

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA No. 535/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Eaton Fluid Power Ltd.,
145, Off Bombay Pune Road,
Pimpri, Pne - 411 018
PAN : AAACV8426E

.... अपीलार्थी/Appellant

Vs.

DCIT, Circle-8,
Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Vishal Kalra
Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 19.04.2018	घोषणा की तारीख / Date of Pronouncement:25.04.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

This is the appeal filed by the Assessee against the orders of DRP/TPO/AO. In this case, TPO passed the order u/s.92CA(3) of the I.T. Act, 1961 on 24-01-2013. Subsequently, AO passed the draft assessment order u/s.144C(1) of the Act on 26-03-2013 incorporating the adjustments recommended by the TPO. As per the law, assessee approached the DRP seeking directions and the DRP passed an order dated 31-12-2013. Eventually, a final assessment order was passed by the AO on 15-01-2014 determining the total income at 34,89,59,976/- as against the returned loss of Rs.9,47,21,950/-.

2. In the appeal filed before the ITAT, assessee raised 21 grounds involving both corporate as well as Transfer Pricing issues. Further,

assessee also filed the following additional grounds and the same as extracted as under :

“1. That on the facts and circumstances of the case and in law, the assessment order dated March 26, 2013 issued by the Assessing Officer (“AO”) **is bad in law and void ab initio** as the same has been passed in violation of section 144C of the Income-tax Act, 1961 (“Act”).

2. That on the facts and circumstances of the case and in law, the AO **erred in violating the procedure laid down under section 144C** of the Act by **issuing notice of demand and penalty notice** under section 274 read with section 271(1)(c) of the Act along with the assessment order dated March 26, 2013 instead of issuing a draft assessment order.”

3. Assessee raises the issue mentioning that the order passed by the AO u/s.144C(1) constitutes an assessment order as the same is followed by issue of the demand notice u/s.156 and penalty notice u/s.274 r.w.s.271(1)(c) of the Act. Such an assessment order is not sustainable as the same is not the product of the proper procedure laid down in the statute. These issues are raised as additional grounds before the Tribunal. On the admission of additional grounds, assessee demonstrated that the issues raised in the said grounds constitute legal in nature and they do not call for any investigation into the facts for adjudication of the same.

4. Before us, at the very outset on the additional ground, Ld. Counsel for the submitted that if above additional grounds of appeal are decided in favour of assessee, then the original grounds of appeal would become academic. In support of the allowability of additional grounds (jurisdictional issue) in favour of the assessee, assessee relied on the following decisions (Pages 1 to 40 of the paper book) :

1. *M/s. Sandvik Asia Pvt. Ltd. Vs. DCIT in ITA No.467/PUN/2015, Cross Appeal in ITA No.564/PUN/2015 along with CO No.24/PUN/2017, relating to assessment year 2010-11, order dated 25.01.2018*

2. *Walter Tools India Pvt. Ltd. Vs. ACIT in ITA No.419/PUN/2014, relating to assessment year 2009-10, order dated 23.01.2018*
3. *Soktas India (P.) Ltd. Vs. ACIT (2017) 77 taxmann.com 19 (Pune – Trib.)*
4. *DCIT Vs. Rehau Polymers (P.) Ltd. (2017) 85 taxmann.com 23 (Pune-Trib.)*

Further, Ld. AR for the assessee also pointed out that, on similar facts, in the case of sister concern of the assessee – Eaton Industrial Systems Pvt. Ltd. in ITA No.536/PUN/2014, dated 12-04-2018 for A.Y. 2009-10, the Tribunal allowed the appeal of the assessee. In this regard, Ld. AR relied on the contents of Para 9 onwards of the said order of the Tribunal.

5. On the additional grounds, Ld. DR for the Revenue relied heavily on the orders of authorities below.

6. On hearing both the parties on the legal issue of admission of additional grounds, we find the said additional grounds should be admitted and adjudicated in this order.

