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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**W.P. (C) No. 3399/2016**

JCB INDIA LTD.

....Petitioner

Through: Mr. M.S. Syali, Senior Advocate with  
Mr. Mayank Nagi, Mr. Tarun Singh and  
Mr. Shubham Gupta, Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR .....Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Rahul  
Chaudhary, Ms. Rhea Verma and Ms. Rajul Jain,  
Advocates

WITH

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**W.P. (C) No. 3429/2016**

JCB INDIA LTD.

....Petitioner

Through: Mr. M.S. Syali, Senior Advocate with  
Mr. Mayank Nagi, Mr. Tarun Singh and  
Mr. Shubham Gupta, Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR .....Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Rahul  
Chaudhary, Ms. Rhea Verma and Ms. Rajul Jain,  
Advocates

AND

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**W.P. (C) No. 3431/2016**

JCB INDIA LTD.

....Petitioner

Through: Mr. M.S. Syali, Senior Advocate with  
Mr. Mayank Nagi, Mr. Tarun Singh and



Mr. Shubham Gupta, Advocates

DEPUTY COMMISSIONER OF INCOME TAX & ANR .....Respondents  
Through: Mr. Sanjay Jain, ASG with Mr. Rahul  
Chaudhary, Ms. Rhea Verma and Ms. Rajul Jain,  
Advocates

**CORAM:**  
**JUSTICE S. MURALIDHAR**  
**JUSTICE PRA THIBA M. SINGH**

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**ORDER**  
**07.09.2017**

**Dr. S. Muralidhar, J.**

1. These are three writ petitions by JCB India Ltd. seeking quashing of an order dated 30<sup>th</sup> March 2016 passed by the Transfer Pricing Officer ('TPO') and the Final Assessment Order dated 31<sup>st</sup> March 2016 passed by the Assessing Officer ('AO) under Section 254 read with Section 143(3) of the Income Tax Act, 1961 ('Act) for three Assessment Years ('AYs'), 2006-07, 2007-08 and 2008-09 respectively.

2. The Petitioner is a wholly owned subsidiary of JC Bamford Excavators Ltd., U. K. ('JCB, U.K.'). It is engaged in the business of manufacture of earth-moving/construction equipments. It commenced its operations in India in the year 1979.

***AY 2006-07***

3. For AY 2006-07, the Petitioner filed its return of income on 19<sup>th</sup> November 2006, declaring an income of Rs. 214,44,73,701/-. After making a reference to the TPO, since there were international transactions involving the Petitioner-Assessee and its Associated Enterprise ('AE'), the



AO passed the final assessment order on 25<sup>th</sup> October 2010 under Section 143 (3) read with Section 144C of the Act. The returned income was enhanced to Rs. 255,45,21,520/-.

4. In the appeal filed by the Assessee, the Income Tax Appellate Tribunal ('ITAT') set aside the assessment and matter to the file of the Dispute Resolution Panel ('DRP') for a fresh determination after dealing with the objections raised by the Assessee.

5. The DRP concurred with the claim of the Assessee and issued directions dated 22<sup>nd</sup> December 2011. In pursuance of these directions, the TPO recommended an adjustment of Rs. 38,95,10,668/- by its order dated 23<sup>rd</sup> December 2011. Thereafter, the AO passed the final assessment order, dated 29<sup>th</sup> December 2011, in line with the recommendation made by the TPO. Thus, the total income was determined at Rs. 253,39,84,370/-.

6. When the matter went in appeal before the ITAT, the issue of determining the arm's length price ('ALP') was set aside to the file of the AO for fresh adjudication. The ITAT also directed that, "Both the Assessee as well as the revenue are granted liberty to file fresh T.P. study and fresh comparables so as to arrive at the arm's length price in accordance with law. In the result, this ground of the Assessee is allowed for statistical purposes."

***AY 2007-08***

7. As far as AY 2007-08 was concerned, the Assessee filed its return of income declaring an income on 26<sup>th</sup> October 2007 declaring an income of Rs. 341,45,94,745/- which, by a final assessment order passed by the AO



under Section 143 read with Section 144C of the Act, stood enhanced to Rs. 426,63,86,286/-. Similar to the previous AY, the matter was set aside to the file of the DRP for fresh adjudication. The final assessment order was passed by the AO, determining total income at Rs. 426,63,86,286/-, in line with the TPO's recommended adjustment which, in turn, was in accordance with the DRP's instructions dated 26<sup>th</sup> September 2011.

8. An order similar to the one made for AY 2006-07 was made by the ITAT on 18<sup>th</sup> September 2013 for AY 2007-08.

#### ***AY 2008-09***

9. For AY 2008-09, the Assessee filed its return of income on 30<sup>th</sup> September 2008, declaring an income of Rs. 604,98,20,690/- which was subsequently revised on 26<sup>th</sup> March 2009 to Rs. 601,92,08,999/-. The AO passed the final assessment order under Section 143 read with Section 144 C of the Act on 18<sup>th</sup> October 2012 enhancing the return of income to Rs. 731,93,88,090/-. In the appeal before the ITAT, matter was set aside to the file of the DRP for fresh determination.

10. After the DRP's order a final assessment order was issued on 18<sup>th</sup> October 2012 by the AO determining the total income at Rs. 731,93,88,090/-. Allowing the Assessee's appeal by order dated 18<sup>th</sup> September 2013, the ITAT set aside the decision on the issue concerning the arms length price and remanded the same issue to the AO for a fresh adjudication in accordance with law. Like in AYs 2006-07 and 2007-08, the ITAT permitted the Assessee as well as the Revenue to file their fresh T.P. study and fresh comparables "so as to arrive at the arm's length



price in accordance with law.” The appeal of the Assessee was allowed for statistical purposes.

11. For all the three AYs, by the letter dated 14<sup>th</sup> February 2014, the AO sought the comments of the TPO on the issue of transfer pricing adjustment. It is stated that there was complete inaction on the part of the TPO from 14<sup>th</sup> February 2014 to 10<sup>th</sup> March 2016. By the letter dated 4<sup>th</sup> March 2016, the AO called upon the TPO to quantify the transfer pricing adjustment in pursuance to the remand made by the ITAT for fresh adjudication. It was reiterated by the AO that the order of assessment was to be framed latest by 31<sup>st</sup> March 2016.

12. Notice of the matter was issued by the TPO on 10<sup>th</sup> March 2016, calling upon the Assessee to present its case. Submissions were made by the Assessee on 17<sup>th</sup> March 2016, *inter alia* stating that the proceedings were barred by limitation in light of Section 92CA (3A) read with Section 153 (2A). Thereafter, a second notice was issued by the TPO on 21<sup>st</sup> March 2016, calling upon the Assessee to file reply on the same day. This was extended to 30<sup>th</sup> March 2016. In reply to the notice dated 21<sup>st</sup> March 2016, the Assessee, in its submissions dated 30<sup>th</sup> March 2016, reiterated that the proceedings were barred by limitation in view of Section 92CA (3A) read with Section 153(2A) of the Act. The TPO then passed separate orders for each of the AYs under scrutiny on 30<sup>th</sup> March 2016, determining the transfer pricing adjustment at Rs. 40,67,16,966/- for AY 2006-07, Rs. 86,76,93,761/- for AY 2007-08 and Rs. 134,21,17,779/- for AY 2008-09.



13. Thereafter, on the very next day, i.e. 31<sup>st</sup> March 2016, the AO passed the final assessment order. These were three separate orders for each of the three AYs, i.e. 2006-07, 2007-08 and 2008-09. The AO enhanced the returned income on the basis of transfer pricing adjustment as recommended by the TPO. A notice of demand under Section 156 and show cause notice under Section 274 read with Section 271, as to why penalty should not be imposed, were also issued by the AO on the same date.

***Analysis***

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 dated 17<sup>th</sup> 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 31<sup>st</sup> 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 17<sup>th</sup> 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 intregra*. 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 27<sup>th</sup> 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 30<sup>th</sup> 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 30<sup>th</sup> March 2016 issued pursuant to the remand by the ITAT.

26. The writ petitions are accordingly allowed but, in the circumstances, with no orders as to costs.

**S. MURALIDHAR, J.**

**PRATHIBA M. SINGH, J.**

**SEPTEMBER 07, 2017**

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