

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

**Before Sh. Saktijit Dey, Vice President  
Dr. B. R. R. Kumar, Accountant Member**

**ITA No.3128/Del/2015 : Asstt. Year: 2010-11**

DCIT, Central Circle-19, New Delhi	Vs	Newbury Holding Two Ltd., C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi - 110 014.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**CO No.344/Del/2015**

**(in ITA No.3128/Del/2015 : Asstt. Year: 2010-11)**

Newbury Holding Two Ltd., C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi - 110 014.	Vs	DCIT, Central Circle-19, New Delhi.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN : AAECN6529J</b>		

**ITA No.3131/Del/2015 : Asstt. Year: 2009-10**

**ITA No.3132/Del/2015 : Asstt. Year: 2010-11**

**ITA No.3133/Del/2015 : Asstt. Year: 2011-12**

DCIT, Central Circle-19, New Delhi	Vs	SDP Services Ltd., C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi - 110 014.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**CO No.345/Del/2015**

**(in ITA No.3131/Del/2015 : Asstt. Year: 2009-10)**

**CO No.346/Del/2015**

**(in ITA No.3132/Del/2015 : Asstt. Year: 2010-11)**

**CO No.347/Del/2015**

**(in ITA No.3133/Del/2015 : Asstt. Year: 2011-12)**

SDP Services Ltd., C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Central Circle-19, New Delhi.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN : AAMCS7834F</b>		

**ITA No.3349/Del/2015 : Asstt. Year: 2008-09**  
**ITA No.3350/Del/2015 : Asstt. Year: 2009-10**  
**ITA No.3351/Del/2015 : Asstt. Year: 2010-11**  
**ITA No.3352/Del/2015 : Asstt. Year: 2011-12**

DCIT, Central Circle-19, New Delhi	Vs	Rolland Enterprises Ltd., C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi – 110 014.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**CO No.353/Del/2015**  
**(in ITA No.3349/Del/2015 : Asstt. Year: 2008-09)**  
**CO No.354/Del/2015**  
**(in ITA No.3350/Del/2015 : Asstt. Year: 2009-10)**  
**CO No.355/Del/2015**  
**(in ITA No.3351/Del/2015 : Asstt. Year: 2010-11)**  
**CO No.356/Del/2015**  
**(in ITA No.3352/Del/2015 : Asstt. Year: 2011-12)**

Rolland Enterprises Ltd., C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Central Circle-19, New Delhi.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN : AACCR7403D</b>		

**ITA No.3356/Del/2015 : Asstt. Year: 2008-09**  
**ITA No.3357/Del/2015 : Asstt. Year: 2009-10**

DCIT, Central Circle-19, New Delhi	Vs	Wickwood Development Ltd. C/o Mr. Sandeep Chilana, Adv. C-56, LFG, Jangpura Extension, New Delhi – 110 014.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**CO No.360/Del/2015**  
**(in ITA No.3356/Del/2015 : Asstt. Year: 2008-09)**  
**CO No.361/Del/2015**  
**(in ITA No.3357/Del/2015 : Asstt. Year: 2009-10)**

Wickwood Development Ltd. C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Central Circle-19, New Delhi.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN : AAACW5128J</b>		

**ITA No.4650/Del/2015 : Asstt. Year: 2008-09**  
**ITA No.4651/Del/2015 : Asstt. Year: 2009-10**  
**ITA No.4652/Del/2015 : Asstt. Year: 2010-11**  
**ITA No.4653/Del/2015 : Asstt. Year: 2011-12**

DCIT, Central Circle-19, New Delhi	Vs	I Energizer Holdings Ltd., C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.
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**CO No.393/Del/2015**  
**(in ITA No.4650/Del/2015 : Asstt. Year: 2008-09)**  
**CO No.394/Del/2015**  
**(in ITA No.4651/Del/2015 : Asstt. Year: 2009-10)**  
**CO No.395/Del/2015**  
**(in ITA No.4652/Del/2015 : Asstt. Year: 2010-11)**  
**CO No.396/Del/2015**  
**(in ITA No.4653/Del/2015 : Asstt. Year: 2011-12)**

I Energizer Holdings Ltd., C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Central Circle-19, New Delhi.
<b>PAN : AACCI0468D</b>		

