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

Date of decision: 26th November, 2018

+ **ITA 1307/2018**

PR. COMMISSIONER OF INCOME TAX-6, DELHI Appellant

Through: Mr. Asheesh Jain, Senior Standing
Counsel with Mr. Dushyant Sarna,
Adv.

versus

NT BACK OFFICE SERVICES PVT. LTD (EARLIER KNOWN AS
GLOBERIAN INDIA PVT. LTD.) Respondent

Through: Mr. Deepak Chopra and Mr. Rohan
Khare, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

CM APP No. 48707/2018 (exemption)

Allowed subject to all just exceptions.

CM APP No. 48705-48706/2018 (condonation of delay)

These applications for delay in filing and delay in re-filing of 34 days and 25 days respectively are condoned as the applications are not opposed by the counsel for the respondent. Applications are allowed.

ITA 1307/2018

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 in the case of NT Back Office Services Pvt. Ltd (earlier known as

Globerian India Pvt. Ltd.) arises from the order dated 22.02.2018 passed by the Income Tax Appellate Tribunal ('Tribunal', for short) and relates to Assessment Year 2007-08.

2. The impugned order annuls the Assessment Order dated 28.03.2014 passed by the Assessing Officer for failure to follow the procedure prescribed under Section 144C of the Act. The Tribunal has relied and followed decision of this High Court in **JCB vs. Deputy Commissioner of Income Tax & Anr.** in W.P.(C) Nos.3399, 3429 & 3431 of 2016 decided on 07.09.2017.

3. Learned senior standing counsel appearing for the Revenue submits that the decision in **JCB India Ltd.** (supra) would not apply and is distinguishable, as in the first round the respondent-assessee had failed to file objections to the draft assessment order within limitation. Hence, the Dispute Resolution Panel (DRP) had not decided any 'objection' in the first round. In the second round the Assessing Officer was justified in passing the Assessment Order without passing a draft assessment order taking recourse to the procedure prescribed in Section 144C of the Act.

4. We do not find any merit in the submission. The Tribunal in the first round vide order dated 15.03.2012 while remanding the case to the Assessing Officer, had directed:

"6. We have heard the parties and have perused the material on record. The DRP has rejected the objections raised by the assessee against the draft assessment order, on the issue of limitation, saying that the DRP has no power to condone the delay. As such, the merits of these issues have not been either adverted to or adjudicated upon by the DRP. However, we are

of the considered view that in the present proceedings before us, the assessee is entitled to contest the merits of the issues involved.

7. For the assessment year 2006-07, i.e., the immediately preceding assessment year, it is seen, the Tribunal has remitted the matter concerning both the issues which are common for the year under consideration also, to the file of the AO to be decided afresh on affording a reasonable opportunity of hearing to the assessee. The decision of the AO on these issues for the assessment year 2006-07, would obviously have a direct bearing on the decision of these issues for the year under consideration, as well.

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."

5. The Tribunal in the first round had set aside the assessment order with direction to the Assessing Officer to pass a fresh assessment order on merits

after hearing the respondent-assessee. The Tribunal had not remanded the matter to the post-the-hearing stage under the procedure prescribed in Section 144C of the Act. A fresh assessment order was to be passed in accordance with law after giving an opportunity of hearing to the assessee.

6. As per the procedure set out and stated in Section 144C, the Assessing Officer is to hear the assessee before passing the draft assessment order and not after or post passing of the draft assessment order. Sub-Sections (1), (2), (3) and (4) Section 144C of the Act read;-

(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.

Aforesaid provisions do not envisage the Assessing Officer giving any hearing on merits after passing of the draft assessment order. Draft assessment order as a proposed assessment is forwarded to the assessee after hearing the assessee on merits. The assessee may either accept the variations as suggested or file objections within thirty days with the DRP and the Assessing Officer. Sub-Section (3) states that the Assessing Officer would complete the assessment i.e. pass the final assessment order if the assessee intimates acceptance of the variations or when no objections are received within the time specified. Sub-Section (4) specifies the time within which final assessment order is to be passed when acceptance of variations is received or period for filing of objections to the draft order expires. Sub-Sections (1) to (4) do not postulate and envisage any hearing on merits being given by the Assessing Officer after passing of the draft assessment order and before the final order is passed. When an assessee does not file objections against the draft assessment order, final order is passed without any fresh hearing. The final order passed by the Assessing Officer in such cases would be identical to the draft assessment order without any modification or changes.

7. Sub-Sections (5) to (14) to Section 144C of the Act read;-

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:— (a) draft order; (b) objections filed by the assessee; (c) evidence furnished by the assessee; (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority; (e) records relating to the draft order; (f) evidence collected by, or caused to be collected by, it; and (g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),— (a) make such further enquiry, as it thinks fit; or (b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under subsection (5) for further enquiry and passing of the assessment order. 1 [Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order,

notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

Sub-sections (5) till (14) prescribe detailed procedure to be followed by the DRP, including power to make or direct to cause further inquiry; confirm, reduce or enhance the variations in the proposed draft order. Every direction under these sub-sections is binding on the Assessing Officer. No direction

can be passed unless the opportunity for hearing is given to the assessee and the Assessing Officer. Time limit for passing such order is also prescribed. These provisions are mandatory.

8. In the present case, the Assessing Officer had written a letter dated 25.11.2013 to the DRP enclosing a copy of the order of the Tribunal dated 15.03.2012, requesting for issue of necessary directions for compliance. The DRP vide letter dated 11.02.2014 had informed the Assessing Officer as under:-

“This is to refer to your letter dated 25.11.2013. As per the Ld. ITAT order dated 18.03.2012 (Para-9), the direction of Hon’ble Tribunal are more than apparently clear i.e. to remit the matter to the file of AO to be decided afresh after providing the due opportunity to the assessee. Accordingly, I have been directed to inform you to complete the assessment as per the said direction of Ld. ITAT. As regards, the DRP direction for the assessment year 2006-07. No assessment can be directed.”

Clearly, the DRP was of the opinion that the Assessing Officer would have to pass the draft assessment order afresh and follow the procedure under Section 144C of the Act.

9. We are surprised that the Assessing Officer did not follow the procedure inspite of the opinion given by the DRP vide letter dated 11.02.2014.

10. Revenue has accepted the order dated 15.03.2012 remanding the case to the file of the Assessing Officer for fresh assessment after affording an opportunity of hearing to the assessee. We are not required to examine validity of the remand order dated 15.03.2012. Therefore, the contention that

in the first round the respondent-assessee had not filed objection within the limitation period prescribed even if assumed as correct is of no avail and relevance.

11. Learned senior standing counsel for Revenue has submitted that the procedure prescribed under Section 144C would apply in cases of an 'eligible assessee'. The expression 'eligible assessee' defined in sub-section (15) to Section 144C of the Act means a person in whose case the variation in taxable income in the draft assessment arises as a consequence of the order of the Transfer Pricing Officer. It is accepted by the Revenue that the variation in the assessment order dated 28.03.2014 was as a consequence of the report of Transfer Pricing Officer which was relied upon. The respondent-assessee would not cease to be an "eligible assessee" as no fresh order or report from the Transfer Pricing Officer was called post the remand. Definition of 'eligible assessee' would equally apply to the proceedings remanded to the Assessing Officer for fresh adjudication when the variation in income or loss returned which is prejudicial to the interest of the assessee arises as a consequence of the order of the Transfer Pricing Officer.

12. We do not find merit in the present appeal as the issue is covered by decision of this court in *JCB India Ltd.* (supra). The appeal is dismissed with no order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 26, 2018/uj