

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH  
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&  
MS.PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.1222/Mum/2021  
(Assessment Year : 2016-17)**

M/s. Jaguar Land Rover India Limited 202/203, Ceejay House Shivsagar Estate Dr. Annie Besant Road Worli, Mumbai-400018	Vs.	Additional/Joint/ Deputy/Assistant Commissioner of Income Tax / Income Tax Officer, National e-Assessment Centre, Delhi
<b>PAN/GIR No.AADCJ0039Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri J.D. Mistry a/w Shri Paras Savla / Shri Pratik Poddar / Shri Rajnandini Shukla
Revenue by	Shri Vachashpati Tripathi
<b>Date of Hearing</b>	<b>21/09/2023</b>
<b>Date of Pronouncement</b>	<b>30/10/2023</b>

**आदेश / O R D E R**

**PER AMIT SHUKLA (J.M):**

The aforesaid appeal has been filed by the assessee against final assessment order dated 23/04/2021 passed u/s. 143(3) r.w.s. 144C(13) passed in pursuance of directions given by DRP vide order dated 19/03/2021 for A.Y.2016-17.

2. In various grounds of appeal assessee-

*Firstly*, has challenged transfer pricing adjustment amounting to Rs.99,90,30,469/- on account of advertisement, marketing and promotion expenses.

*Secondly*, treating the domestic purchase of vehicles from M/s. Tata Motors Ltd., as an international transaction.

*Thirdly*, adjustment on the distribution segment for the purchase of CBU's, spare parts and accessories from Jaguar Land Rover Limited, UK; and

*Lastly*, assessee has also challenged disallowance u/s.40a(ia) of Rs.1,89,33,194/-.

Besides this also assessee has also raised a legal ground **that the TPO order has been passed beyond the period of limitation stipulated u/s.92CA(3A) of the Act and therefore, the whole transfer pricing adjustment is bad in law and also the Corporate tax addition deserves to be quashed because final assessment order is barred by limitation.**

3. The brief facts are that assessee, i.e., Jaguar Land Rover India Limited is 100% subsidiary of Jaguar Land Rover Limited, UK which is manufacturer of sports and luxury vehicles and in India JLR UK sells products to subsidiary companies like assessee which are responsible for the import, marketing, sale and distribution of the products to independent Jaguar and Land Rover retailers. During the relevant financial year JLR India Ltd., had entered into various international transactions relating to purchase of vehicle, spare parts and accessories from JLR UK; purchase

of vehicles from M/s. Tata Motors Limited besides of the transactions. Assessee filed its return of income for A.Y.2016-17 on 29/11/2016 declaring loss of Rs.49,79,73,607/-. The said return of income was selected for scrutiny and notice u/s. 143(2) was issued and served on the assessee on 03/07/2017. Thereafter, the case was referred to Transfer Pricing Officer for determination of arm's length price of the international transactions entered into by the assessee to its AE. The ld. TPO vide order dated 01/11/2019 passed u/s. 92CA(3) proposed TP adjustment of Rs.119,14,79,020/-. Accordingly, a draft assessment order was passed by the ld.AO vide order dated 25/12/2019 u/s.143(3) r.w.s. 144C(1) proposing to assess the total income of Rs.71,24,38,607/-. The additions proposed by the ld. AO were as under:-

<b>Sr.No.</b>	<b>Particulars</b>	<b>Amount (INR)</b>
	Loss as per return of income	(49,79,73,607)
Add:	Additions u/s 92CA(3) as per TP Order:	
1.	Adjustment in relation to transaction of purchase of vehicle, spare parts and accessories (hereinafter referred to as the Aggregated Vehicle segment)	97,86,00,000
2.	Adjustment in relation to advertisement. marketing and promotion (AMP) expenses incurred by the Assessee	21,28,79,020
Add:	Disallowance u/s 40(a)(i)	1,89,33,194
	<b>Total Income</b>	<b>71,24,38,607</b>

4. The assessee preferred objections before the ld. DRP and finally the ld. DRP issued directions to the ld. AO and accordingly, TP adjustment was reduced to Rs. 99,90,30,469/- and disallowance u/s.40(a)(ia) of Rs. 1,89,33,194/- and accordingly, the income assessed was at Rs.51,99,90,056/-.

5. Before us ld. Counsel for the assessee, Mr. J.D. Mistry submitted that here in this case the transfer pricing order u/s. 92CA(3) was passed on 01/11/2019, whereas the last date of passing the order was 31/12/2019 and therefore, in view of the decision of the **Madras High Court in the case of Pfizer Healthcare India Ltd. reported in (2021)124 taxmann.com 536** and **DCIT vs. Saint Gobain India Pvt. Ltd. reported in (2022) 137 taxmann.com 215**, the final assessment order is barred by limitation. He further relied upon various judgments of this Tribunal for which a separate compilation was filed before us. He further submitted that once the ld. TPO order is barred by limitation, then assessee is no longer an eligible assessee and therefore, there was no requirement for passing draft assessment order and accordingly, final assessment order should have been passed on or before 31/12/2019 whereas here in this case final assessment order has been passed on 23/04/2021. Therefore, not only the whole transfer pricing adjustment but also disallowance u/s. 40(a)(ia) made on corporate tax deserves to be quashed as the final assessment order itself is barred by limitation. In support following computation of period of limitation has been provided before us.

<b>Sr. No.</b>	<b>Events</b>	<b>Relevant Dates</b>
1.	Assessment Year ("AY")	2016-17
2.	End of AY	31.03.2017
3.	Due date for completion of assessment under section 153(1) read with section 153(4) of the Act (i.e. 21+12-33 months from the end of AY)	31.12.2019
4.	Time limit for passing the order under section 92CA(3A) of the Act	60 days
5.	Less: Date on which limitation expires under section 153 of the Act Le. 31.12.2019	1 day
6.	Less: Remaining days of December 2019	30 days
7.	Less: Number of days of November 2019	30 days
8.	Last date of passing order under section 92CA(3) of the Act	31.10.2019
9.	Date on which transfer pricing order ("TP order) under section 92CA(3) of the Act is passed.	1.11.2019
10.	Last date to pass final assessment order considering assessee is not an eligible assessee	31.12.2019
11.	Date on which final assessment order was passed	23.04.2021

6. Before us, ld. DR submitted that the department has filed written submission in many cases which for the sake of ready reference are elaborated hereunder:-

*i. It is submitted that the legislature uses different words such as "from", "to", "before", "after", "prior", "within", "not later than", "not thereafter", "not less than", "at least" for computation of days. The principle of excluding the date of starting day and the inclusion of ending day are provided in sec. 12 of the Limitation Act and in sec. 9 of the General Clauses Act and a provision cannot be interpreted ignoring the same.*

*ii. As per sec. 9 of the General Clauses Act, in computation of the time limit, the day referred to as "from" has to be excluded and the day referred to as "to" has to be included. In the case on hand, the date of the order dated 30-1-2015 was taken as starting point of limitation and 60 days was computed from 30-1-2015 and rightly the same has to be excluded and the last day 31-3-2015 has to be included and thus the order 30-1-2015 is rightly passed as per sec. 92CA(3A).*

*iii. When the period is marked by terminus a quo and terminus ad quem, the canon of interpretation envisaged and section 9 of the General Clauses Act, 1897 require to exclude the first day and to include the last day*

*iv. Sec. 92CA(3A) expressly provides for counting the last day 31-3-2015 and therefore for counting the 60 days the last day has to be taken into account and thus the order passed by the TPO dated 30-1-2015 is well within the time:*

*v. When the word "to" is specifically incorporated in sec. 92CA(3A), any other interpretation excluding the last day would be against the plain language of the statute and the intent of the legislature.*

*vi. The section 92CA(3A) states that "an order u/s.92CA(3) may be made at any time before 60 days prior to the date on which the period of limitation referred to in section 153 expires" The section refers that an order may be made at any time before 60*

*days and these 60 days have to be prior to the date on which Sec 153 limitation expires. It needs to be noted that the word used regarding limitation in section 153 is expires that implies that the date on that particular time ceases to exist, that is not alive and it has expired. The last day expires on 00.00 am. It is only after the expiry of this date that an order may not be passed. Therefore, while computing the 60 days period, the last day of March has to be counted for computing the time limitation. If the same is counted, then working reverse the period of limitation for passing of a TP Order expires on 30-1-2015 and since the order is passed on this date, therefore the order is not barred by time limitation.*

*vii. Sec. 92CA(3A) uses the word may only and the same cannot be construed as shall and equated to limitation especially when further proceedings are contemplated under the Act such as passing draft assessment order, remedy before Dispute resolution panel and final assessment order.*

*viii. There is no necessity or occasion to read the word "may" as "shall" Sub-sections 3A and 4 were introduced in sec. 92CA by the very same Finance Act, 2007 and the Legislature has consciously used the word "may" in Sec 92CA(3A) while using the word "shall" in sec. 92CA(4). Hence, in view of the context and background of the provisions, the word "may" should not and cannot be read as "shall" If such an interpretation is accepted it will make the provisions of the statute inoperative, it is well settled law of interpretation that any statute or enabling provision must be so construed as to make it operative and effective.*

*ix. On similar set of facts, the Hon'ble Madras High Court in the case of Pfizer Healthcare Pvt. Ltd has ruled in favour of the assessee. The decision of the Hon'ble Court was not accepted by the Department and Department is before the Hon'ble Supreme Court of India on this ground."*

7. After considering the aforesaid submissions on the legal issues raised in ground No.1 and also going through the chronology of events and the judgments relied upon by the

assessee, we find that the last date of passing the order passed by ld. TPO u/s.92CA(3) was 31/10/2019. The period of limitation for passing the assessment order as per Section 143(3) was 31/12/2019 and however, the extension of period of limitation u/s.92CA(3A) to pass the order by the ld. TPO expired on 31/10/2019 i.e. 60 days one day before 31/12/2019.

8. Sub-section 3A of section 92CA provides a time limit for passing of the order by the TPO u/s.92CA(3) in the following manner:-

*3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation fresh assessment, as the case may be, expires:"*

Ergo, the TPO can pass an order u/s 92CA of the Act at any time before 60 days prior to the date on which period of limitation reformed to u/s 153 expires. Thus 60 days have to be counted prior to the date of last d limitation u/s 153.”

9. The interpretation of Section 92CA(3) r.w.s. 153 has been dealt by the Hon’ble Madras High Court not only in the case of Pfizer Healthcare India Ltd but also in the case of Saint

Gobain India Pvt. Ltd. (supra) which was rendered for the A.Y.2016-17 only. The relevant observations of the Hon'ble High Court in Saint Gobain India Pvt. Ltd. (supra) reads as under:-

**28.** *The word "date" in section 92CA(3A) would indicate 31-12-2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31-12-2019 must be excluded. The usage of the word "prior" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be calculated. It is settled law that while interpreting a statute, it is not for the courts to treat any word(s) as redundant or superfluous and ignore the same. In this connection, it is pertinent to note the judgment of the Apex Court in *Grasim Industries Ltd. v. Collector of Customs* [2002 taxmann.com 1803](http://2002.taxmann.com), wherein, it was held as follows :*

*"10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be*

avoided. As stated by the Privy Council in *Crawford v. Spooner* [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See : *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests* [1990 Supp SCC 785 : AIR 1990 SC 1747] , *Union of India v. Deoki Nandan Aggarwal* [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] , *Institute of Chartered Accountants of India v. Price Waterhouse* [(1997) 6 SCC 312] and *Harbhajan Singh v. Press Council of India* [(2002) 3 SCC 722 : JT (2002) 3 SC 21] .)"

29. The language employed is simple. 31-12-2019 is the last date for the assessing officer to pass his order under section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. In the present case, the word "before" used before "60 days" would indicate that an order has to be passed before 1-11-2019 i.e on or before 31-10-2019 as rightly held by the Learned Judge.

30. Even considering for the purpose of alternate interpretation, the scope of section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31-12-2019 must be excluded. After excluding 31-12-2019, if the period of 60 days is calculated, the 60th day would fall on 1-11-2019 and the TPO must have passed the order on or

*before 31-10-2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.*

### *Mandatory or Directory*

*31. The next contention that has been raised by the learned senior standing counsel for the appellants is that the usage of the word "may" in section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings.*

*32. Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-section (1) of section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under section 92CA (3) of the Act. As per section 92CA(3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-section (5) of section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. Sub-section (13) of section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of section 144C of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment*

*unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.*

*33. It would only be apropos to note that as per proviso to section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only is the time frame mandatory, but also that the TPO has to pass an order within 60 days.*

*34. Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to section 153.*

*35.....*  
*36.....*  
*37.....*

*38. In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 7-9-2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.*

*39. Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the sub-section clarifies the*

*mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31-10-2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory.*

*V. Conclusion.*

*40. Ergo, we find no reasons to interfere with the order of the Learned Judge, which is impugned herein and accordingly, dismiss these intra-court appeals, but without costs. Consequently, connected miscellaneous petitions are closed.*

10. Similar view has been taken by the Co-ordinate Bench in several decisions including in the case of Atos India Pvt. Ltd. vs. DCIT reported in (2023) 103 ITR(T) 296 and Shell India Markets Pvt. Ltd. vs. ACIT (2023) 153 taxmann.com 366. Accordingly, we hold that transfer pricing order itself is barred by limitation. Once the ld. TPO's order is held to be nullity on the ground that it is barred by limitation, then draft assessment order could not have been passed in the case of the assessee because assessee would no longer treated as eligible assessee. This view has been discussed in detail in the case of Atos India Pvt. Ltd., (supra) and Shell India Markets Pvt. Ltd. (supra). In Atos India Pvt. Ltd the Coordinate Bench has observed and held as under:-

*"30. Now another issue which crops up, is, whether, once the TPO order is held to be nullity or quashed on the ground of being barred by limitation, then could AO have passed the draft order treating it to be as 'eligible assessee'. Section 144C was brought on the statute as special scheme of assessment and to provide alternative dispute resolution*

scheme to certain categories of 'eligible assessee'. Section 144C provides that the AO has to pass and forward a draft assessment order in the case of 'eligible assessee' if he proposes to make any variation which is prejudicial to the interest of such assessee, Sub-section 15 has defined 'eligible assessee' for the purpose of section 144C. The relevant provisions of section 144C(1) and sub section 15 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 which is prejudicial to the interest of such assessee.

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means...

(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."

31. The aforesaid section envisages that, AO in the first instance has to forward a draft of the proposed order of assessment to the "**eligible assessee**", if he proposes to make any variation which is prejudicial to the interest of such assessee. The draft assessment order is to be forwarded to an "eligible assessee", which means that, for this section to apply a person has to be an "eligible assessee" Here, the draft assessment order is to be forwarded **only to an "eligible assessee" and not to every assessee under the Act.**

32. Thus, under the aforesaid provision, the expression "eligible assessee" is followed by an expression "**means**" and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of TPO's order and (ii) any NR or Foreign company. The use of the word "means" indicates that the definition "eligible assessee" for the purposes of Section 144C(15)(b) is a hard and fast definition and can only be applicable in the above two categories. Ostensibly, the expression 'eligible assessee' has a restrictive meaning as it covers only the two types of persons mentioned above.

33. Further, considering the express language employed in defining the term 'eligible assessee' under section 144C(15)(b) and section 144C(1) in forwarding a draft assessment order to such an 'eligible assessee' only, is plain, clean and unambiguous; the said statute must be interpreted strictly without there being any role of 'equity or intendment' in such interpretation.

34. In the present case, the assessee is an Indian company and, thus, a resident in India under section 6 of the Act. Thus, the second condition under section 144C (15)(b)(ii) of the Act for qualifying as an 'eligible assessee' is not applicable. As regards the first condition under section 144C(15)(b)(i) of the Act, the same applies where there is a transfer pricing variation arising as a consequence of the order of the Ld. TPO under section 92CA(3) of the Act. In the instant case, it will be apparent that there is no transfer pricing variation arising as a consequence of the order of the Ld. TPO once the said transfer pricing order is held to be time-barred, non-est and void-ab-initio from the very date of its existence and inception. The entire premise to adopt the special procedure under section 144C of the Act and treat the appellant an 'eligible assessee' rests on the fact that the order passed under section 92CA(3) of the Act has resulted in transfer pricing variations prejudicial to the interest of the appellant. However, once the transfer pricing order under section 92CA(3) of the Act, per-se, becomes a nullity, there remains no transfer pricing variation arising/ resulting or remaining as a consequence thereto. The effect of passing a null and void transfer pricing order here is that it has to be considered as non-est, meaning thereby, that it entails all the consequences of not having been passed at all and is ignored

for all practical purposes. Thus, in absence of any transfer pricing order being passed at all and any variations arising there from, the entailing consequence in instant case is that the appellant cannot be said to be an 'eligible assessee' under section 144C(15)(b)(ii) of the Act.

35. Accordingly, once the assessee becomes an 'ineligible assessee', the very foundation for proceeding to pass the draft assessment order does not survive, meaning thereby, that the draft assessment order passed in the instant case becomes legally invalid and hence, all consequential proceedings on the basis of the said order fail. In the instant case, a reference was made by the Ld. AO to the Ld. TPO as per the provisions of section 92CA(1) of the Act and accordingly the timelines prescribed u/s 153 of the Act remain extended by a year in view of the 3<sup>rd</sup> proviso of section 153 of the Act. Accordingly, the time limit to complete assessment proceedings u/s 143(3) of the Act in the instant case expired on **31 March 2016**. As on the date of passing **draft assessment order** u/s 144C(1) of the Act i.e. on **29 March 2016**, the Ld. AO had already received the order passed by the Ld. TPO dated **31 January 2016**, which as discussed above, is time barred, illegal and void ab initio, thereby making the Appellant **not an eligible assessee** u/s 144C(15) of the Act. In view of the same, the Ld. AO was ostensibly required to pass the final assessment order u/s 143(3) of the Act on that day. Having said that, the draft assessment order passed by the Ld. AO under the provisions of law is also illegal and void ab initio which deserves to be quashed.

36. It is a well-settled proposition now that a draft order passed in case of an 'ineligible assessee' vitiates the entire exercise of assessment and all subsequent proceedings are liable to be quashed has been held in the following cases:

- (i) **Honda Cars India Ltd. v. Dy. CIT [2016] 67 taxmann.com 29/240 Taxman 707/382 ITR 88 (Delhi);**
- (ii) **Pankaj Extrusion Ltd. v. Asstt. CIT [2011] 10 taxmann.com 17/198 Taxman 6 (Guj.)**
- (iii) **FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. v. DCIT [2019] 108 taxmann.com 542 (Mumbai - Trib.)**

*In case of FedEx Express, the relevant portion of which has been reproduced in the foregoing paras, wherein the Tribunal has expressed the provision and finally deleted the corporate grounds also. We accordingly follow the same reasoning here in this case also.*

*37. Similarly, in a reverse case scenario, i.e., where a draft assessment order was required to be passed on an 'eligible assessee' as per section 144C(1) of the Act but the same was not so passed, in the following decisions as well, the entire assessment proceedings have been held to be invalid and liable to be quashed:*

- (i) **Vijay Television (P.) Ltd. v. DRP [2014] 46 taxmann.com 100/225 Taxman 35/369 ITR 113 (Madras)** affirmed by the Division Bench of the Hon'ble Madras HC in [2018] 95 taxmann.com 101 (Madras);*
- (ii) **International Air Transport Association v. Dy. CIT [2016] 68 taxmann.com 246 (Bombay);***
- (iii) **Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh)-** Revenue's SLP dismissed by the Hon'ble Apex Court in CC No. 16694/2013 on 27th September 2013*

*38. What culminates from the aforesaid two sets of parallel decisions is that the provisions of section 144C of the Act are specific and provides for a special code which must be strictly followed since it impacts the rights of an assessee substantively, i.e., the ability to accept or object a draft order proposition, file objections before the Dispute Resolution Panel and ensure a speedy disposal thereof. Any lapse in treating an assessee as 'eligible assessee' where it is otherwise not one and vice-versa results in fatality, since it becomes a jurisdictional defect and goes on to the roots in deciding the validity of the entire assessment proceedings against the revenue. In this context, on the issue of passing a correct assessment order in first instance (either a draft or a final one), the findings of the **Hon'ble Madras High Court** in case of **ACIT v. Vijay Television (P.) Ltd [2018] 95 taxmann.com 101 (Madras)** are extremely critical which reads as follows:*

“47. The necessity for the Parliament to incorporate Section 144-C is not only to safeguard the Revenue, but also the assessee and **any mistake committed by any one of them, the said party is supposed to face the consequences and cannot put the hands of the clock back and start afresh.**”

39. Further, in case of **Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh)**, 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.

40. The various judgments which have been cited before us that 144C(1) will not apply and there is no variation in the return of income which cannot be disputed. Thus in our view, Ld. AO to acquire a legal and valid jurisdiction for the purpose of forwarding a draft assessment order at the first instance under section 144C(1) of the Act, it is necessary that the **assessee must be an 'eligible assessee'** within the restrictive and strict four corners of how the said expression has been defined under section 144C(15)(b) of the Act. Here, once it is held that there is no legal or valid transfer pricing order under section 92CA(3) of the Act, there remains no variation arising as a consequence thereto and the case of the assessee, being an Indian company, falls outside the definition of 'eligible assessee' as defined under section 144C(15)(b) of the Act. Thus, the Ld. AO cannot be said to acquire a 'legal or a valid' jurisdiction under section 144C(1) r.w.s. 144C(15)(b) of the Act to pass or forward a draft assessment order to the appellant who is otherwise an 'ineligible assessee'. The action of the Ld. AO in passing the impugned draft assessment order in instant case results in non-compliance of section 144C of the Act which vitiates the entire assessment exercise.

41. *The issue being fairly settled and the intent of legislature in strictly interpreting the provision of section 144C of the Act being repeatedly held so, the act of the Ld. AO in proceeding to pass a draft assessment order on the basis of an order by the Ld. TPO which is barred by limitation and thus bad in law/ non-est, results in an incurable illegality which is liable to be held as null and void, and thus, consequentially holding the final assessment order to be bad in law as well.*

42. *Thus, despite the fact that the reference made to the Ld. TPO is valid, in absence of a legally valid transfer pricing order and a valid draft assessment order, the Ld. AO cannot assume jurisdiction to proceed with the assessment under Section 144C of the Act and pass the consequential final assessment order. The decisions of the Hon'ble jurisdictional High Court in case of International Air Transport Association (supra) and Dimension Data Asia Pacific PTE Ltd. (supra) fortifies appellant's contentions and the irresistible conclusion that the draft assessment order imbibes a jurisdictional power in terms of Sec. 144C(1) of the Act and creates/ envisages special rights upon the 'eligible assessee'. If such an order is passed on an assessee who is not an 'eligible assessee' as defined in section 144C(15)(b)(i) of the Act, then it would render the entire proceedings pursuant to such order null and void.*

43. *We find that section 153(1) of the Act, as it stood applicable for the AY 2012-13, provided a time limit of **3 years** from the end of AY 2012-13 for completion of assessment under section 143(3) of the Act, i.e., on or before **31 March 2016**.*

44. *In such a case if the Ld. AO invokes the provisions of section 144C of the Act and passes the final assessment order after **31 January 2016** i.e. beyond the period of limitation as stated above, such final assessment order u/s 143(3) r.w.s 144C of the Act is liable to be quashed as being barred by limitation.*

45. *In a recent decision of the **Hon'ble Madras High Court** in case of **Virtusa Consulting Services Put. Ltd [TS-474-HC-2022(MAD)] dated 9 June 2022**, it has been held in context of period of limitation under section 153 of the Act as under:*

"17. Further, it is to be noted that the different timelines to be adhered by the TPO, Assessing Officer to pass a draft order, assessee to file their objections, DRP to issue directions and the assessing officer to pass final order, would commence only on a reference to the TPO and not otherwise. At **this juncture, it is not to be forgotten that the period of 33 months is to pass the final order of assessment after the directions from the DRP.** In this case, we find from the undisputed dates and events that not only was the reference to the TPO made after the period of expiry of the period of limitation to pass assessment orders, but also that **the assessing officer has failed to pass final assessment orders in time.** The time to pass the original assessment would end on 31.12.2008 being 21 months from the end of the assessment year 2006-07 i.e., 31.03.2007. Then the last date for the assessing officer to pass the final assessment order would end on 31.12.2009, even considering the extension by twelve months. In the present case, the order of the DRP itself is only 24.09.2010 much beyond the permissible period."

46. Thus taking into the provisions of law and the judgment referred to above, we hold that the final assessment order passed on 31 January 2017 is beyond the prescribed period of limitation under section 153 of the Act expiring on 31 March 2016, thus, barred by limitation and is hereby quashed.

11. Accordingly, we quash the final assessment order being barred by limitation and once the assessment is quashed then none of the additions are sustained. Accordingly, the appeal of the assessee is allowed.

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

Order pronounced on 30<sup>th</sup> October, 2023.

Sd/-

(PADMAVATHY S)

ACCOUNTANT MEMBER

Mumbai; Dated 30/10/2023

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**