

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “ C ” BENCH: BANGALORE
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.2722 & 2723/Bang/2018
(Assessment Years : 2010-11 & 2011-12)

M/s. Inteva Products India Automotive Pvt. Ltd.,
Manyata Embassy Business Park, N1 Block,
4th Floor, ORR, KR Puram Hobli, Nagawara,
Rachenahalli Vill., Bangalore-560 045
PAN AABCM 9623K

....Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 3(1)(1), Room No.227, BMTC Building,
Koramangala, Bangalore.

.....Respondent.

Assessee By:	Shri M.P.Lohia C A and Shri Chavalli Narayanan CA
Revenue By:	Smt R.Premi JCIT DR

Date of Hearing :	3.07.2020.
Date of Pronouncement :	24.11.2020.

ORDER

PER SHRI PAVAN KUMAR GADALE, JM :

These are the appeals filed by the assessee against the separate orders of
Commissioner of Income Tax (Appeals)-3, Bangalore for the Asst. Years 2010-11

& 2011-12) passed under Section 143(3) r.w.s. 254 and 250 of the Income Tax Act, 1961 (in short 'the Act').

2. At the time of hearing, the assessee has filed a petition for admission of additional ground of appeal and the LdDR has no serious objections. Accordingly additional ground of appeal is admitted and heard.

Since the issues in both appeals are common and identical, hence they are clubbed and heard and consolidated order is passed. For the sake of convenience, we shall take up ITA No.2722/Bang/2018 for asst year 2010-2011 . The assessee has raised the following grounds of appeal and additional ground of appeal as under:

1. Erred in making an addition to the total income of the Appellant on transfer pricing adjustment aggregating to INR 22,23,78,359 in respect of its international transactions pertaining to Pune unit of Inteva India.
2. **Erred in non-allowance of capacity utilisation adjustment**
Erred in law and facts by ignoring the submissions of the Appellant for providing the capacity utilisation adjustment to account for differences in the capacity utilized by the Appellant in view of its initial year of the manufacturing operations and the capacity utilized by the comparable companies and thereby not complying with the ITAT order.
3. **Erred in non- exclusion of abnormal expenditure from the cost base of Inteva India**
Erred in law and facts by ignoring the submissions of the Appellant with respect to exclusion of abnormal expenses while computing the margins of Inteva India Pune unit.
4. **Initiation of penalty proceedings under section 274 read with section 271(1)(c) of the Act**
Erred in initiating the penalty proceedings under section 274 read with section 271(1)(c) of the Act.

Additional Ground of Appeal.

“5. The learned Assessing Officer erred in directly passing the final assessment order under section 143(3) of the Act, without passing the draft assessment order as applicable in case of Assessee being 'eligible Assessee' as per section 144C(1) of the Act, thereby entire order which not in consonance of the Act should be quashed.”

3. The Brief facts of the case are that, the assessee company is engaged in manufacture of automobile components and filed the return of income on 27.09.2010 with total income of Rs(-).21,16,13,852/-. Subsequently, Notice under Section 143(2) and 142(1) of the Act were issued. The Assessing Officer found that the assessee has international transactions and with prior approval of Pr CIT, the matter was referred to the Transfer Pricing Officer (TPO) for determination of ALP. Whereas, the TPO has passed the order under Section 92CA of the Act dt.30.01.2014 with T P adjustment of Rs.44,76,06,091/- and Draft Assessment order was passed. Subsequently, the Assessee company has filed objections in Form 35A with the Dispute Resolution Panel (DRP) against the Draft Assessment order. The DRP considered the objections and has passed the order u/sec144C(5)of the Act dt28-112014. Further the TPO based on the directions of DRP determined the TP adjustment of Rs.44,06,38,914/-. Whereas AO has passed the final assessment order under Section 143(3) and 144C dt.18.12.2014 with assessed total income of Rs.23,53,14,436/-. The Assessee has filed an appeal before ITAT and got the relief in IT(TP)A No.83 and 136/Bang/2015 dt.20.07.2016. Subsequently, the order giving effect t(OGE) to the ITAT order was passed by the Assessing Officer on

8.8.2017. Aggrieved by the order giving effect, the assessee has filed an appeal with the CIT (Appeals). Whereas the CIT (Appeals) has confirmed the order giving effect and dismissed the appeal of the assessee. Aggrieved by the CIT (Appeals) order, the assessee has filed an appeal with the Tribunal.

4. At the time of Hearing, the LdAR has argued only on the additional ground of appeal and has not pressed other grounds of appeal. The LdAR submitted that as per the directions of the Hon'ble Tribunal, the order giving effect of order(OGE) was passed on 8-8-2017 and tax demand notice u/sec156 of the Act was issued. Further, the assessing officer has passed final order without passing draft assessment order, hence the entire assessment proceedings are bad in law and relied on catena of judicial decisions and supported his arguments with the Paper Book. Contra, the learned Departmental Representative supported the orders of lower authorities and filed written submissions.

5. We heard the rival submissions and perused the material on record. The learned Authorized Representative has restricted his arguments to the extent of additional ground of appeal and emphasized that the order giving effect (OGE) passed by the assessing officer on 8.8.2017 is bad in law, as the assessee was not provided with draft assessment order to file objections with the DRP and relied on the decision of Hon'ble Delhi High Court in the case of Control Rigs India Pvt. Ltd. Vs. DCIT in

W.P.C. 5722/2017 and C M No.23860/2017 Dt.27.07.2017 at page 237 to 239 read as under :

ORDER
27.07.2017

1. The challenge in this writ petition is to an order dated 11th May, 2017 passed by the Respondent, Deputy Commissioner of Income Tax, Circle 6 (2) (hereafter the Assessing Officer - 'AO') under Section 254/143(3) of the Income Tax Act, 1961 ('Act') read with Section 144C as well as the consequential notice of demand dated 11th May, 2017 issued under Section 156 of the Act for the Assessment Year ('AY') 2011-12.

2. The facts, in brief, are that the Petitioner is engaged in the business of providing specialist risk consultancy services. Consequent upon the return filed by the Assessee for the AY in question, a draft assessment order was passed by the AO on 16th March, 2015 making *inter alia* the following conditions/disallowance:-

(i) Transfer pricing adjustment: Rs.2,29,27,042/-

(ii) Disallowance of interest on late deposit of TDS Rs.5,35,894/-

3. Aggrieved by the abovementioned draft assessment order, the Petitioner approached the Dispute Resolution Panel ('DRP'). On 23rd December, 2015, the DRP passed an order confirming the above variations. In compliance with the directions of the DRP, the Transfer Pricing Officer ('TPO') recomputed the value of the transfer pricing adjustment by an order dated 14th January, 2016. This resulted in the final assessment order being passed by the AO on 29th January, 2016 under Section 143(3) read with Section 144C of the Act.

4. Thereafter, the matter was taken in appeal by the Assessee to the Income Tax Appellate Tribunal ('ITAT'). By an order dated 28th September, 2016, the ITAT remitted the matter to the TPO to consider the additional details filed by the Petitioner before the ITAT and upon such consideration to pass a speaking order.

5. The TPO then undertook a fresh benchmarking analysis and passed an order dated 31st March, 2017 proposing an adjustment of Rs. 1,19,49,680/- to the Arm's Length Price ('ALP') determined by the Petitioner.

6. Thereafter, instead of passing a draft assessment order, the AO passed a final assessment order on 11th May, 2017 which has been challenged by the Petitioner in this writ petition.

7. That consequent upon an order of the TPO under Section 92 CA (3) of the Act, it is incumbent upon the AO to pass a draft assessment order under Section 144C of the Act, is the settled legal position as explained by the

Court in its decision in *Turner International India Pvt. Ltd. Vs. DCIT, (2017) 82 Taxman.com 125 (Del)*. In the present case, clearly the AO overlooked the above legal position and proceeded to pass a final assessment order, thereby depriving the Assessee of an opportunity of questioning the draft assessment order under Section 144C of the Act before the DRP.

8. Consequently, the Court has no hesitation in hereby setting aside the impugned assessment order dated 11th May, 2017 passed by the AO. The consequential notice of demand of the same date under Section 156 of the Act issued to the Petitioner is also hereby quashed.

9. The writ petition is accordingly allowed with no order as to costs. The application is disposed of.

6. Further, Hon'ble Madras High Court in the case of *ACIT Vs. Vijay Television (P) Ltd* in W.A. Nos.1327 to 1329 of 2014 (2018) 95 Taxman.com 101 held as under :

Section 144C, read with Section 292B of the Income-tax Act, 1961 - Dispute resolution panel (General) - Assessment year 2009-10 - Whether Assessing Officer is duty bound to adhere to mandatory requirement mandated under section 144C(1) by first passing a draft assessment order, failure of which would invalidate final assessment order and consequent demand notices and penalty proceedings - Held, yes - Assessee filed its return of income for assessment year 2009-10 on 30-9-2009 - As case involved international transactions, matter was referred to Transfer Pricing Officer and order of assessment under section 143(3) was passed - Since order passed under section 143(3) was a final assessment order, revenue, realising mistake committed by it, had, issued corrigendum, amending section to read as section 144C, read with sections 92C and 143(3) - Demand notice under section 156 had been issued and penalty had also been imposed - Even though corrigendum had been issued indicating to read 'section 143(3)' as 'section 144C, read with sections 92(CA) and 143(3)' but it did not indicate that demand and penalty made in assessment order had been withdrawn - Whether, non-compliance of mandatory provisions of section 144C, being an incurable illegality, rendered assessment order null and void and mistake committed by revenue in not following mandatory requirement of section 144C by passing an order under section 143(3) cannot be cured by issuance of a corrigendum - Held, yes [Paras 41-46] [In favour of assessee]

7. Similarly, the Hon'ble Bombay High Court in the case of Prin. CIT Vs. Lion bridge Technologies Pvt. Ltd. In ITA No.622 of 2016 Dt.3.12.2018 has held at page 4 para 11 as under :

“ 11. It must be noted that in respect of the procedure and determination of the ALP of International Transaction between related person, the law provides a special dispensation. In terms of [Section 144C\(I\)](#) of the Act, the Assessing Officer is to first pass a draft Assessment Order which is subject to challenge, by way of representation to the DRP. It is only after the DRP disposes of the representation, that the Assessing Officer passes a final order in terms of the directions of the DRP and such final order is appellable to the Tribunal. In this case, it is undisputed that on 12th March, 2014, the Assessing Officer passed a final Assessment Order in terms of the directions made by the DRP in the earlier round. The time to pass any such order, would expire in the present facts on 31 st March, 2014, however, in case a Draft Assessment Order is issued, then the time to pass a final Assessment Order gets extended to one month after the passing of the directions by the DRP in terms of [Section 144C\(13\)](#) of the Act. Nevertheless, the Draft Assessment Order should have in the present facts been passed before 31 st March, 2014 in terms of 4 of 6 S.R.JOSHI itxa-622-2016.odt [Section 153A\(2A\)](#) of the Act. In this case, undisputedly, a final order was passed on 12th March, 2014 and is being sought to be corrected by issue of corrigendum on 16th April, 2014 i.e. after the time to pass the Draft Assessment Order has expired. In fact, the Tribunal placed reliance upon the decision of a single judge of the Madras High Court in Vijay Television (P) Ltd., (supra). This, decision has now been upheld by the Division Bench of the Madras High Court in Assistant Commissioner of Income Tax v/s. Vijay Television (P) Ltd., 407 ITR 642. In the above case, non issue of Draft Assessment Order could not be corrected by issuing a corrigendum to a final Assessment Order. Just as in the facts before the Madras High Court, here also the demand notice and institution of pending proceedings were not withdrawn by the corrigendum. Besides, in International Air Transport Association v/s. Deputy Commissioner of Income Tax 68 taxmann.com 246 - this Court has held that the Draft Assessment Order is necessary in terms of Section 144 C(1) of the Act before the Assessing Officer can proceed to pass a final Assessment Order. In the absence thereof, the order is without jurisdiction. So far the contention on behalf of the Revenue that the Respondent was estopped from challenging the corrigendum dated 16th April, 2004, as it was accepted by it and a representation also filed to the DRP. This submission overlooks the fact that there can be no estoppel on issue of law pertaining to jurisdiction. Therefore, if the corrigendum dated 16 th April, 2014 and the order dated 12th March, 2014 of the Assessing Officer is without jurisdiction, the same can be raised at any time and the principle of estoppel will not apply. Mere consent of parties does not bestow jurisdiction, if the order is beyond jurisdiction. Therefore, we do not find any substance in this objection of the Revenue. Besides, the finding of the 5 of 6 S.R.JOSHI itxa-622-2016.odt Tribunal in the impugned order that the order of the Assessing Officer was beyond the scope of the remand by order dated 25 th January, 2012 of the Tribunal. This more particularly so as the remand by the Tribunal was occasioned on account of failure of the DRP to deal with the objections of the Respondent to the Draft Assessment Order. Therefore, making a reference again to the TPO for fixing the ALP, was not called for. Nothing has been pointed out to us which would even remotely suggest that the same is not correct.”

8. Further the Hon'ble ITAT, Mumbai Bench in the case of DCIT Vs. Lion bridge Technologies Pvt. Ltd. in ITA No.1041/Mum/2015 Dt.29.5.2015 has observed at page 9 paras 16 to 18 as under :

16. In the case of Vijay Television Private Ltd (supra), the assessing officer passed the assessment order on 26.3.2013 without passing a draft assessment order as per the provisions of sec. 144C(1) of the Act. Later the AO issued a corrigendum on 15.04.2013 modifying the final assessment order passed on 26.03.2013 to be read as “Draft assessment order”. The Hon'ble Madras High Court noticed that the AO

had issued Demand notice raising tax demand upon the assessee. Further, the High Court noticed that the AO has failed to withdraw the demand raised upon the assessee at the time of issuing Corrigendum. The Hon'ble High Court further noticed that the Corrigendum dated 15.04.2013 is beyond the period prescribed for limitation. Under these set of facts, the High Court held that the assessment order dated 26-03-2013 should be construed as final assessment order passed in violation of the statutory provisions of the Act. The High Court further held that such a defect or failure on the part of the AO to adhere to the statutory provisions is not a curable defect by virtue of corrigendum dated 15.04.2013.

17. In the instant case also, it is not the case of the department that the demand raised in the assessment order dated 12-03-2014 was withdrawn by the AO at the time of issuing Corrigendum dated 16-04-2015. Further, the Corrigendum itself was issued by the AO after the expiry of time limit prescribed under third proviso to sec. 153(2A) of the Act. As per the decision of Hon'ble Madras High Court rendered in the case of Vijay Television Private Ltd (supra), the said defect cannot be cured by the Corrigendum issued subsequently after the expiry of limitation period. Hence the assessment order dated 12-03-2014 passed by the AO should be construed as final assessment order passed in violation of the statutory provisions of the Act. Since the AO has failed to comply with the time limit prescribed by sec. 153(2A) of the Act and further failed to follow the mandate of the provisions of sec. 144C, the impugned order is the one without jurisdiction, null and void and unenforceable. Accordingly we set aside the impugned assessment order.

18. Since we have annulled the assessment order, there is no necessity to address the issues urged by the assessee on merits. For the same reasoning, we do not find it necessary to adjudicate the grounds urged by the revenue in its appeal filed before us."

9. Similarly, the Hon'ble ITAT, Mumbai Bench in the case of M/s KSB Limited Vs. ACIT in ITA No.2722/Mum/2018 Dt.11.6.2019 has observed at page 10 to 18 para 13 to 16 as under :

" 13. We have heard the Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. The issue involved in the present appeal lies in a narrow compass i.e as to whether the assessment framed by the A.O under Sec.143(3) r.w.s 92CA r.w.s 254, dated 23.03.2016 in pursuance to the directions of the Tribunal, without passing a draft assessment order was sustainable or not. We find that the Tribunal in the first round of appeal was seized of the matter as regards the benchmarking of the ALP of the commission payments by the assessee to its AE at Singapore, namely M/s KSB Singapore (Asia Pacific) Pte. Ltd. As observed by us hereinabove, the Tribunal after necessary deliberations, had observed, that CUP method was the most appropriate method to compute the ALP in respect of commission paid by the assessee to its AE at Singapore. However, as the Tribunal was not inclined to accept the manner in which the TPO had applied the CUP method for computing the ALP in respect of commission payment, therefore, it had in all fairness restored the matter to the file of the A.O, with a direction to provide the assessee a reasonable opportunity to support its case in respect of determination of ALP of the commission payments. A perusal of the order of the Tribunal reveals, that the assessee was given the liberty to file a fresh TP study report for the transaction under consideration, in case if he so desired. Further, as is discernible from the order, the Tribunal had observed, that the A.O would be at discretion, as per the mandate of law, to refer the matter to the TPO, and therein re-adjudicate the issue afresh. We find that

pursuant to the aforesaid order of the Tribunal, the assessee vide its letter dated 12.08.2014 addressed to the A.O, had submitted a fresh TP study report in respect of payment of commission to its AE. The A.O had thereafter referred the matter to the TPO under Sec. 92CA(1) on 13.11.2014. As observed by us hereinabove, the TPO once again worked out the transfer pricing adjustment with respect to commission paid by the assessee to its AE at Rs.63,60,732/-. On receipt of the aforesaid order passed by the TPO under Sec.92CA(3), dated 18.01.2016, the A.O passed the assessment order under Sec.143(3) r.w.s 92CA r.w.s. 254, dated 23.03.2016. It is the case of the assessee before us, that as the A.O had exceeded his jurisdiction and therein framed the assessment without forwarding a draft of a proposed order of assessment as envisaged under Sec.144C(1), therefore, the assessment so framed by him is unsustainable in the eyes of law and is liable to be vacated on the said count itself. On the contrary, it is the claim of the revenue that as there was a limited direction by the Tribunal for re-determining the ALP of the commission payment by the assessee to its AE, therefore, it was not obligatory on the part of the A.O to have passed a draft assessment order.

14. We have given a thoughtful consideration to the issue before us. As per Sec. 144C (1) r.w.s 144C(15) of the Act, in a case where the A.O pursuant to the order of the TPO passed under sub-section (3) of Sec. 92CA, 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 the assessee, then notwithstanding anything to the contrary contained in the Act, in the first instance, he is obligated to forward a draft of the proposed order of assessment to the assessee. Further, as per sub-section (2) of Sec.144C, on receipt of the draft order, the assessee shall within 30 days of the receipt of such order is vested with a discretion viz. (i) to file his acceptance of the variations to the A.O; or (ii) file his objections, if any, to such variations with (a). the Dispute Resolution Panel; and (b). the assessing officer. In case, the assessee intimates to the A.O his acceptance of the variations, or files no objection within the aforesaid stipulated time period of 30 days of receipt of the draft order then, as per sub-section (3) of Sec.144C it is obligatory on the part of the A.O to complete the assessment on the basis of the draft order. Apart there from, as per sub-section (4) of Sec. 144C, the AO remains under an obligation to pass the assessment order under sub-section (3) within one month from the end of the month in which viz. (i) the acceptance is received; or (ii) the period of filing of objections by the assessee under sub-section (2) expires. Further, the DRP shall, in a case where any objection is received under sub-section (2), of Sec. 144C, issue such direction, as it thinks fit, for the guidance of the A.O to enable him to complete the assessment. Further, the aforesaid directions shall be issued by the DRP after considering viz. (i) draft order; (ii) objections filed by the assessee; (iii) evidence furnished by the assessee; (iv) report, if any of the assessing officer, valuation officer or transfer pricing officer or any other authority; (v) records relating to the draft order; (vi) evidence collected by, or caused to be collected by it; and (vii) result of any inquiry made by, or caused to be made by it. A perusal of the aforesaid statutory provision, viz. Sec. 144C, therein reveals that forwarding of a draft of the proposed order of assessment to an assessee in whose case variation in the income or loss returned as a consequence of the order of the TPO passed under sub-section (3) of Sec. 92CA is proposed, is not merely an idle formality, but in fact, the same is a statutory requirement which cannot be dispensed with. As a matter of fact, it is only after receipt of such draft order that the assessee is able to exercise his statutory right of filing his objections, if any, to the proposed variations to his returned income or loss with the DRP. The fact that a statutory obligation is cast upon the A.O to forward a draft of the proposed order of assessment, can be appreciated from the fact that the time limit for framing an assessment by the A.O under subsection (3) of Sec.143 r.w sub-section (4) of Sec.144C, has to be done within a period of one month from the end of the month in which viz. (i) the acceptance to the variations is received from the assessee; or (ii) the period of filing of objections by the assessee as envisaged in subsection (2) of Sec. 144C expires. In our considered view, in the absence of a draft of the proposed order of assessment, the assessee would stand divested of his statutory right of objecting to the proposed variations before the

DRP. In sum and substance, the forwarding of a draft of the proposed order of assessment by the A.O to an assessee where a variation to his income or loss returned is proposed to be made pursuant to the order passed by the TPO passed under subsection (3) of Sec. 92CA, is statutorily required and cannot be whimsically dispensed with by him.

15. We shall now advert to the facts involved in the case before us. A perusal of the order passed by the Tribunal in the first round of appeal reveals, that the Tribunal being of the view that the benchmarking of the ALP of the commission payment by the assessee to its AE could safely be drawn by applying CUP method, had while setting aside the matter to the file of the A.O, categorically observed that the assessee would be at a discretion to file a fresh TP study report for the said international transaction. Further, it was observed by the Tribunal, that the A.O as per the provisions of law may refer the matter to the TPO, and therein adjudicate the matter afresh. As the assessee in the course of the set aside proceedings had filed a fresh TP study report, wherein it had undertaken secondary analysis using external CUP as the most appropriate method and had selected 8 comparables agreements, therefore, the A.O referred the matter to the TPO under Sec. 92CA(1) on 13.11.2014. We find that the TPO as per his order passed under Sec. 92CA(3), dated 18.01.2016, had rejected the benchmarking analysis of the assessee, and therein proposed the transfer pricing adjustment of Rs.63,60,732/- as was earlier made by his predecessor. Now, in our considered view, the A.O after receiving the aforesaid order passed by the TPO under Sec. 92CA(3), dated 18.01.2016, wherein a TP adjustment of Rs.63,60,732/- was proposed, thus remained under a statutory obligation as envisaged in Sec. 144C(1) r.w.s 144C(15) to have forwarded a draft of the proposed order of the assessment to the assessee, therein proposing to make a variation to its returned income, in consequence of the aforesaid order of the TPO. We are unable to persuade ourselves to subscribe to the claim of the Id. D.R, that as there was a limited direction by the Tribunal to re-determine the ALP of the commission payment by the assessee to its AE, therefore, there was no obligation cast on the A.O to have passed a draft order before framing the assessment. In fact, we are of a strong conviction, that the A.O in the course of the 'set aside' proceedings on receiving the order passed by the TPO u/s 92CA(3), had triggered Sec. 144C(1) r.w.s 144C(15), which obligated him to forward a draft of the proposed assessment to the assessee, if he proposed to make any variation in the income returned by the assessee, as a consequence of the aforesaid order passed by the TPO under sub-sec. (3) of Sec. 92CA. According to us, there can be no escape for the A.O from compliance of the aforesaid statutory requirement. We are of the considered view, that the AO by dispensing with the statutory obligation of forwarding a draft of the proposed assessment to the assessee had, as a matter of fact divested the assessee of its statutory right of filing objections against the proposed variations to its returned income before the DRP. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Delhi in the case of Nokia India Pvt. Ltd. Vs. Additional CIT [W.P (C) No. 36929/2017, dated 07.09.2017]. The Hon'ble High Court in the aforesaid case had, observed, that the mandatory requirements under Sec.144C(1) had to be met even where the TPO had passed the order in the second round on remand by the Tribunal. The 'Special Leave Petition' (for short 'SLP') filed by the revenue against the aforesaid order of the Hon'ble High Court had thereafter been dismissed by the Hon'ble Supreme Court in the case of Addl.CIT Vs. Nokia India Pvt. Ltd. [SLP (C) Diary No. 7302/2018, dated 14.05.2018]. Further, a similar view had also been taken by the Hon'ble High Court of Delhi in the case of Control Risks India Pvt. Ltd. Vs. DCIT [WP (C) 5722/2017, dated 27.07.2017]. The Hon'ble High Court in the aforesaid case, observed, that the A.O had passed a final assessment order on 11.05.2017, without passing a draft assessment order. In the backdrop of the aforesaid facts, the High Court relying on its earlier decision in the case of Turner International India Pvt. Ltd. Vs. DCIT (2017) 82 taxman.com 125 (Del) concluded, that as the A.O by overlooking a legal position had proceeded to pass a final assessment order, thereby depriving the assessee of questioning the draft assessment order under Sec.144C before the DRP, therefore, the assessment order so passed by him could not be sustained and was liable to be quashed. The 'SLP' filed by the revenue against the aforesaid order of the High Court had

also been dismissed by the Hon'ble Supreme Court in Deputy Commissioner of Income Tax, Delhi Vs. Control Risks India Pvt. Ltd. [SLP (Civil) Diary No. 7090/2018, dated 16.03.2018] (SC). We find that the Hon'ble High Court of Bombay in the case of PCIT Vs. M/s Andrew Telecommunication Pvt. Ltd. [Tax appeal No. 144 of 2017, dated 16.07.2018] (Bom) had declined to accept the contention advanced by the revenue, that if a matter was remanded by the Tribunal, then no obligation was cast upon the A.O to pass a draft assessment order. We find that the Hon'ble High Court observed, that the issuance of a draft assessment order was not an empty formality. In fact, it was observed by the Hon'ble High Court that when a draft assessment order is passed and a copy is given to the assessee, the assessee can raise objections before the DRP on any of the proposed variations. Accordingly, it was held that a right was given to the assessee to object and to have the objections considered not by the A.O, but by the DRP. The Hon'ble High Court after extensive deliberations observed, that it was not discernible from the scheme of Sec.144C that if the proceedings were started a fresh on remand, there would be no requirement of passing a draft assessment order. In the backdrop of the aforesaid observations, the Hon'ble High Court had observed that non-issuance of the draft assessment order vitiated the final assessment order passed by the A.O. Also, the Hon'ble High Court of Bombay in the case of Dimension Data Asia Pacific Pte. Ltd. Vs. DCIT [W.P No. 921 of 2018, dated 06.07.2018] (Bom) had rejected the view of the revenue that the requirement of passing a draft assessment order under Sec.144C would only extend to the orders passed in the first round of proceedings, or in respect of an order passed by the A.O in remand proceedings by the Tribunal in a case where the entire original assessment order had been set aside. It was observed by the Hon'ble High Court, that the aforesaid distinction which was sought by the revenue was not borne out by Sec. 144C of the Act. In fact, it was observed by the Hon'ble High Court that even in partial remand proceedings from the Tribunal, the A.O was obliged to pass a draft assessment order under Sec.144C(1). We also find that the Hon'ble High Court of Bombay in the case of International Air Transport Association Vs. DCIT and Others [Writ Petition (L) No. 351 of 2016, dated 18.06.2016] had observed, that a draft assessment order passed under Sec.144C(1) of the Act bestows certain rights upon an eligible assessee such as, to approach the DRP with its objections to the draft assessment order. It was further observed by the Hon'ble Court that 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, the rights made available to an eligible assessee under Sec. 144C are rendered futile, if directly a final order under Sec.143(3) is passed without being preceded by a draft assessment order. On the basis of the aforesaid settled position of law, we are of a strong conviction that the A.O in the present case by dispensing with the statutory requirement of forwarding a draft of the proposed order of assessment, as envisaged in Sec. 144C(1), before passing the final assessment order, had thus, clearly traversed beyond the scope of his jurisdiction. Accordingly, in terms of our aforesaid observations and respectfully following the aforesaid judicial pronouncements, we are of the considered view that the assessment order passed by the A.O under Sec.143(3) r.w.s 92CA(3) r.w.s 254, dated 23.03.2016 cannot be sustained and is liable to be struck down on the said count itself. Accordingly, the order passed by the CIT(A) is set aside and the assessment order passed by the A.O under Sec. 143(3) r.w.s 92CA(3) r.w.s. 254, dated 23.03.2016 is quashed.

16. The appeal of the assessee allowed."

We considering the decisions of the Hon'ble High Courts and Hon'ble Tribunal, observe that the Assessing Officer while passing the order giving effect of ITAT order should follow the procedure as envisaged under Section 144C(1) of the Act

and pass a draft assessment order and as against the draft assessment order the assessee has right to file objections to the DRP. But in the present case, the assessing Officer has passed the order dt8-8-2017 giving effect to ITAT order and raised the demand u/sec156 of the Act without passing Draft Assessment order, which cannot be sustained. Accordingly, we set aside the CIT(A) order and quashed the order passed by the Assessing Officer and allow the additional ground of appeal of the assessee.

10. Similarly for the Asst. Year 2011-12, were the facts are similar and identical, the same directions and decision shall apply equally as decided in ITA no 2722/B/18 for A.Y.2010-11. Accordingly, we set aside the order of the CIT (Appeals) and quash the Assessing Officer order and allow the additional ground of appeal of the assessee.

Since the additional ground of appeal has been adjudicated and allowed in favour of the assessee. The original grounds of appeal raised by the assessee are left open and are not adjudicated. .

11. In the result, both the appeals filed by the assessee are allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Dated: 23 .11.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore