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

\+ **W.P.(C) 11325/2017 & CM 46253/2017**

STRYKER INDIA PVT. LTD ..... Petitioner

Through : Mr Deepak Chopra and Mr Harprit Singh Ajmani and Mr Rohan Khare, Advocates.

versus

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

Through : Mr Asheesh Jain, Senior Standing Counsel for Revenue.

\+ **W.P.(C) 11342/2017 & CM 46361/2017**

STRYKER INDIA PVT. LTD. ..... Petitioner

Through : Mr Deepak Chopra and Mr Harprit Singh Ajmani and Mr Rohan Khare, Advocates.

versus

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

Through : Mr Asheesh Jain, Senior Standing Counsel for Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

O R D E R

% **16.08.2018**

We have heard the learned counsel for the parties.

The petitioner's grievance is that the impugned order, for Assessment Years 2009-2010 and 2002-2003, are vitiated illegal because the Transfer Pricing Officer (TPO)'s proposals, with the Assessing Officer(A.O.)'s proposed additions, were not made in the form of the draft order but rather the A.O. passed a final order.

The facts are not many but the relevant ones are that for Assessment Year 2009-2010, the draft order pursuant to the reference made to the TPO was initially made on 27.02.2013; the objections by the Assessee to the Dispute Resolution Panel (DRP) were disposed of on 31.10.2013 and a final assessment was made on 19.12.2013 by the A.O.

The assessee carried the matter in appeal to the Income Tax Appellate Tribunal (ITAT) which remitted the matter entirely to the TPO on 15.04.2014. The Revenue's appeal under Section 260-A of the Income Tax Act, 1961 to this Court resulted in modification of the remit; by order of 07.05.2015. This Court directed the ITAT to examine the matter. The ITAT, in turn, on 03.06.2016, remitted the issues for consideration to the TPO. This resulted in a fresh reference by the A.O. to the TPO under Section 92CA(1) of the Act . On 09.10.2017, the TPO passed an order under Section 92CA(3) of the Act, proposing adjustments. It was, in these circumstances, that the A.O. was expected to issue a draft assessment order; instead he proceeded to pass a final order, incorporating the adjustments along with other additions, on 14.11.2017.

The petitioner relies upon the judgment of this Court in *JCB India Limited versus Deputy Commissioner of Income Tax* to say that such orders, which contravene express provisions of law, are to be treated as nullity and have no further consequence.

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 versus JCIT, Range-63, New Delhi {* (W.P.(C) 7623/2017 decided on 05.02.2018}

We notice that in the *JCB India Limited* (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.

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 Section 144(C) of the Income Tax Act, 1961, in accordance with law.

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

All rights and contentions of the parties are hereby kept open.

Order Dasti.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 16, 2018
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