Further, on the merits of these additional grounds, we find the relevant facts of the case include that assessee is a company and is engaged in the manufacture and distribution of fluid power equipment such as pumps, gear pumps, valves, cylinders and related components for mobile & industrial markets. In this case, a reference was made to the Transfer Pricing Officer (TPO) u/s. 92CA(1) of the Act, who in turn, passed an order dated 24-01-2013 u/s. 92CA(3) of the Act, proposing total adjustments of Rs.344,308,840/-. The AO thereafter, passed draft assessment order dated 26-03-2013 u/s.143(3) r.w.s. 144C(1) of the Act. Ld. AR for the assessee referring to the said draft assessment order and pointed out that while passing the said draft order, the AO crystallized the demand at this stage itself and issued notice u/s.156 of

the Act as well as the notice u/s.274 r.w.s.271(1)(c) of the Act. The copies of these notices are available in the records. The demand notice u/s.156 of the Act was issued to the assessee with the tax demand of Rs.13.93 crores (rounded off) for furnishing inaccurate particulars of income. In the said draft assessment order itself, vide Para No.24, the AO calls it a proposed order of assessment, against which the assessee was given 30 days either to accept the same or file objections before the Dispute Resolution Panel (DRP). He further submitted that objections were raised before the DRP on merits but no such preliminary issue was raised and the said objections were dismissed. The AO thereafter, passed order u/s. 143(3) r.w.s. 144C(13) of the Act, dated 15-01-2014, wherein the said adjustment on account of arm's length price of international transactions was made in the hands of assessee. Ld. AR further submitted that draft assessment order passed by the AO raising the demand notice along with notice for initiation of penalty proceedings is unsustainable.

7. Ld. DR for the Revenue on the other hand relied on the orders of the lower authorities below on this legal issue and stated that there is no merit in the plea of Ld. AR for the assessee.

8. We heard both the sides and perused the orders of the Revenue and the Tribunal order in the case of M/s. Eaton Industrial Systems Pvt. Ltd. (supra). On perusing the same, we find the facts in the case of sister concern of the assessee above are identical. The Tribunal discussed the issue elaborately relying on various decisions and allowed the appeal of the assessee. Contents of Para No.9 to 12 are relevant in this regard. We find the additional grounds raised by the assessee are covered by the said order of the Tribunal. For the sake of completeness, relevant findings of the Tribunal are extracted here as under :

“9. We have heard the rival contentions and perused the record. The additional grounds of appeal raised by the assessee do not require any investigation of facts and hence, the same are admitted. The issue which is raised in the present appeal is whether the draft assessment order passed in the case along with issue of demand notice is correct start of proceedings against the assessee. The requirement of the Act is that in the draft assessment order proposed, additions are to be made and show cause notice is to be issued to the assessee either accepting the same or to file objections before the DRP. However, in the facts of the present case, there was no proposal for making addition but the final assessment order was passed though the Assessing Officer calls it a draft assessment order and also observed that the assessee was at liberty to file objections before the DRP or accept the same. The Assessing Officer in the draft assessment order itself crystallized the demand on income assessed in the hands of assessee and he also issued demand notice under section 156 of the Act. The Assessing Officer further initiated penalty proceedings under section 271(1)(c) of the Act by issuing notice under section 274 of the Act. The contention of learned Departmental Representative for the Revenue is that though the demand notice was issued but the same was not served upon the assessee. However, we find that the assessee in the Appeal Memo itself had attached copy of demand notice issued and has also filed the same during the course of hearing before us. In any case, the demand notice issued is available on record and the same is issued against the assessee. Hence, there is no merit in the plea of learned Departmental Representative for the Revenue in this regard and the same is dismissed.

