

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'C' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)  
&  
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 139/KOL/2021  
Assessment Year: 2014-2015**

***Zydus Healthcare Limited,.....Appellant  
(Successor to Zydus Healthcare Sikkim),  
4<sup>th</sup> Floor, 'D' Wing,  
Zudus Corporate Park,  
Scheme No. 63, Survey No. 536,  
Khoraj (Gandhinagar),  
Nr. Vaishnodevi Circle,  
Ahmedabad, Gandhinagar, Gujrat-382481  
[PAN: AAACG1895Q]  
-Vs.-***

***Assistant Commissioner of Income Tax,....Respondent  
Circle-3(2), Gangtok,  
Sikkim-737101***

**Appearances by:**

*Shri Ajit Kumar Jain, CA and Sonal Pandey, A.R.,  
appeared on behalf of the assessee*

*Shri G. Hukugha Sema, CIT, appeared on behalf of the  
Revenue*

**Date of concluding the hearing : January 18, 2023  
Date of pronouncing the order : February 20, 2023**

**O R D E R**

**Per Rajpal Yadav, Vice-President (KZ):-**

The assessee is in appeal before the Tribunal against the order of ld. Assessing Officer dated 24.02.2021 passed under

section 143(3) /263 read with section 144C of the Income Tax Act, 1961 in A.Y. 2014-15.

2. Originally the assessee has raised six grounds of appeal. However, by way of an application dated 02.11.2022, the assessee sought to raise additional grounds of appeal, which read as under:-

*(1) On the facts and circumstances of the case and in law, Learned Assessing Officer ('AO') erred in issuing notice of demand under section 156 of the Act and penalty notice initiating under section 271(1 )(c) of the Act along with draft assessment order dated 30 December 2019, and thus, contravening the provisions of section 144C of the Act. Therefore the draft assessment order passed by the Learned AO is bad in law and deserves to be quashed.*

*(2) On the facts and circumstances of the case and in law, the final assessment order dated 24 February 2021 is issued beyond the time limit as prescribed under section 153 of the Act. Consequently, the final assessment order is time barred and deserves to be quashed.*

3. The ld. Counsel for the assessee, in support of his application for permission to raise additional grounds of appeal, has relied upon following decisions:-

*(i) National Thermal Power Co. Ltd v CIT [1998] 229 ITR 383 (SC);*

*(ii) Jute Corporation of India Limited v CIT [1991] 187 ITR 688 (SC);*

*(iii) CIT v Nelliappan (S.) [1967] 66 ITR 722 (SC);*

*(iv)Ahemdabad Electricity Co. Ltd. v CIT | 1993] 199 ITR 351 (Bom.);*

*(v)Inaroo Ltd. v CIT [1993] 204 ITR 312 (Bom.);*

*(vi) Ashok Vardhan Birla v CWT [1994] 208 ITR 958 (Bom.);*

*(vii) CIT v Govindram Bros. Pvt. Ltd. [1983] 141 ITR 626 (Bom.).*

4. The contention of the assessee for permission to raise additional grounds of appeal is that Scheme of the Income Tax Act contemplates that under section 144C of the income Tax Act, the ld. Assessing Officer was required to first prepare a draft assessment order and such draft assessment order is to be served upon the assessee providing it to give an opportunity for filing the objections against such an order. In the present case, though the title of the assessment order does indicate that it is a draft order under section 144C of the Income Tax Act, but the ld. Assessing Officer has not only determined the demand required to be paid by the assessee but also issued a demand notice under section 156 of the Income Tax Act simultaneously. The ld. Assessing Officer thereafter issued a notice under section 274 of the income Tax Act inviting the explanation of the assessee as to why penalty under section 271(1)(c) be not imposed upon the assessee. This notice is also dated 30.12.2019, i.e. the day when a notice in Form No. 7 under section 156 by raising the demand was issued. Thus according to the ld. Counsel, the Assessing Officer failed to adhere the procedure contemplated in section 144C of the Income Tax Act and the subsequent proceeding is a nullity. Therefore, the prayer has been made that since this issue will go to the root of the dispute itself, hence the assessee be

permitted to raise these additional grounds along with the other grounds of appeal.

5. The ld. D.R., on the other hand, was unable to controvert anything.

6. On due consideration of the above facts and circumstances, we are of the view that since it is necessary to determine whether the ld. Assessing Officer has exercised the jurisdiction correctly or not for determining the taxable income of the assessee. If the ld. Assessing Officer failed to determine the income of the assessee correctly in accordance with the Scheme of the Act, then probably the demand will not be sustainable upon the assessee. In the judgment of National Thermal Power Co. Limited, Hon'ble Supreme Court has duly laid down that if any issue goes to the root of the cause and does not require discovery of any new fact, then such a plea can be permitted to be raised at any stage. In the present situation, the assessee is only praying that additional plea may please be permitted to be included in the original ground of appeal and no jurisdictional aspect for debarring in raising such a plea is applicable. Considering the above, we admit these additional grounds of appeal and proceed to adjudicate them on merit.

7. Brief facts of the case are that the assessee-company had filed its return of income on 14.11.2014 declaring therein total

income of Rs.2,20,370/- and adjusted total income under section 115JC(1) of Rs.413,26,99,626/-. Subsequently this return was revised by filing a revised return of income on 31.03.2015 showing adjusted total income under section 115JC(A) of the Income Tax Act at Rs.391,69,68,350/-. The ld. Assessing Officer has accepted the returned income by way of an assessment order under section 143(3) of the Income Tax Act passed on 18.08.2016. The ld. Principal Commissioner, Siliguri took cognizance of revisionary powers under section 263 of the Income Tax Act and set aside the assessment order vide his order dated 19.12.2017, directing the ld. Assessing Officer to make a *denovo* assessment order following proper procedure to make reference to the ld. Transfer Pricing Officer (TPO) for determination of Arm's Length Price in respect of Domestic Transactions entered into by the assessee with its Associate Enterprises. The ld. Assessing Officer in pursuance of the order passed under section 263 of the Income Tax Act, 1961 made a reference to the ld. TPO after taking prior approval of ld. Principal CIT, Siliguri. The ld. TPO has submitted a report to the ld. Assessing Officer. The ld. Assessing Officer thereafter passed the alleged Draft Assessment Order. His concluding paragraph reads as under:-

*“4. In view of the adjustments made by the Transfer Pricing Officer, the total income of the assessee for the Assessment year 2014-15 is computed as under:-*

<i>Profit and Gains from Business or Profession</i>	<i>Rs.391,91,43,633/-</i>
<i>Adjustment as per TPO-2,</i>	<i>Rs.112,64,51,330</i>

<i>Kolkata's order dated 31.10.2019</i>	
<i>Business Income</i>	<i>Rs.504,55,94,963/-</i>
<i>Income from Other Sources</i>	<i>Rs. 3,24,716/-</i>
<i>Total Income</i>	<i>Rs.504,59,19,679/-</i>
<i>Less: Deduction under Chapter-VIA</i>	<i>Rs.391,92,47,980/-</i>
<i>Assessed Income</i>	<i>Rs.112,66,71,699/-</i>
<i>Assessed Income (R/o</i>	<i>Rs.112,66,71,700</i>

5. *The order is passed as per the provisions of section 143(3)/263 read with section 144C of the I.T. Act, 1961. Copy of Draft Assessment Order is issued to the assessee. Tax payable as per calculation sheet.*

6. *Penalty proceeding u/s 271(1)(c) of the I.T. Act, 1961 is initiated separately for furnishing inaccurate particulars of income.*

*Sd/-  
(R. Kiruthiga)  
DCIT, Circle-3(2), Gangtok".*

8. The Id. Assessing Officer has determined the taxable income assessable in the hands of the assessee. Thereafter he prepared a detailed computation of income available on pages no. 53 to 55 of the record. On page 56, the notice of demand issued under section 156 of the Income Tax Act dated 30.12.2019 is available. Accordingly, Id. Assessing Officer has raised the demand.

9. The Id. Counsel for the assessee while impugning the alleged final assessment order dated 24.02.2021 submitted that

the alleged Draft Order dated 30.12.2019 is not a simple Draft Assessment Order, rather it is final order, which culminated in determination of taxes payable by the assessee. The complete computation of income is annexed with this order. Simultaneously the ld. Assessing Officer has issued a demand notice under section 156, which enforced that the order passed was not a Draft Assessment Order, rather a final assessment order, which has determined the demand payable by the assessee. In order to give consequential effect to this final order, the ld. Assessing Officer has issued notice under section 274 read with section 271(1)(c) of the Income Tax Act dated 30.12.2019. It is a notice inviting the explanation of the assessee as to why penalty be not imposed upon it. Copy of this notice is available on page no. 57 of the record. The ld. Counsel for the assessee further submitted that this issue has come up before the Tribunal as well as Hon'ble Madras High Court in a large number of cases. He put reliance upon the following decisions, which are placed on record in the paper book and the index containing the citation reads as under:-

<u>Sl. No.</u>	<u>Name of the Case Law</u>	<u>Page No.</u>	<u>Relevant Page No.</u>	<u>Para Reference</u>
<i>A</i>	<i>Draft Assessment Order issued with Demand Notice and Penalty Notice</i>			
1	Atlas Copco (India) Limited ( <b>Pune Tribunal</b> ) ITA No.649/Pun/2013 & 1726/Pun/2014	01 – 17	4, 10, 1, 12 and 13	6, 13 14, 16
2	Kohler Power India Private Limited (Earlier known as “Lombardini India Private Limited”) ( <b>Pune Tribunal</b> ) (ITA No. 2467/PUN/2016)	18 – 30	19, 20 and 28	4 to 6
3	Perfetti Van Melle (India) Pvt. Ltd ( <b>Delhi Tribunal</b> ) (ITA No. 9116/DEL/2019)	31 - 55	32 36, 37 42 to 44 54	4 15 to 18, 23 to 28 34 and 35
4	Olympus Medical Systems India Pvt Ltd ( <b>Delhi Tribunal</b> ) (ITA No. 8892/DEL/2019)	56 – 71	58 and 70	7 and 8
5	Manorama Devi Jaiswal ( <b>Kolkata Tribunal</b> ) (I.T.A. No. 485/Kol/2020)	72 – 74	73 and 74	3 and 4
6	Vijay Television Private Ltd. ( <b>Madras High Court</b> ) (W.A. NOS. 1327 To 1329 OF 2014)	75 – 99	89 to 94 96 and 97	31, 36 to 39, and 46 to 49
7	Lionbridge Technologies Pvt Ltd ( <b>Bombay High Court</b> ) (ITA NO. 622 OF 2016)	100 – 105	104	11
8	Turner International India Pvt Ltd (Delhi High Court) (W.P.(C) 4260/2015)	106 – 111	108 to 111	8 to 11 15 to 17
9a	Zuari Cement Ltd. ( <b>Supreme Court</b> ) (CC 16694/2013)	112 – 112	112	-
9b	Zuari Cement Ltd. ( <b>Andhra Pradesh High Court</b> ) (W.P. No. 5557 of 2012)	113 – 123	120 to 122	-
<i>B</i>	<i>Time-limit prescribed w/s 144C and 153 to be mutually-inclusive</i>			
10	Roca Bathroom Products Private Limited ( <b>Madras High Court</b> )	124 – 178	160 to 169 174, 175	17 to 23 27

10. The ld. D.R., on the other hand, submitted that ld. Assessing Officer has issued a rectification order under section 154 of the Income Tax Act dated 16.03.2020 observing that this order be read as a Draft Assessment Order.

11. The ld. Counsel for the assessee pointed out that such an order is available on page no. 390 of the paper book, but submitted that as per sub-clause (2) of section 144C, the assessee was required to file his objections to the Dispute Resolution Panel within 30 days from receipt of the Draft Order.

This exercise has been carried out by the Id. Assessing Officer quite late, the impugned order, which attained finality on 13.12.2019. Thereafter he cannot change the color of a final order by terming it as a Draft Assessment Order. The Id. Assessing Officer has already served a demand notice as well as a show-cause notice for inviting its explanation as to why penalty should not be imposed upon the assessee under section 271(1)(c). Taking through the case law, he drew our attention towards the decision of the ITAT, Pune Bench, wherein elaborate discussion has been made on all these points, similarly to the decision of the ITAT, Delhi in the case of Perfetti Van Melle (India) Pvt. Limited.

12. We have duly considered the rival contentions and gone through the record carefully. We find that the first judgment relied upon by the assessee is in the case of Atlas Copco (India) Limited, copy of this decision has been placed in the paper book. In this case, the assessee filed Cross Objection in A.Y. 2008-09, which is time-barred by 1965 days. By way of the Cross Objection, the assessee raised additional ground of appeal. The Tribunal has condoned the delay in filing such a Cross Objection based on two decisions of the Hon'ble Bombay High Court in the case of Vijay Vishin Meghani -vs.- DCIT & Anr. (2017) 398 ITR 250, wherein Hon'ble Bombay High Court has held that "*none should be deprived of an adjudication on merits unless it is found that the litigant deliberately delayed the filing of appeal*".

13. The next decision relied upon by the ITAT is Anil Kumar Nehru and Another –vs.- ACIT (2017) 98 CCH 0469 (Bom. HC). In this case, Hon'ble Bombay High Court did not condone the delay of 1662 days but Hon'ble Supreme Court has reversed the decision of the Hon'ble Bombay High Court and condoned the delay. The one more factor, which was available before the Tribunal was that impugned order was open for debate and it is just a Cross Objection filed by the assessee. The rights in the hands of the appellant have not been crystallized. Therefore, the Tribunal made an elaborate discussion and held that such an order be termed as a complete order and if the Assessing Officer has adopted this procedure, then assessment order is null and void. The income offered in the return becomes total income of the assessee.

14. The second order relied upon by the ld. Counsel for the assessee is in the case of Kohler Power India Pvt. Limited (ITA No. 2467/PUN/2016). The Hon'ble Members in this case are same, who have decided the case of Atlas Copco (India) Limited. In this case also, this plea was raised by the assessee by way of an additional ground of appeal. The additional ground was admitted and thereafter Tribunal has held that assessment order is null and void. The Tribunal made reference to a large number of decisions including that of Hon'ble Madras High Court. We cannot do better than to extract the lucid discussion made by the Tribunal in this judgment, which reads as under:-

*“2. At the time of hearing, the Ld. AR of the assessee filed certain additional ground which pertains to violation of [Section 144C](#) of the Income Tax Act, 1961 (hereinafter referred to as „the Act”) by the Assessing Officer while framing the draft assessment order. The Ld. AR of the assessee contended that since this legal ground goes into the root of the matter, therefore, this ground should be admitted. The Ld. AR has placed reliance on the following decisions:*

- i) National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*
- ii) Jute Corporation of India Ltd. Vs. CIT, 187 ITR 688 (SC)*
- iii) Ahmedabad Electricity Co. Ltd. Vs. CIT, 199 ITR 351 (Bom.)*

*3. We have heard the submissions of the assessee and have perused the relevant documents filed before us as well as judicial pronouncements placed before us. Respectfully, following the binding judgments referred before us and taking totality of facts and circumstances, we are convinced that additional grounds goes to the root of the matter in deciding the issue of the assessee and hence, the additional ground is admitted for adjudication.*

*4. The assessee in this legal ground has challenged the assessment order dated 15.01.2013 as bad in law and void-ab-initio since it was passed in violation of [Section 144C](#) of the Act. The Ld. AR demonstrated that the assessment order dated 15.01.2013 was draft assessment order which is evident from the very heading of the order. Along with this draft assessment order, the Assessing Officer has issued notice of demand u/s.156 of the Act and penalty notice u/s.274 r.w.s.271(1)(c) of the Act and therefore, procedure laid down in [Section 144C](#) of the Act has been violated. The provisions of [Section 144C](#) spells out that on receipt of the draft order, the eligible assessee shall within thirty days of the receipt by him of the draft assessment order file his acceptance of the variations to the Assessing Officer or file his objections, if any, to such variation with the DRP. Thereafter, the Assessing Officer shall complete the assessment order on the basis of draft order.*

*5. In the present case, the contention of the Ld. AR is that along with draft order itself, notice of demand and penalty notice being issued is therefore in contravention to this provision. The Ld. AR of the assessee has placed reliance on the order of Co-ordinate Bench of the Tribunal, Pune in ITA No.546/PUN/2014 for the assessment year 2009-10 in the case of Skoda Auto India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax wherein the Tribunal referred to another*

*decision of the Pune Bench of the Tribunal in ITA No.566/PUN/2015 for assessment year 2010-11 in the case of DCIT, Circle-10, Pune Vs. Rehau Polymers (P) Ltd., 85 taxmann.com 23 (Pune-Trib.) wherein the facts are as follows:*

*"7. Briefly, in the facts of the case, the assessee had filed the return of income declaring total income of Rs.1,77,77,012/-. The case of assessee was selected for scrutiny. The first issue which arises in the present appeal is against notice issued under section 143(2) of the Act. However, without going into the merits of the said issue, we find that the Assessing Officer had made reference under section 92CA(1) of the Act to the Transfer Pricing Officer (TPO) to determine the arm's length price of international transactions undertaken by the assessee. The TPO vide order passed under section 92CA(3) of the Act dated 24.01.2014 applied CUP method and determined the arm's length price of international transactions of payment of service fees at Nil as against Rs.3,45,55,434/- determined by the assessee. The Assessing Officer passed the draft assessment order under section 143(3) r.w.s. 144C(1) of the Act dated 22.03.2014 and assessed the income at Rs.9,65,31,058/- on account of adjustment made as per order under section 92CA(3) of the Act and various other additions. The Assessing Officer vide para 11 observed that the income was assessed under section 143(3) r.w.s. 144C(1) of the Act at Rs.9.65 crores. He also directed charging of interest under sections 234A, 234B, 234C and 234D of the Act, as applicable. He further directed Issue Order, demand notice along with ITNS-150, issue notice under section 271(1)(c) of the Act. He further held that the order was a proposed / draft order of assessment passed under section 143(3) r.w.s. 144C(1) of the Act and he further held that the ITA No. 2467/PUN/2016 A.Y.2009-10 assessee shall within 30 days of the receipt of this draft order file acceptance of variations to the undersigned or file its objections against such variations with the Dispute Resolution Panel under intimation to the undersigned. The assessee filed objections before the DRP and the Assessing Officer also issued final assessment order under section 143(3) r.w.s. 144C(13) of the Act, dated 27.02.2015."*

*14. That on these facts, the Ld. AR had put forth the following arguments:*

*"8. The learned Authorized Representative for the assessee has pointed out that the draft assessment order passed in the case of assessee is actually not a draft assessment order since the demand notice along with ITNS-150 had been issued and also notice under section 274 r.w.s. 271(1)(c) of the Act was issued for initiation of penalty proceedings. He fairly admitted that though the Assessing Officer had in the said order said that it is a proposed / draft assessment order but in actual fact, it was assessment order passed by the Assessing Officer determining the demand payable in the case of assessee and has also initiated penalty proceedings under section 271(1)(c) of the Act by issue of notice under section 274 of the Act. The learned Authorized Representative for the assessee pointed out that the issue raised in the present appeal is squarely covered by the order of Tribunal in Suktas India (P) Ltd. Vs. ACIT (2017) 77 taxmann.com 19 (Pune - Trib.)"*

*15. The Ld. DR on the other hand, referred to the noting of the Assessing Officer and relied on the same.*

*16. That on the issue, the Co-ordinate Bench of the Tribunal, Pune has held as follows:*

*"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 Soltas 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 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 mis- interpreted 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 Suktas 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. Thus, the Cross Objection No.2 raised by the assessee is allowed. Since we hold the assessment order to be invalid in law, then all the other issues become academic in nature...."*

*17. We have perused the case records and heard the rival contentions. We have also considered the judicial pronouncement placed before us. The issue is clearly identifiable and is covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal, Pune as herein above referred.*

*Respectfully, following the same, we hold the draft assessment order to be bad in law and void ab initio and thereby allow the additional ground of appeal."*

*6. We have perused the case records and heard the rival contentions. We have also considered the judicial pronouncements placed before us. The issue is clearly identifiable and covered in favour of the assessee by the decisions rendered by the Co-ordinate Bench of the Tribunal, Pune in the case of Skoda Auto India Pvt. Ltd. Vs.*

*ACIT (supra.) and also in the case of DCIT, Circle-10, Pune  
Vs. Rehau Polymers (P) Ltd. (supra.).*

*Respectfully following the above referred decisions,  
we hold the draft assessment order to be bad in law and  
void-ab-initio and thereby allow the additional ground  
raised in appeal by the assessee”.*

15. The other decisions are in the similar line. In the case of Perfetti Van Melle (India) Pvt. Limited (ITA No. 9116/DEL/2019), one more angle was debated before the Tribunal. In that case, it was submitted by the Revenue that since the assessee has participated in subsequent proceeding and it was well aware that the alleged order was a draft assessment only, therefore, the assessee cannot be allowed to probate/ reprobate. In other words, the assessee has participated in the proceeding by filing objections on the so-called draft order meaning thereby in practicality the assessee has construed it as a draft order. This aspect was considered by the Tribunal and the discussions made by the Tribunal on all these aspects read as under:-

*“21. We fail to persuade ourselves to agree with the submissions of the ld. DR. In our understanding of the law, there is no provision in the I.T. Act which provides for proposed/draft notice of demand and secondly, whether the demand has been entered in Demand and Collection Register or the order uploaded in the ITD is and internal matter/procedure of the Revenue and cannot be taken into consideration to decide whether the demand notice issued alongwith order dated 27.12.2018 complete the proceedings.*

*22. In so far as the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works is concerned, the decision of the Hon'ble High Court of Gujarat has been in the context of whether notice of demand is an integral part of assessment or not and while deciding the issue, the Hon'ble High Court has considered the decision of the Hon'ble Supreme Court in the case of Kalyan Kumar Ray [supra] and, therefore, the decisions referred to hereinabove are*

*in the same context in which the facts of the case in hand are considered.*

*23. In light of the aforesaid decision, we are of the considered opinion that the Assessing Officer has by-passed the relevant sub-sections i.e. sub-section (3) and (13) to section 144C of the Act mentioned elsewhere.*

*24. Whether by by-passing mandatory provisions of the Act can assessment survive? The answer has been given by the Hon'ble Supreme Court in the case of Dipak Babaria 3SCC 502 wherein the Hon'ble Supreme Court has held as under:*

*"If the law requires that a particular thing should be done in a particular manner, it must be done in that way and none other. State cannot ignore the policy intent and procedure contemplated by the statute.*

*25. In light of the above ratio laid down by the Hon'ble Supreme Court, we are of the considered opinion that by issuing the demand notice on 27.12.2018 itself the Assessing Officer has by passed all the mandatory sub-sections of section 144C of the Act.*

*26. The ld. DR has placed reliance on the decision of the Co-ordinate Bench in the case of Price Water House Company 117 Taxmann.com 276 in ITA No. 2298/KOL/2016. It is the say of the ld. DR that under similar circumstances, the Tribunal has upheld the assessment order. The ld. DR vehemently stated that by participating in subsequent proceedings, the assessee was well aware that the order dated 27.12.2018 is merely a draft assessment order and not a final assessment order. The ld. DR concluded by saying that the assessee cannot approbate and reprobate.*

*27. The question whether participation in subsequent proceedings would estop the assessee from challenging the validity of the order dated 27.12.2018 has been answered by the Hon'ble Supreme Court in the case of V Mr. T.P. Firm MUAR in 56 ITR 67 wherein the Hon'ble Supreme Court has laid down the ratio "Approbate and Reprobate" is only species of estoppel. It applies only to conduct of parties as in the case of estoppel, it cannot operate against the provisions of a statute. IF particular income is taxable under the [I.T. Act](#), it cannot be taxed on the basis of estoppel or any other equal document. Equity is out of placed in tax place. A particular income is either exigible under the Income tax under taxing statute or not. If it is not, the ITO Has no power to tax the said income."*

*28. With our utmost respect to the co-ordinate bench [Kolkata], we fail to persuade ourselves to follow the same as the said decision of*

*the Tribunal has not considered the decision of the Hon'ble Supreme Court discussed hereinabove and the decision is per incurium.*

*29. The ld. DR has tried to distinguish the decisions relied upon by the ld. counsel for the assessee in his written submissions.*

*30. We have carefully perused the written submissions of the ld. DR. We are of the considered view that the decisions relied upon by us extracted hereinabove are directly related to the underlying facts in issue before us.*

*31. Another argument of the ld. DR that merely issue of notice of demand and penalty notice will not convert draft assessment order into final assessment order, does not hold any water, in as much as the mandatory provisions of the Act have to be followed and the Assessing Officer does not get any leverage for bypassing the mandatory provisions of the Act.*

*32. We find that there are series of decisions of the Tribunal wherein in the set aside proceedings, if the Assessing Officer has not followed the mandatory steps mentioned in [section 144C](#) of the Act, assessment order has been treated as void. To name a few such decisions, Nikon India Pvt Ltd ITA Nos. 8752 & 8753/DE/2019. The principles laid down by the co-ordinate bench in this decision were approved by decisions by various High Courts like the Hon'ble High Court of Delhi in the case of Turner International Pvt Ltd 398 ITR 177 and JCB India Ltd WPC 3399/2016.*

*33. The ld. DR has also drawn strong support from the provisions of [section 292B](#) of the Act stating that the subsequent participation of the assessee would debar the assessee to raise this issue before the appellate authority. The answer to this has been given by the Hon'ble High Court of Delhi in the case of JCB India Ltd [supra]. The relevant findings read as under:*

*"14. The short question that arises for consideration is whether, after the remand proceedings, the AO could have, without issuing a draft assessment order under Section 144 C of the Act, straightway issued the final assessment order. 15. Mr Syali, learned Senior Counsel for the Assessee, referred to the decision of this Court dated 17th May 2017 passed in W.P. (C) No. 4260/2015 (Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax, Circle 25(2), New Delhi) to urge that the AO could not have passed the final assessment order without complying with the mandatory requirement under [Section 144C](#) of the Act whereby first a draft order had to be*

issued in respect of which an objection can be filed by the Assessee before the DRP. The failure to do so, according to Mr. Syali, was not a mere irregularity. He further referred to a decision of the Gujarat High Court dated 31st July 2017 in Tax Appeal No. 542 of 2017 ([Commissioner of Income Tax, Vadodara-2 v. C-Sam \(India\) Pvt. Ltd.](#)) W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 7 of 12 16. In response, Mr. Sanjay Jain, learned Additional Solicitor General of India appearing for the Revenue, submitted that there was an efficacious alternative remedy available to the Petitioner to file appeals against the impugned final assessment orders passed by the AO. It is denied that it was mandatory on the part of the AO to pass a draft assessment order since this was a second round before the TPO pursuant to remand by the ITAT. Moreover, it was not as if the ITAT had set aside the entire assessment order of the AO. The setting aside was only in respect of the transfer pricing adjustment and that too with a specific direction to the AO for determining the arms length price "after considering fresh comparables." Since the assessment itself was not cancelled by the ITAT or completely set aside, it is the provisions of [Section 153](#) (3) (ii) of the Act which would apply. Mr Jain submitted that the requirement of passing a draft assessment order under [Section 144C](#) was only in the first instance and not after the remand by the ITAT.

17. The Court is unable to agree with the submissions made on behalf of the Revenue by Mr. Jain. [Section 144C](#) (1) of the Act is unambiguous. It requires the AO to pass a draft assessment order after receipt of the report from the TPO. There is nothing in the wording of [Section 144C](#) (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.

18. It was then contended by Mr. Jain that the assessment order passed by the AO should not be declared to be invalid because of the failure to first W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 8 of 12 pass a draft assessment order under [Section 144C](#) of the Act. In this regard, reference is made to [Section 292B](#) of the Act.

19. As already noted, the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality. [Section 292B](#) of the Act would not protect such an order. This has been explained by this Court in its decision dated 17th July 2015 passed in ITA No. 275/2015 ([Pr. Commissioner of Income Tax, Delhi-2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.](#)) where it was held: "[Section 292B](#) of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act."

20. The Court further observed that [Section 292B](#) of the Act cannot save an order not passed in accordance with the provisions of the Act. As the Court explained, "the issue involved is not about a mistake in the said order but the power of the AO to pass the order."

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\(1\)](#) W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 9 of 12 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." W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 10 of 12 22. In the decision of the Gujarat High Court in C-Sam (India) (supra), the Court negated the plea that non-compliance with the terms of Section 144C of the Act is merely an 'irregularity'. The Gujarat High Court held that it was of 'great importance and mandatory'. The following passages of the said decision of Gujarat High Court are relevant for the present purposes: "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-obstante 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 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 a 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 W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 11 of 12 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." 23. In the present case, just as in Turner International (supra), it is submitted that, at the most, failure to pass a draft assessment order under [Section 144C](#) of the Act is a curable defect and that the Court should now delegate the parties to a stage as it was when the TPO issued a fresh order after the remand by the ITAT. 24. This very argument of the Revenue has been negated by the Court in Turner International (supra) where it was observed in paras 15 and 16 as under: "15. Mr. Dileep Shivpuri, learned counsel for the Revenue sought to contend that the failure to adhere to the mandatory requirement of issuing a draft assessment order under [Section 144C](#) (1) of the Act would, at best, be a curable defect. According to him the matter must be restored to the AO to pass a draft assessment order and for the Petitioner, thereafter, to pursue the matter before the DRP. W.P.(C) Nos. 3399/2016, 3429/2016 & 3431/2016 Page 12 of 12 16. The Court is unable to accept the above submission. The legal position as explained in the above decisions is unambiguous. The failure by the AO to adhere to the mandatory requirement of [Section 144C](#) (1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings." 25. For all of the aforementioned reasons, the Court finds no difficulty in holding that the impugned final assessment orders dated 30th March 2016 passed by the AO for AYs 2006-07, 2007-08 and 2008 -09 are without jurisdiction on account of the failure, by the AO, to first pass a draft assessment order and thereafter, subject to the objections filed before the DRP and the orders of the DRP, to pass the final assessment order. The Court also sets aside the orders of the TPO dated 30th March*

*2016 issued pursuant to the remand by the ITAT."*

*34. Considering the facts of the case in totality, in the light of the decisions discussed hereinabove, we have no hesitation to hold that the proceedings culminated on 27.12.2018 when the demand notice was issued and served upon the assessee along with penalty notice u/s 274 of the Act and, therefore, all the subsequent proceedings and orders become non est. The additional ground is, accordingly, allowed.*

*35. Since we have held that the order of the DRP and final assessment orders are non est, therefore, we do not find it necessary to dwell into the grounds raised in the Appeal Memo".*

16. In the light of above, if we examine the facts of the present case, then it would reveal that Id. Assessing Officer has passed a final assessment order on 30.12.2019 only made a mention in the Title "Draft Order under Section 144C of the Income Tax Act, 1961". Except this Title, the Id. Assessing Officer has complied with all the mandatory requirement for passing an assessment order, i.e. issuance of a demand notice as well as show-cause notice for inviting assessee's explanation as to why penalty under section 271(1)(c) be not imposed upon it for furnishing inaccurate particulars of income. The ITAT, Delhi in the case of Perfetti Van Melle (India) Pvt. Limited has observed that there is no provision in the Income Tax Act, which provides for a proposed/draft notice of demand. The moment the demand notice is issued to the assessee, it is to be termed income assessable to tax, has been determined. The issue is squarely covered in favour of the assessee by series of judgment at the end of the Tribunal as well as by the Hon'ble High Courts. Therefore, we allow these additional grounds of appeal and quash the alleged assessment order by declaring it null and void. As observed by ITAT, Pune in

the case of Atlas Copco (India) Limited, the income offered in the return becomes total income of the assessee.

**17. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on 20<sup>th</sup> February, 2023.

Sd/-

**(Girish Agrawal)  
Accountant Member**

Sd/-

**(Rajpal Yadav)  
Vice-President (KZ)**

***Kolkata, the 20<sup>th</sup> day of February, 2023***

*Copies to : (1) Zydus Healthcare Limited,  
(Successor to Zydus Healthcare Sikkim),  
4<sup>th</sup> Floor, 'D' Wing,  
Zudus Corporate Park,  
Scheme No. 63, Survey No. 536,  
Khoraj (Gandhinagar),  
Nr. Vaishnodevi Circle,  
Ahmedabad, Gandhinagar, Gujrat-382481*

*(2) Assistant Commissioner of Income Tax,  
Circle-3(2), Gangtok, Sikkim-737101;*

*(3) Commissioner of Income Tax- ;*

*(4) The Departmental Representative*

*(5) Guard File*

*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***