the Act.

3. The DR sought time to call for a report from the AO whether any draft assessment order was framed. On similar request the appeal was adjourned on earlier date of hearing.

4. We have given a thoughtful consideration to the request of the DR but do not find any merit. Whether a draft assessment order was framed can be easily ascertained from the appeal folder itself and we do not find any such mention in the body of the assessment order.

5. When the assessee preferred appeal against the assessment order dated 30.03.2017 before the CIT(A). The assessee raised following grounds of appeal :-

1. Assessment order passed u/s 254/143(3) r.w.s 144C r.w.s. 92CA(3) under the set aside directions of Hon'ble Delhi High Court and Hon'ble Delhi IT AT is bad in law and needs to be quashed.

2. Ld. AO erred in passing the Final Assessment Order u/s 254/143(3) r.w.s. 144C without passing Draft Assessment Order as per the provisions of section 144C(1) thereby denying the appellant its right to raise objections before the Hon'ble Dispute Resolution Panel. "

3. Assessment Order passed 254/143(3) r.w.s 144C is void-ab-initio as the same is not based on any directions of the Hon'ble DRP in view of the fact that the Ld. AO has not complied with the mandatory procedure laid down u/s 144C while passing the order.

4. Assessment order passed by Ld. AO is barred by limitation u/s 143(3) r.w.s. 53(5)/153(7) as the same was dispatched through speed post (No. ED54058793IN) on 01.04.2017 i.e. after the time barring date of 31.03.2017.

5. Ld. AO/TP O has erred in law and on facts by proposing to add Rs. 7,96,32,880/- to the income of assessee u/s 92CA(3).

6. Ld.TPO failed to appreciate that when CUP cannot be applied due to absence of comparables then ALP should be determined under other suitable method which may be TNMM.

7. Ld. TPO failed to follow the directions issued by Hon'ble Delhi High Court requiring to follow the directions issued by it in *Magneti Marelli Pwertrain India Pvt. Ltd vs. DC1T [(2016) 389 ITR 469(Del)]* and *Sony Ericsson Mobile Communication India (P) Ltd. vs. C1T [(2015) 374 ITR 118(Del)]*.

8. Ld. TPO failed to apply CUP as directed by Hon'ble ITAT.

9. Ld. TPO has erred in disallowing the Royalty and FTS on the ground that royalty is not required to be paid to the AE as it is not bringing any income to the assessee.

10. Ld.TPO has erred in law and on facts of the case by rejecting the aggregation approach under TNMM for benchmarking royalty and FTS at entity level on ground that aggregation can be accepted only if the volume of expenses is very small as compared to the operating expenses.

11. Ld.TPO failed to appreciate that application of aggregation approach is based on principle of close inter-relation between the transaction and non upon volume of expenses.

12. Ld. TPO failed to appreciate that purchase of Raw Material is closely inter-linked with the payment of Royalty & FTS.

13. Ld. AO has erred in initiating the penalty proceedings u/s 274 r.w.s 271 of the

*Income Tax Act, 1961.*

*14. The Ld. AO has erred in charging interest u/s 234B/234C of the Income Tax Act, 1961.*

*The appellant craves leave to add, amend, alter or withdraw any of the above grounds of objections whether before or during the course of the appellant proceedings in the interest of justice. ”*

6. Before proceeding to decide the appeal it is mandatory for the CIT(A) to send a copy of Form no.35 alongwith notice to the AO. There is no mention in the body of the order of the CIT(A) that the AO had raised any objection on the grounds taken by the assessee in Form No.35.

7. Considering the totality of the facts as mentioned here in above the request for adjournment is denied.

8. Coming to the facts of the case in hand we find that in the first round of litigation the quarrel relating to the transfer pricing adjustment travelled upto the Hon’ble High Court of Delhi and Hon’ble High Court of Delhi vide order dated 20.12.2016 held as under :-

*“12. In the light of the above findings, the appeal is partly allowed. The matter is remitted for re-consideration by the concerned TPO, who shall hear counsel for the parties and render findings on both aspects.”*

9. Once the Hon'ble High Court has remitted the matter for reconsideration by the concerned TPO it meant that the new hearing of the matter had to be conducted as if the original hearing had not taken place. Consequently, the AO had to decide the matter in accordance with elaborate procedure mentioned in section 144 C of the Act.

10. The TPO framed the order u/s. 92CA (3) r.w.s 254 of the Act vide order dated 29.03.2017 and the AO framed the final assessment order u/s. 254 r.w.s. 143 (3) r.w.s. 144 C of the Act vide order dated 30.03.2017. This means that the AO has bypassed mandatory procedure laid-down by the provision of section 144C of the Act. A similar quarrel was considered by the Hon'ble High Court of Delhi in the case of JCB India Limited Vs. DCIT 85 taxman.com 155 wherein the Hon'ble High Court held as under :-

14. The short question that arises for consideration is whether, after the remand proceedings, the AO could have, without issuing a draft assessment order under Section 144 C of the Act, straightway issued the final assessment order.

15. Mr Syali, learned Senior Counsel for the Assessee, referred to the decision of this Court *Turner*

*International India (P.) Ltd. v. Dy. CIT* [2017] 82 taxmann.com 125 (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 *CIT v. C-Sam (India) (P.) Ltd.* [2017] 84 taxmann.com 261.

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 *Pr. CIT v. Citi Financial Consumer Finance India (P.) Ltd.* [IT Appeal No. 275 (Delhi) of 2015, dated 17-7-2015] 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.

11. In the case of Headstrong Services India Private Limited 125 taxmann.com 262 the Hon'ble High Court of Delhi, on similar facts, held as under :-

24. Consequently, in the present case, in complete contravention of section 144C, the Assessing Officer wrongfully assumed the jurisdiction and passed the final assessment order without passing a draft assessment order and without giving the respondent/assessee an opportunity to raise objections before the Dispute Resolution Panel.

25. Keeping in view the aforesaid, this Court is of the opinion that no question of law, let alone a substantial question of law, arises in the present appeal.

26. This Court is of the view that till the Income-tax Department ensures that the Assessing Officers follow the mandate of law, in particular, binding provisions like section 144C and eschew filing of unnecessary appeals rather than in nearly all matters where the Assessing Officer has taken a view against the Assessee, the assessments will not achieve finality for a number of years like in the present case where the case of assessment year 2007-08 stands remanded and restored to the file of the Assessing Officer.

12. The Ld. DR in his written submission has stated that the judgment of the Hon'ble Delhi High Court in the case of JCB India (supra) has been distinguished by another judgment of Hon'ble High Court of Delhi in the case of Stryker India Private Limited 103 taxmann.com 267 and prayed for restoration of the appeal to the files of the AO.

13. We find that the Hon'ble High Court of Delhi in the case of Stryker India Private Limited (supra) has observed as under :-

**5.** *The petitioner relies upon the judgment of this Court in **JCB India Ltd. v. Dy. CIT** [2017] 85 taxmann.com 155/251 Taxman 143/398 ITR 189 to say that such orders, which contravene express provisions of law, are to be treated as nullity and have no further consequence.*

**6.** *Learned counsel for the Revenue, on the other hand, urges that the defect found exist is a curable one and urges that this Court should follow the approach adopted in **BSC C&C Joint Venture v. Jt. CIT**[W.P.(C) 7623 of 2017 dated 05-02-2018].*

**7.** *We notice that in the **JCB India Ltd.** (supra), the Court had undoubtedly stated that the order which purports to be a final one to the extent it contravenes Section 144C(3) is a nullity, however, the Court refrains from expressing anything further, which implies that the Revenue's option to proceed afresh and*

*conclude the assessment order, is kept open. Obviously in **BSC C&C Joint Venture {supra}**, the Court took the matter further and directed the completion of proceedings for issuance of final assessment order. Notably, however, **BSC C&C Joint Venture (supra)** was premised upon consent of the parties to treat the final order a draft order. However, the consent is not forthcoming in the present case.*

**8.** *In the present circumstances, the Court hereby quashes the impugned order of the A.O. dated 14.11.2017. The period summoned by the present proceedings under Article 226 of the Constitution of India shall hereby be excluded from reckoning the period of limitation for the purposes of making a fresh assessment order. The A.O. shall proceed in accordance with law and complete the final assessment under Election 144(C) of the Income-tax Act, 1961, in accordance with law.*

**9.** *The Writ Petitions are allowed Pending applications also stand disposed of accordingly.*

14. A perusal of the above order show that it was pursuant to a writ petition by the assessee and while deciding writ petition as above the Hon'ble High Court has on principle upheld the findings in the case of JCB India Limited (supra). It was only for the period of limitation, if any, available with the AO, the Hon'ble High Court directed the AO to make fresh assessment excluding the period summoned by the writ proceedings under article 226 of the Constitution of India excluded.

15. In our considered opinion the decision relied upon by the DR is misplaced and moreover is on different context.

16. The facts of the case in hand are identical to the facts considered by the Hon'ble High Court of Delhi in the aforementioned cases, therefore, we have no hesitation in dismissing the appeal by the Revenue.

Order pronounced in the open court on 25.05.2022

Sd/-  
**(YOGESH KUMAR US)**  
**JUDICIAL MEMBER**

\*NEHA\*

Date:- 25.05.2022

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI