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

\+ **W.P.(C) 11056/2017 & CM Appl. No. 45224/2017 (stay)**

OMNIGLODE INFORMATION TECHNOLOGIES (INDIA) PVT LTD ..... Petitioner

Through Mr. Ajay Vohra, Sr. Advocate with Mr. Neeraj Jain & Mr. Aditya Vohra, Advocates

versus

ADDL COMMISSIONER OF INCOME –TAX ..... Respondent

Through Mr. Zoheb Hossain, Advocate

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% **07.08.2019**

1. The short question that arises for consideration is a question that has been answered numerous times by this Court in several judgments and yet keeps cropping up every now and then.

2. The question is whether without passing the draft order under Section 144 (C) of the Act the Assessing Officer can proceed straightway on the basis of the report of the Transfer Pricing Officer (TPO) under Section 92 (CA) of the Act to pass a final assessment order?

3. In ***JCB India Limited v. Deputy Commissioner of Income Tax (2017) 85 Taxman.com 155 (Del)*** and ***Turner International India Private Limited v. DCIT (2017) 82 Taxman.com 125 (Del)*** and numerous other orders including the order dated 7th September, 2017 in WP (C) No. 3629/2017

passed by this court in ***(Nokia India Limited vs. Additional Commissioner of Income Tax)*** it has been explained time and again that "once there is a clear order of setting aside of an assessment order with the requirement of the AO/TPO to undertake a fresh exercise of determining the arm's length price, the failure to pass a draft assessment order, would violate Section 144C (1) of the Act result. This is not a curable defect in terms of Section 292B of the Act as held by this Court in its decision dated 17th July, 2015 in ITA No. 275/2015 ***(Pr. Commissioner of Income Tax, Delhi-2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.)"***

4. Mr. Ajay Vohra, learned senior counsel for the Petitioner informs the Court that the Revenue's Special Leave Petition against the above order being SLP(C) No. 13715/2018 was dismissed by the Supreme Court on 14th May, 2018. Against a similar order of this Court dated 27th July, 2017 in WP(C) 5722/2017 ***Control Risks India Private Limited vs. DCIT*** the SLP(C) No.7452/2018 was dismissed on 16th March, 2018.

5. Learned counsel for the Revenue placed reliance on an order dated 5th February, 2018 passed by this Court in WP(C) No.7623/2017 (***BSC C & C Joint Venture v. Joint Commissioner of Income Tax***) wherein under similar circumstances the Court recorded the statement of the Joint Commissioner of Income Tax present in the Court that the final assessment order "may be treated as draft assessment order and procedure under Section 144 (C) can be followed".

6. The Court notes that in the said order some sort of a via-media to have the matter straightway proceed to the stage of Dispute Resolution Panel was

offered by the Department and it appears that counsel for the Petitioner too on instructions accepted the above offer in Court.

7. The Court is unable to accept the submission of the Petitioners that the aforementioned order dated 5th February, 2018 which appeared to have proceeded on a concession as laying down any principle of law constituting a binding precedent. The fact remains that the officer in question in the present case has failed to follow the legal requirement spelt out so clearly under Section 144 (C) as has been explained by this Court in the above judgments.

8. Consequently, the impugned order dated 30th October, 2017 is hereby set aside.

9. The writ petition is allowed in the above terms. The application is also disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 07, 2019
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