10. We find similar issue arose before Tribunal in the case of DCIT Vs. M/s. Rehau Polymers Pvt. Ltd. in ITA No.566/PUN/2015, relating to assessment year 2010-11 with CO No.27/PUN/2017, order dated 14.06.2017, wherein it was held as under:-

“10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is in relation to the draft assessment order passed by the Assessing Officer under section 143(3) r.w.s. 144C(1) of the Act. After receipt of the order under section 92CA(3) of the Act from the TPO, the Assessing Officer was supposed to issue draft assessment order proposing to make the addition. However, the Assessing Officer called the said order to be draft assessment order but assessed income in the hands of assessee and further issued demand notice along ITNS-150, after charging interest under sections 234A, 234B & 234C, etc. He also initiated penalty proceedings under section 271(1)(c) of the Act. Undoubtedly, the assessee on understanding that the same was draft assessment order, made objections to the DRP, who gave certain directions and thereafter, the Assessing Officer passed an order under section 143(3) r.w.s. 144C(13) of the Act. However, in order to adjudicate the issue raised, we need to make reference to the provisions of section 144C of the Act.

11. We find that similar issue of assessment to be framed under section 143(3) r.w.s. 144C of the Act arose before the Pune Bench of Tribunal in Suktas India (P) Ltd. Vs. ACIT (supra).

12. The Tribunal after noting the facts that the Assessing Officer had passed the order under section 143(3) r.w.s. 92CA(3) and 144C of the Act and had also issued demand notice under section 156 of the Act and had also issued notice under section 274 r.w.s. 271(1)(c) of the Act. However, the covering letter said that it was draft assessment order, against which the assessee was either to file objections before the DRP or accept the same. The assessee filed the objections before the DRP, who dismissed

the same on the surmise that the order passed by the Assessing Officer was final assessment order, since the Assessing Officer had also issued the demand notice and had also issued show cause notice under section 274 r.w.s. 271(1)(c) of the Act for levy of penalty. In view of the said facts, the Tribunal observed as under:-

“6. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the Assessing Officer had made reference to the TPO vis-à-vis to determine the arm's length price of international transaction entered into by the assessee with its associate enterprises. The TPO vide order dated 28.01.2014 under section 92CA(3) of the Act had proposed the adjustment to arm's length price of international transaction and had passed the said order. The Assessing Officer on receipt of said order passed order under section 143(3) r.w.s. 92C(4) and 144C of the Act. The said order of Assessing Officer was forwarded to the assessee along with letter dated 28.02.2014, wherein the Assessing Officer categorically said that the draft assessment order was being forwarded for necessary action at the end of assessee. It was clearly mentioned in the said letter that on receipt of draft order, the assessee may within 30 days of the receipt of draft order either file acceptance of variation as proposed in the order or file objections to the variation to the DRP or to the undersigned. However, the Assessing Officer also issued demand notice under section 156 of the Act dated 28.02.2014 and also issued notice under section 274 r.w.s. 271 of the Act. The assessee on understanding that it was draft assessment order filed objections before the DRP on 07.04.2014 i.e. within the time allowed under the Statute. However, the said objections of assessee were not considered by the DRP and the same were rejected on the surmise that the order passed by the Assessing Officer was final assessment order since the Assessing Officer had also issued demand notice under section 156 of the Act and show cause notice under section 274 r.w.s. 271 of the Act for levy of penalty. The DRP observed that since the assessment order passed by the Assessing Officer was final assessment order, it did not have any jurisdiction to issue any directions on such final assessment order. After receiving the DRP's order, the assessee filed an application before the Assessing Officer for necessary action. The Assessing Officer in reply, vide letter dated 30.01.2015 stated that the DRP had clearly mentioned that the order passed on 28.02.2014 was final order and not draft order, so the Assessing Officer does not have any jurisdiction over the case.

7. In order to adjudicate the issue, reference needs to be made to the provisions of section 144C of the Act. Under the provisions of section 144C of the Act, it is provided that where the Assessing Officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned, which is prejudicial to the interest of assessee, then the Assessing Officer shall in the first instance forward the draft of the proposed order of assessment to the eligible assessee. Under sub-section (2) of section 144C of the Act on receipt of the draft order, the eligible assessee shall within 30 days of the receipt, file his acceptance of the variation to the Assessing Officer or file his objections, if any, to such variation with the Dispute Resolution Panel and the Assessing Officer. Under sub-section (3) of section 144C of the Act, the Assessing Officer shall complete the assessment on the basis of draft order if the assessee intimates to the Assessing Officer the acceptance of the variation or no objections are received within period specified in sub-section (2) of section 144C of the Act. Thereafter, the Assessing Officer is empowered to pass the assessment order within one month from the end of month, in which the acceptance

is received or the period of filing objections under sub-section (2) of section 144C of the Act expires. Under sub-section (5) of section 144C of the Act, it is provided that the Dispute Resolution Panel shall in case where 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. Upon receipt of the said directions, the Assessing Officer shall in conformity with the same, complete the assessment without providing any further opportunity of being hearing to the assessee within one month from the end of the month in which such direction is received, notwithstanding anything to the contrary contained in section 153 or 153B of the Act, as per sub-section (13) to section 144C of the Act. In view of the provisions of section 144C of the Act impliedly where the TPO proposes any variation in the income or loss returned by the assessee, which is prejudicial to the interest of assessee, the Assessing Officer shall in the first instance forward the draft of the proposed assessment order to the assessee and thereafter, if no objections are received and / or the assessee files his acceptance to the variation to the Assessing Officer, then the Assessing Officer is empowered to complete the assessment within one month from the end of the month thereof. In case, the assessee files his objection before the DRP and where the said Panel issues directions as it thinks fit, then the Assessing Officer on receipt of such directions shall complete the assessment in conformity with such directions. In view of the said provisions of the Act, the compliance to section 144C of the Act is mandatory in all such cases, where the TPO proposes variation in the income or loss returned, which is prejudicial to the interests of assessee. Only after complying with the conditions laid down in section 144C of the Act, the Assessing Officer is empowered to pass the order under section 143(3) r.w.s. 144C of the Act completing the assessment on such enhanced income or variation in the loss returned by the assessee.

8. *The Hon'ble Madras High Court in the case of Vijay Television Writ Petition Nos.1526 and 1527 of 2014 & M.P. Nos.1 and 1 of 2014, it was held that non-passing of draft assessment order after adjustment made by the TPO renders proceedings null & void by observing as under:-*

“Under Section 144C(1) of the Act, with effect from 1st October 2009, the Assessing Officer has to mandatorily issue a draft assessment order if there is a proposed variation to the return which are prejudicial to the eligible assessee. The fact that the petitioner is an eligible assessee is not in dispute. While so, under section 144C(2) of the Act, the eligible assessee has the option, either to accept the variation or to file their objections before the DRP and such option has to be exercised within 30 days. On such objections filed by the assessee, the DRP shall issue appropriate direction for the guidance of the Assessing Officer under section 144C(5) of the Act. It is only thereafter, the AO is bound to pass a final order of assessment in compliance with the directions issued by the DRP under section 144C(3) of the Act. In the present case, without following the above mandatory procedure, the AO has passed the order of assessment on 26.03.2013 and subsequently issued a corrigendum on 15.04.2014 to rectify the mistake committed in passing the final order of assessment inter alia to treat it as a draft assessment order. This course of action adopted by the second respondent is contrary to the mandatory provisions contained in the Act and the corrigendum issued by the AO could not cure the defect. The very fact that the Assessing

Officer has signed the order of assessment and also assessed the amount payable by the assessee has become complete and it cannot be simply treated as a draft assessment order or it can be rectified by issuing the corrigendum. In fact, pursuant to the order of assessment under section 143C, demand was also made for payment of the amount and such demand has not been withdrawn by the second respondent even after issuing the corrigendum. Even as per the website of the department, the demand made to the petitioner company continues till date and therefore, the final order as well as the corrigendum issued by the second respondent are vitiated by errors apparent on the face of the record and they are legally not sustainable.”

9. *The similar issue had arisen before the Pune Bench of Tribunal in Agfa India Pvt. Ltd. Vs. ACIT in ITA Nos.341/PN/2014 and 1072/PN/2014, relating to assessment year 2008-09, order dated 28.10.2015 and reference was made to the decision of the Hon’ble High Court of Andhra Pradesh at Hyderabad in M/s. Zuari Cements Ltd. Vs. ACIT in WP No.5557/2012, vide judgment dated 21.02.2013 and the Hon’ble Supreme Court in ACIT Vs. M/s. Zuari Cement Ltd. vide Special Leave Petition CC No.16694/2013, judgment dated 27.09.2013 and it was held as under:-*

*“20. The Hon’ble High Court of Andhra Pradesh at Hyderabad in M/s. Zuari Cements Ltd. Vs. ACIT (supra) on similar issue where after receipt of the order passed by the TPO under section 92CA(3) of the Act, the Assessing Officer had passed the assessment order under section 143(3) of the Act raising a demand of Rs.27,40,71,913/- without giving an opportunity to the assessee under section 144C of the Act, observed that where the Assessing Officer proposes to make on or after 01.10.2009, any variation in the income or loss returned by the assessee, then notwithstanding to the contrary contained in the Act, he shall first pass the draft assessment order, forward the same to the assessee and after assessee files his objections, if any, the Assessing Officer shall complete the assessment within one month, in view of the provisions of section 144C of the Act. It was further observed that the assessee is also given an option to file an objection before the DRP, in which the latter can issue directions for the guidance of Assessing Officer to enable him to complete assessment. Where the Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and pass the assessment order, it was held by the Hon’ble High Court of A.P that the impugned order of assessment was clearly contrary to section 144C of the Act and was without jurisdiction, null and void. The objection of the Revenue that the Circular No.5/2010 of the CBDT which laid down that the provisions of section 144C of the Act shall not apply for the assessment year 2008-09 and would only apply from assessment year 2010-11 and later years was held to be not tenable where the language of sub-section (1) of section 144C of the Act referred to the cutoff date of 01.10.2009 indicates the intention of Legislature to make it applicable. The Hon’ble High Court of A.P further held that the Circular No.5/2010 issued by the CBDT stating that section 144C(1) of the Act would apply only from assessment year 2010-11 and subsequent years and not from assessment year 2008-09 was contrary to the expressed language of the section and the said view of the Revenue was held to be not acceptable. **The Hon’ble High***

Court of A.P thereafter held that the impugned order of assessment dated 23.12.2011 passed by the respondent was contrary to the mandatory provisions of section 144C of the Act is declared as one without jurisdiction, null and void and unenforceable. The Hon'ble High Court of Andhra Pradesh held as under:-

“In this view of the matter we are of the view that the impugned order of assessment dt. 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside.”

21. The Hon'ble Supreme Court (supra) in ACIT Vs. Zuari Cements Ltd. (supra) had dismissed the Special Leave Petition filed by the Department upon hearing the Counsel. The learned Authorized Representative for the assessee contended that since the said Special Leave Petition was dismissed after hearing the Counsel and the view taken by the Hon'ble High Court of Andhra Pradesh at Hyderabad has been approved by the Apex Court and any order contradicting the conditions laid down in section 144C of the Act is null and void and unenforceable in law.

22. Further, the Delhi Bench of Tribunal in the case of Capsugel Healthcare Limited in ITA No.1356/Del/2012, vide order dated 30.09.2014 have upheld the similar view that “Failure to pass draft assessment order after TPO's order renders proceedings void. **Show cause notice cannot be quoted with draft assessment order**”.

10. Further, the Hon'ble Bombay High Court in International Air Transport Association Vs. DCIT (supra) have also down the similar proposition and held as under:-

“4. The Petitioner had consequent to the assessment order dated 23rd March 2015 filed its objection in terms of Section 144C(2) of the Act to the Dispute Resolution Panel (“DRP”). By an order dated 7th October, 2015, the DRP refused to pass any direction on the objections because the objections had been filed in respect of a final order under Section 143(3) of the Act and not in respect of the draft assessment order passed under Section 144C(1) of the Act. The order dated 7th October, 2015 of the DRP holds that its jurisdiction is only to entertain objections with regard to draft assessment order passed under Section 144C(1) of the Act.

5. However, it is pertinent to note that the order dated 7th October, 2015 of the DRP in paragraph (3) thereof records that “There is no dispute that the assessee is a foreign company”. This position is undisputed even before us. Therefore, in view of Section 144C(15) of the Act which defines eligible assessee to whom Section 144C(1) of the Act applies to inter alia mean any foreign company. Therefore, a draft assessment order under Section 144C(1) of the Act is mandated before the Assessing Officer passes a final order under Section 143(3) of the Act in case of eligible assessee. An draft assessment order passed under

Section 144C(1) of the Act bestows certain rights upon an eligible assessee such as to approach the DRP with its objections to such a draft assessment order. This is for the reason that an eligible assessee's grievance can be addressed before a final assessment order is passed and appellate proceedings invoked by it. However, these special rights made available to eligible assessee under Section 144C of the Act are rendered futile, if directly a final order under Section 143(3) of the Act is passed without being preceded by draft assessment order.

6. *In the above view, the assessment order dated 23rd March, 2015 passed by the Assessing Officer for the assessment year 2012-13 is completely without jurisdiction. This is so as it has not been preceded by a draft assessment order. Hence, the foundational/basic order viz. the assessment order dated 23rd March, 2015 is set aside and quashed as being without jurisdiction. Consequent orders passed on rectification application as well as on penalty are also quashed and set aside being unsustainable."*

11. *The learned Authorized Representative for the assessee has placed reliance on the ratio laid down by the International Air Transport Association Vs. DCIT (supra) and the Hon'ble Madras High Court in the case of Vijay Television Writ Petition Nos.1526 and 1527 of 2014 & M.P. Nos.1 and 1 of 2014 vis-à-vis. Whereas the learned Departmental Representative for the Revenue strongly opposed and pointed out that the Assessing Officer has sent the draft assessment order wherein the letter clearly says that it is draft assessment order. He pointed out that the DRP had misinterpreted and the issue may be sent back to the file of DRP. He also pointed out that the facts before the Hon'ble Bombay High Court were different and the said proposition is not applicable. We find no merit in the plea of learned Departmental Representative for the Revenue. The Assessing Officer passed the order on 28.02.2014 along with which it also issued the demand notice and show cause notice for levy of penalty. In other words, the Assessing Officer has crystallized the demand in the case of assessee. Whereas, as per the provisions of the Act where the Assessing Officer proposes to vary the income in the hands of assessee, there was requirement to issue show cause notice to the assessee to the said additions, by way of draft assessment order. The demand does not get crystallized in draft assessment order. Undoubtedly, the Assessing Officer had issued covering letter where it says that it is draft assessment order but in spirit, it had finalized the assessment, wherein the demand was crystallized and demand notice was issued to the assessee. The Assessing Officer has not followed the correct procedure as provided in the Statute and has passed final assessment order without passing draft assessment order which is against the provisions of the Act and hence, the same is invalid in law. Reliance is placed on the ratio laid down by the Hon'ble Bombay High Court in International Air Transport Association Vs. DCIT (supra) and the Hon'ble Madras High Court in Vijay Television Pvt. Ltd. Vs. DRP & Others (supra) and the Hon'ble High Court of Andhra Pradesh in M/s. Zuari Cements Ltd. Vs. ACIT (supra). We hold that the assessment order passed in the case is invalid and the same is set aside. Since we have decided the preliminary issue in favour of assessee, the other grounds of appeal against the additions made become academic and the same are dismissed."*

13. The facts before us are similar to the facts before the Tribunal in *Soktas India (P) Ltd. Vs. ACIT (supra)*. In the facts of present case also, the demand got crystallized on passing of the draft assessment order, wherein the Assessing Officer had issued demand notice in ITNS-150 and had also initiated penalty proceedings. Undoubtedly, the said assessment was framed as draft assessment but in actual fact, the Assessing Officer had made the assessment in the hands of assessee by not only assessing the income but also determining the demand payable. In the case of draft assessment order, proposed additions are to be made and the assessee is show caused either to accept the same or file the objections before the DRP. However, in the present facts, there was not a proposal for making addition but final assessment order was passed. Undoubtedly, the Assessing Officer said that he is passing draft assessment order and the assessee was also at liberty to file the objections before the DRP or accept the same, but in actual fact, the order passed by the Assessing Officer was complete assessment order which is not envisaged under section 143(3) r.w.s. 144C of the Act. Accordingly, we hold that draft assessment order passed in the case is invalid in law.”

11. We further find that the Hon'ble High Court of Delhi in *JCB India Ltd. Vs. DCIT (2017) 85 taxmann.com 155 (Del)* has laid down that even in remand proceedings the Assessing Officer cannot straightaway pass final assessment order without issuing draft assessment order under section 144C of the Act. The Hon'ble High Court did not accept the stand of Revenue that it was an irregularity which was curable under section 292B of the Act. Relying on earlier decision of the said High Court, it was observed that section 292B of the Act could not save an order not passed in accordance with the provisions of the Act, where the issue involved was not about the mistake in the said order but the power of Assessing Officer to pass the order. Further, reference was made to the decision of said High Court itself in *Turner International India (P.) Ltd. Vs. DCIT (2017) 82 taxmann.com 125 (Del)*, wherein **it was held that it was mandatory for the Assessing Officer to pass draft assessment order under section 144C of the Act prior to issuing final assessment order.** The relevant findings of the Hon'ble High Court are in para 21 which reads as under:-

“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."

12. Applying the said ratio to the facts of the present case and also the issue arising before us being identical to the issue before Tribunal in *DCIT Vs. M/s. Rehau Polymers Pvt. Ltd.* (supra) and in *M/s. Sandvik Asia Pvt. Ltd. Vs. DCIT* (supra), we hold that the draft assessment order passed by the Assessing Officer was complete assessment order which is not envisaged under section 143(3) r.w.s. 144C of the Act. **Accordingly, we hold that the draft assessment order passed in the case is invalid in law and hence the consequent order passed does not survive.** In view of our deciding the jurisdictional issue in favour of assessee, we do not address the issues on merits. The additional grounds of appeal No.1 and 2 raised by the assessee are thus, allowed.

9. The undisputed facts in this case include that the AO issued notice of demand u/s.156 of the Act as well as issue of notice u/s.274 r.w.s. 271(1)(c) of the Act at the stage of making draft assessment order as per the provisions of section 144C(1) of the Act. Normally, such notices are issued at the end of the assessment proceedings and at the time of making assessment order. The fact that demand is raised is evident on the fact of draft assessment order which bears the entry of the demand in the register of Demand Collection and Balance (DCR 02/45, dated 20-2-13). The notice u/s.274 of the Act is found issued for furnishing of inaccurate particulars of income. On law, it is settled legal proposition at the level of High Courts that the assessment orders

based on such draft assessment orders not following the mandatory provisions of section 144C of the Act is without jurisdiction and therefore, null and void and not enforceable in law. Further, the Hon'ble Andhra Pradesh High Court in the case of M/s. Zuari Cements Ltd. Vs. ACIT in Writ Petition No.5557/2012, dated 21-02-2013 held that the impugned order dated 12-12-2011 passed by the respondent was contrary to the mandatory provisions of section 144C of the Act is declared as one without jurisdiction, null and void and unenforceable. (SLP filed against the judgment of AP High Court in the case of ACIT Vs. M/s. Zuari Cements Ltd. by the Revenue stands dismissed on this issue).

Therefore, we hold that the assessment order passed by the AO in the instant case dated 15-01-2014 is without jurisdiction and null and void. Accordingly, the additional grounds raised by the assessee are allowed in his favour.

10. Consequent to allowing of additional grounds in favour of the assessee, we find adjudication of the issues raised in the original grounds on merits become an academic exercise. Accordingly, the said grounds are dismissed as academic.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on this 25th day of April, 2018.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 25th April, 2018
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-13, Pune
4. CIT-IIT/TP, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune