

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I' NEW DELHI**

**BEFORE SHRI G.S. PANNU, PRESIDENT &
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA Nos.1376 & 1377/Del/2016
Assessment Years: 2009-10 & 10-11

Xander Advisors India Pvt. Ltd., 111, Hotel Taj Palace, Sardar Patel Marg, New Delhi	Vs.	ACIT, Central Circle, New Delhi
PAN :AAACX0403B		
(Appellant)		(Respondent)

Appellant by	Shri Mukesh Bhutani, AR, Shri Vishal Kalra, Adv. & Ms. Sumisha Murgai, AR
Respondent by	Shri Mahesh Shah, CIT (DR)

Date of hearing	12.07.2022
Date of pronouncement	30.08.2022

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

Captioned appeals have been filed by the same assessee, assailing a consolidated order dated 21.12.2015 passed by learned Commissioner of Income-Tax (Appeals)-1, Noida. Though, in the aforesaid consolidated order, learned Commissioner (Appeals) has

disposed of appeals relating to four different assessment years, however, presently, we are concerned with the assessment years 2009-10 and 2010-11.

2. In addition to the grounds raised in the Memorandum of Appeal, the assessee vide letters dated 9th September 2019 has raised the following common additional ground in both these appeals:

1. That on the facts and circumstances of the case and in law, the assessment order dated March 30,2104 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(1) of the Income-Tax Act, 1961 (“Act”).

3. Since, in the aforesaid additional ground assessee has raised a purely legal and jurisdictional issue going to the root of the matter and which can be decided without making investigation into fresh facts, we admit the additional ground for adjudication. For deciding the aforesaid additional, only few relevant facts need to be discussed.

4. Briefly stated, assessee is a resident corporate entity and stated to be engaged in providing advisory services to its Overseas Associated Enterprises (AE). For the assessment year 2009-10, assessee filed its return of income on 29.09.2009 declaring income of

Rs.1,97,36,630. In course of the original assessment proceedings, the Assessing Officer, having noticed that assessee had entered into international transactions with its AE had made a reference to the Transfer Pricing Officer (TPO) to determine the Arms Length Price (ALP) of the international transactions. On 24.09.2014, the TPO passed an order under Section 92CA(3) of the Act, suggesting transfer pricing adjustment of Rs.1,11,62,277 to the ALP of the international transaction.

5. Pertinently, a search and seizure operation under Section 132 of the Act, in the meanwhile, was conducted in case of assessee on 28.03.2012. Consequent to such search and seizure operation, proceedings under Section 153A of the Act was initiated in case of the assessee for the impugned assessment year. Ultimately, the Assessing Officer completed the assessment under Section 153A of the Act vide order dated 30.03.2014 determining the total income at Rs.3,08,98,910. Variation between the income declared by assessee and as determined by the Assessing Officer was solely on account of the addition of transfer pricing adjustment of Rs.1,11,62,277 suggested by the TPO. Against the assessment order so passed,

assessee preferred an appeal before learned Commissioner (Appeals). Being unsuccessful before the first appellate authority, assessee has come in appeal before the Tribunal.

6. Shri Mukesh Bhutani, learned counsel appearing for the assessee, submitted, since, the assessee is an eligible assessee under Section 144C(15)(b) of the Act and the Assessing Officer has made variation to the income declared by the assessee, which is prejudicial to the interest of the assessee, he should have proposed a draft assessment order in terms with section 144C(1) of the Act. He submitted, instead of following mandatory procedure laid down under Section 144C(1) of the Act, the Assessing Officer has passed the final assessment order under Section 153A of the Act, which is wholly without jurisdiction, hence, non est in the eyes of law. For such proposition, learned counsel relied upon the following decisions:

- i) Decision of Hon'ble Supreme Court in case of Zuari Cement Ltd. vs. ACIT bearing SLP No. 16694/2013 (SC) affirming the decision of Hon'ble Bench of Andhra Pradesh High Court in the case of WP(C) No. 5557/2012(AP);*
- ii) DCIT vs. Control Risks India Pvt. Ltd.: [2019] 264 Taxman 91 (SC);*

- iii) *ACIT vs. Nokia India Pvt. Ltd.: [2018] 259 Taxman 91 (SC);*
- iv) *Turner International India (P) Ltd. vs. DCIT [2017] 398 ITR 177 (SC); &*
- v) *PCIT vs. Headstrong Services India Pvt. Ltd.: [2021] 278 Taxman 224 (Del).*

7. Shri Mahesh Shah, learned CIT (DR), appearing for the Revenue submitted that the provisions contained under Section 144C of the Act were brought to the Statute by Finance Act (No.2) Act, 2009 with retrospective effect from 01.04.2009. He submitted, the Central Board of Direct Taxes (CBDT) had issued an explanatory Circular, vide Circular No. 5 of 2010 dated 03.06.2010, explaining that, since, the amendment brought to the Statute by Section 144C of the Act has been made applicable with effect from 1st October 2009, the said provision will apply in relation to assessment year 2010-11 and subsequent assessment years. Thus, he submitted, when the circular issued by the Board explained that the provisions contained under Section 144C of the Act would apply from assessment year 2010-11, the Assessing Officer has not committed any jurisdictional error in framing assessment under Section 153A of the Act. In support of such

contention, learned CIT(DR) relied upon a decision of the Hon'ble Madras High Court in case of M/s. Vedanta Ltd. vs. ACIT Writ Petition No. 1729 of 2011, judgment dated 22.10.2019.

8. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. In so far as the factual aspect of the issue is concerned, there is no dispute that assessee had filed the return of income for the impugned assessment year on 29.09.2009. Whereas, thereafter, the Assessing Officer had made a reference to the TPO for determining the ALP of the international transaction with the AE. It is also a fact on record that while completing the assessment under Section 153A of the Act vide order dated 30.03.2014, the Assessing Officer has made a variation to the total income declared by assessee by adding back the transfer pricing adjustment suggested by the TPO.

9. Keeping in perspective the aforesaid factual position, let us examine the legal position. Undisputedly, section 144C of the Act was introduced to the Statute by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2009. The aforesaid provision reads as under:

"144C. (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, 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.

(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 sub-section (5) for further enquiry and passing of the assessment order.*
- (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, 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.

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the [Principal Commissioner or] Commissioner as provided in sub-section (12) of section 144BA.]

(14B) The Central Government may make a scheme, by notification in the Official Gazette, for the purpose of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and account, ability by-

- a) eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;*
- b) optimising utilization of the resources through economies of scale and functional specialisation;*
- c) introducing a mechanism with dynamic jurisdiction for issuance or directions by dispute resolution panel.*

(14C) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (14B), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, [2024].

(14D) Every notification issued under sub-section (14B) and sub-section (14C) shall, as soon as may be after the notification is issued , be laid before each House of Parliament.]

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means,—

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any non-resident not being a company, or any foreign company."

10. On a reading of sub-section(1) of Section 144C, it becomes very much clear that it incorporates a non-obstante clause, hence, overrides all other provisions in the Act, in so far as, they are contrary to section 144C of the Act. Further, the provision mandates that after 1st October 2009, if, the Assessing Officer proposes to make any variation in the income or loss returned by an eligible assessee, which is prejudicial to the interest of the said eligible assessee, in the first instance, he has to forward a draft of the proposed order of assessment to the concerned assessee for enabling him to either object to the draft assessment order

;before the Dispute Resolution Panel (DRP) or accept the variation proposed by the Assessing Officer. In case, assessee objects to the draft assessment order before the DRP within the prescribed period of limitation, then, the Assessing Officer has to pass the final assessment order implementing the directions of the learned DRP. Otherwise, the Assessing Officer shall complete the assessment on the basis of the draft assessment order within the period of limitation prescribed under sub-section (4) read with sub section (3) of section 144C of the Act. The expression “eligible assessee” has been defined under sub-section (15) of section 144C of the Act. As per sub-section (15)(b)(i) of section 144C of the Act, eligible assessee means any person in whose case the variation referred to in sub-section(1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section(3) of section 92CA of the Act.

11. Thus, if, we apply the provisions of section 144C of the Act to the facts of the present appeal, undoubtedly, assessee qualifies as an eligible assessee under sub-section (15)(b)(i) of section 144C of the Act. Further, it is an established fact on record that the variation made by the Assessing Officer to the income returned by the assessee is as a

consequence of the order of TPO passed under Section 92CA(3) of the Act. It is also an established fact on record that the Assessing Officer has made the variation to the income returned by assessee after the cut off date of 1st day of October, 2009. Therefore, the provisions of section 144C(1) are clearly applicable to the assessee. However, it is a fact on record that instead of forwarding a draft assessment order in terms with the mandatory provisions of section 144C(1) of the Act, the Assessing Officer has passed a final assessment order under Section 153A of the Act. Pertinently, though, Section 153A of the Act overrides certain provisions of the Act, however, it has no impact on section 144C of the Act.

12. A plain reading of section 144C(1) of the Act makes the provision very much clear and leaves no room for any ambiguity. Irrespective of the assessment year involved, it is incumbent upon the Assessing Officer to propose a draft assessment order, in case, he makes any variation to the income returned by an eligible assessee after the 1st day of October 2009, which is prejudicial to the interest of such assessee. Thereafter, the procedure laid down in the other provisions of section 144C would follow. Thus, in sum and substance,

section 144C is a complete code by itself and lays down the mechanism of assessment in respect of an eligible assessee. To our mind, the entire controversy regarding applicability of section 144C to assessment years prior to assessment year 2010-11 was triggered by CBDT Circular No. 5/2010 dated 03.06.2010. While interpreting provisions contained under Section 144C of the Act, vis-à-vis, the clarificatory circular issued vide CBDT by Circular No. 5/2010 dated 03.06.2010, Hon'ble Andhara Pradesh High Court, in case of Zuari Cement Ltd. Vs. ACIT (supra) has held as under:

“We have noted the contentions of the respective parties.

S. 144C of the Act was introduced by the Finance (No.2) Act, 2009 and sub-sections (1) to (8) thereof states:

"144C. Reference to dispute resolution panel.—(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, 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.

(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 sub-section (5) for further enquiry and passing of the assessment order.*

A reading of the above section shows that if the Assessing Officer proposes to make, on or after

01.10.2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forwarded it to the assessee and after the assessee files his objections, if any, the Assessing Officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.

In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs.52.14 crores u/s.92CA of the Act on 20.09.2011 and forwarded it to the Assessing Officer and to the assessee under sub-section (3) thereof. The Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 01.10.2009, the cut off date prescribed in sub-section (1) of S. 144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly this has not been done and the respondent has passed a final assessment order dt. 23.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S. 144C of the Act and is without jurisdiction, null and void.

The contention of the Revenue that the circular No. 5/2010 of the CBDT has clarified that the provisions of S. 144C shall not apply for the assessment year 2008-09 and would apply only from the assessment year 2010-11 and later years is not tenable in as much as the language of sub-section (1) of S. 144C referring to the cut off date of 01.10.2009 indicates an intention of the legislature to make it applicable, if there is a proposal by the Assessing Officer to make a variation in the income or loss returned by the assessee which is prejudicial to the assessee, after

1.10.2009. Therefore, this particular provision introduced by Finance (No.2) Act, 2009 would apply if the above condition is satisfied and other provisions, in which similar contrary intention is not indicated, which were introduced by the said enactment, would apply from 01.09.2009 i.e., from the assessment year 2010-11.

It is not disputed that the memorandum explaining the Finance Bill and the Notice and clauses accompanying the Finance Bill which preceded the Finance (No.2) Act, 2009 clearly indicated that the amendments relating to S. 144C would take effect from 01.10.2009. In our view, the circular No. 5/2010 issued by the CBDT stating that S. 144C(1) would apply only from the assessment year 2010-11 and subsequent years and not for the assessment year 2008-09 is contrary to the express language in S. 144C(1) and the said view of the Revenue is unacceptable. The circular may represent only the understanding of the Board/Central Government of the statutory provisions, but it will not bind this court or the Supreme Court. It cannot interfere with the jurisdiction and power of this court to declare what the legislature says and take a view contrary to that declared in the circular of the CBDT (rattan Melting and Wire Industries Case (1 supra), Indra Industries (2 supra). The Revenue has not been able to persuade us to take a contra view by citing any authority.

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.”

13. Thus, the aforesaid observations of the Hon'ble Andhara Pradesh High Court very aptly clarifies the legal position regarding applicability of section 144C in case of an eligible assessee. It is worthwhile to mention, a Special Leave Petition filed by the Revenue against the aforesaid decision of the Hon'ble Andhara Pradesh High Court was dismissed by the Hon'ble Supreme Court vide order dated 27.09.2013. Thus, the decision of the Hon'ble Andhara Pradesh High Court in case of Zuari Cement Ltd. (supra) has attained finality.

14. As discussed earlier, Revenue's case rests on Circular No. 5/2010 dated 03.06.2010 issued by the CBDT, which states that section 144C of the Act would apply from assessment year 2010-11 and subsequent assessment years. However, it is worth mentioning, Circular No. 5 of 2010 dated 03.06.2010 was subsequently superseded by another circular issued by the CBDT vide Circular No. 9/2013 dated 19.11.2013 which reads as under:

“File No. 142/20/2013-TPL

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

Dated, the 19th November, 2013

Sub: Clarification in respect of Circular No.5/2010 – F. No. 142/13/2010 –SO
(TPL) dated 03.06.2010- regarding.

Section 144C, providing for reference to Dispute Resolution Panel (DRP), was inserted in the Income-tax Act, 1961 by Finance (No.2) Act, 2009. Subsection (1) of section 144C reads as under:

“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 (hereinafter 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. Explanatory Circular for Finance (No.2) Act, 2009 i.e. Circular No. 5 of 2010 dated 03.06.2010, in para 45 has explained the said new section 144C and the consequential amendments made in other sections of Income-tax Act. Para 45.5 of the Circular No.5/2010 dated 03.06.2010 reads as under:

“45.5 Applicability: These amendments have been made applicable with effect from 1st October, 2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. The Dispute Resolution Panel Rules have been notified by S.O. No. 2958 (E) dated 20th November, 2009.”

In the above extracted Para 45.5 there has been an inadvertent error in stating the applicability of the provisions of section 144C inserted vide Finance (No.2) Act, 2009 that amendments will apply in relation to the assessment year 2010- 11 and subsequent assessment years. Accordingly, para 45.5 is replaced with the following:

“45.5. Applicability: Section 144C has been inserted with effect from 1st April, 2009. Accordingly, the Assessing Officer is required to forward a draft assessment 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. In other words section 144C is applicable to any order which proposes to make variation in income or loss returned by an eligible assessee, on or after 1st October, 2009 irrespective of the assessment year to which it pertains. Amendments to other sections of the Income-tax Act referred to in para 45.3 of the circular 5/2010 dated 3rd June, 2010 shall also apply from 1st October, 2009”

-sd- [Ashis Mohanty]

Under Secretary [Tax Policy & Legislation-IV]”

15. In the aforesaid circular, the Board has clarified that section 144C of the Act is applicable to any order which proposes to make variation in income or loss returned by an eligible assessee on or after

Ist October 2009, irrespective of the assessment year to which it pertains.

16. Interestingly, on 30.03.2014, when the Assessing Officer passed the impugned assessment order under Section 153A of the Act, CBDT Circular No. 9/2013 dated 19th November 2013 was very much in existence. It is fairly well settled, circular/notifications issued by the Board are binding on the statutory authorities, such as, the Assessing Officer. Of course, we hasten to add, CBDT Circulars cannot override statutory provisions. Therefore, the Assessing Officer has not only failed to implement the mandatory provision of section 144C(1) of the Act but has also gone against CBDT Circular No. 9/2013 dated 19th November 2013.

17. At this stage, it is necessary to take note of the following observations of Hon'ble Gujarat High Court in case of CIT vs. C-Sam (India) Pvt. Ltd.[2017] 84 taxmnn.com 261(Gujarat):

“6. These statutory provisions make it abundantly clear that the procedure laid down under Section 144C of the Act is of great importance and is mandatory. Before the Assessing Officer can make variations in the returned income of an eligible assessee, as noted, sub-section (1) of Section 144C lays down the procedure to be followed notwithstanding anything to the

contrary contained in the Act. This non-obstate clause thus gives an overriding effect to the procedure "notwithstanding anything to the contrary contained in the Act". Sub-section (5) of Section 144C empowers the DRP to issue directions to the Assessing Officer to enable him to complete the assessment. Sub-section (10) of Section 144C makes such directions binding on the Assessing Officer. As per sub-section (13) of Section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.

*7. The procedure laid down under Section 144C of the Act is thus of great importance. When an Assessing Officer proposes to make variations to the returned income declared by an eligible assessee he has to first pass a draft order, provide a copy thereof to the assessee and only thereupon the assessee could exercise his valuable right to raise objections before the DRP on any of the proposed variations. In addition to giving such opportunity to an assessee, decision of the DRP is made binding on the Assessing Officer. It is therefore not possible to uphold the Revenue's contention that such requirement is merely procedural. The requirement is mandatory and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the Assessing Officer but by the DRP. Interestingly, once the DRP gives directions under sub-section (5) of Section 144C, the Assessing Officer is expected to pass the order of assessment in terms of such directions without giving any further hearing to the assessee. Thus, at the level of the Assessing Officer, the directions of the DRP under sub-section (5) of Section 144C would bind even the assessee. He may of course challenge the order of the Assessing Officer before the Tribunal and take up all contentions. Nevertheless at the stage of assessment, he has no remedy against the directions issued by the DRP under **sub-section (5)**. All these provisions amply demonstrate that the*

legislature desired to give an important opportunity to an assessee who is likely to be subjected to upward revision of income on the basis of transfer pricing mechanism. Such opportunity cannot be taken away by treating it as purely procedural in nature.

8. Reference by the Revenue to the circulars dated 03.06.2010 and 19.11.2013 in this regard would be of no avail. First of these circulars was an explanatory circular issued by the Finance Ministry in which it was provided that these amendments (which included [Section 144C](#) of the Act) are made applicable with effect from 01.10.2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. In the latter clarificatory circular dated 19.11.2013, it was provided that in the earlier circular there was an inadvertent error and [Section 144C](#) would apply to any order which is being passed after 01.10.2009 irrespective of the concerned assessment year. The latter circular was thus merely in the nature of a clarificatory circular and clarified which all along was the correct position in law. Sub-section (1) of [Section 144C](#) itself in no uncertain terms provides that the Assessing Officer shall forward a draft order to the eligible assessee, if he proposes to make any variation in the income or loss which is prejudicial to the interest of the assessee on or after 01 st day of October 2009. The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the Assessing Officer proposed to make after 01.10.2009. The earlier circular dated 03.06.2010 did not lay down the correct criteria in this regard. The assessee cannot be made to suffer on account of any inadvertent error which runs contrary to the statutory provisions. No question of law arises. Tax appeal is therefore dismissed.”

18. As has been observed by Hon'ble Gujarat High Court, the provision contained under Section 144C (1) of the Act is very much clear and permits no ambiguity. Therefore, the Circulars issued by the Board, in any case, cannot override the clear statutory provision as contained under Section 144C(1) of the Act. It is noteworthy, in case of DCIT vs. Control Risk India (P) Ltd. (supra), the Hon'ble Supreme Court has upheld the decision of Hon'ble jurisdictional High Court, laying down the ratio that consequent upon an order of the TPO under Section 92CA(3) of the Act, it would be incumbent upon the Assessing Officer to pass a draft assessment order under Section 144C(1) of the Act. The other decisions cited by learned counsel for the assessee express identical view.

19. We are conscious of the fact that in case of M/s. Vedanta Ltd. Vs. ACIT (supra), the Hon'ble Madras High Court has held that provisions of section 144C would be applicable from assessment year 2010-11 and subsequent assessment years. However, with due respect, we are unable to persuade ourselves to apply the ratio laid down in case of M/s. Vedanta Ltd. Vs. ACIT (supra) due to the following reasons. Firstly, the decision of the Hon'ble Andhra Pradesh

High Court in case of Zuari Cement Ltd. (supra) was not considered in case of M/s. Vedanta Ltd. (supra). Secondly, the decision in case of Zuari Cement Ltd. (supra) was rendered by the Division Bench of a High Court, whereas, the decision in case of M/s. Vedanta Ltd. (supra) was rendered by a single Judge of a High Court. In our humble opinion, as per the *Principles of Stare Decisis*, a decision rendered by a Bench of superior strength would get precedence over a decision rendered by a Bench of lesser strength. Therefore, respectfully following the decision of the Hon'ble Andhara Pradesh High Court in case of Zuari Cement Ltd. (supra) and the other decisions cited by the learned counsel for the assessee, we hold that the Assessing Officer has committed a gross jurisdictional error in not following the mandatory provisions of section 144C of the Act. Therefore, the impugned assessment order passed under Section 153A of the Act, being wholly without jurisdiction, is void ab initio. Accordingly, the assessment order dated 30.03.2014 passed under Section 153A of the Act is hereby quashed. Resultantly, the impugned order of learned Commissioner (Appeals) is set aside.

20. In so far as assessee's appeal in ITA No.1377/Del/2016 relating to assessment year 2010-11 is concerned, facts are identical except variation in figures. Therefore, our decision in ITA No.1376/Del/2016 (supra) will apply mutatis mutandis. However, we cannot restrain ourselves from observing that the approach of the Assessing Officer in completing the assessment under Section 153A of the Act in this assessment year is quite perplexing. As discussed earlier, the entire edifice of Revenue's defence is built upon the argument that as per CBDT Circular No. 5/2010 dated 03.06.2010, the provisions of section 144C of the Act are applicable from assessment year 2010-11. Therefore, even going by the aforesaid stand of Revenue, Assessing Officer should have completed the assessment following the procedure laid down under Section 144C of the Act. However, that is not the case. Thus, assessee's case in assessment year 2010-11 stands on terra firma. Therefore, the assessment order dated 30.03.2014 passed under Section 153A of the Act is hereby quashed. Resultantly, impugned order of learned Commissioner (Appeals) is set aside.

21. Since, the appeals are decided on this legal issue, all other grounds raised by assessee having rendered academic are not required

to be decided in the present appeals. Hence, those grounds having become infructuous, are dismissed.

22. In the result, both the appeals are allowed, as indicated above.

Order pronounced in the open court on 30th August, 2022.

**Sd/-
(G.S. PANNU)
PRESIDENT**

**Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER**

Dated: 30th August, 2022.
Mohan Lal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation (Order drafted through Dragon software):	02.08.2022
2.	Date on which the draft of order is placed before the Dictating Member:	05.08.2022
3.	Date on which the draft of order is placed before the other Member:	22.08.2022
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	24.08.2022
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	30.08.2022
6.	Date on which the final order received after having been singed/pronounced by the Members:	30.08.2022
7.	Date on which the final order is uploaded on the website of ITAT:	31.08.2022
8.	Date on which the file goes to the Bench Clerk	31.08.2022
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	