**ITA No.5396/Del/2015 : Asstt. Year: 2011-12**

DCIT, Central Circle-19, New Delhi	Vs	iServices Investment Ltd., C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**CO No.388/Del/2015  
(in ITA No.5396/Del/2015 : Asstt. Year: 2011-12)**

iServices Investment Ltd., C/o Mr. Sandeep Chilana, Adv., C-56, LFG, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Central Circle-19, New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCI6428A</b>		

**Assessee by : Sh. Amit Goel, CA, Pranav Yadav, Adv.,  
Sh. Nippun Mittal, CA & Ms. Anjali Jain, Adv.**  
**Revenue by : Sh. Vizay B. Vasanta, CIT-DR &  
Sh. Sanjay Kumar, Sr. DR**

<b>Date of Hearing: 26.10.2023</b>	<b>Date of Pronouncement: 10.01.2024</b>
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**ORDER****Per Bench:**

The present appeals by the Revenue and the Cross Objections by the assessee have been filed against the orders of Id. CIT(A)-XXVII, New Delhi.

2. The common grounds raised in ITA Nos. 3128, 3131 to 3133, 3356 & 3357, 3349 to 3352, 4650 to 4653 & 5396/Del/2015. In ITA No. 3349/Del/2015, following grounds have been raised by the Revenue:

"1. The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in holding that there is

*substantial force in the submission made by the appellant on the issue of initiating proceedings u/s 153C of Income Tax Act.*

2. *The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in holding that assessee company is not resident in terms of provisions under section 6(3)(ii) of the I.T. Act for the purpose of tax liability whereas on the basis of seized documents/e-mails and various statements of Sh. Ajay Kalsi/Sh. Anil Aggarwal, it has been established that control and management of the assessee company is situated wholly in India.*

3. *The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in ignoring that underlying assets and sources of revenue of all the overseas companies are the Indian Companies.*

4. *The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in ignoring the substantial evidence in form of seized material, E-mails, Share Holding pattern showing the ultimate control and management of Indian companies and overseas companies lies with Sh. Ajay Kalsi and Smt. Mala Kalsi, who have created different verticals of corporate veil under them to avoid taxability in India.*

5. *The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in ignoring the provisions of section 9(1) of the I.T. Act as the revenue has been earned because of underlying assets of the assessee wholly and totally situated in India.*

6. *The Ld. Commissioner of Income Tax (Appeals) has erred in law as well as on facts in deleting the addition of Rs.17,79,28,594/- made by Assessing Officer."*

3. The common grounds raised in CO Nos. 344 to 347, 353 to 356, 360, 361, 388 & 393 to 396/Del/2015. In CO No. 353/Del/2015 following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case, the learned A.O. has erred, both on facts and in law, in assuming jurisdiction over the subject company.

2.(i) On the facts and circumstances of the case, the learned A.O. has erred, both on facts and in law, in proceeding with the assessment proceedings without considering the aspect of jurisdiction in terms of Section 124(4) of the Income Tax Act, 1961 ('Act'), despite the fact that the company has objected to assumption of jurisdiction.

2.(ii) That on the facts of the case and in law, the alleged jurisdiction assumed by learned A.O. is contrary to the scheme of the Act including provisions of section 124 to 127 of the Income Tax Act. Accordingly, the assessment order passed is void ab initio and liable to be quashed.

3.(i) That on the facts and circumstances of the case, the proceedings initiated by learned A.O. under Section 153C are bad in law and against the statutory provisions.

3.(ii) That without prejudice to the above and in the alternative, the learned A.O. has erred in initiating proceeding under section 153C of the Act for the assessment year under consideration as the proceedings initiated and the consequent assessment is barred by limitation.

4. On the facts and circumstances of the case, the learned A.O. has erred, both on facts and in law in passing the assessment order straightaway while ignoring the statutory provisions of Section 144C of the Act, in terms of which, the learned A.O. ought to have passed a draft assessment order in the case of an eligible company, i.e. a foreign company.

5. That the assessment framed without issuance of statutory notice under Section 143(2) of the Act after filing of the return is bad in law and therefore, liable to be quashed."

4. Heard the arguments of both the parties and perused the material available on record.

5. The COs pertaining to A.Y. 2008-09, A.Y. 2009-10, A.Y. 2010-11, and A.Y. 2011-12 are being dealt together.

6. At the outset, the Id. AR preferred to argue ground no. 4 of the CO which reads as under:

**"4. On the facts and circumstances of the case, the learned A.O. has erred, both on facts and in law in passing the assessment order straightaway while ignoring the statutory provisions of Section 144C of the Act, in terms of which, the learned A.O. ought to have passed a draft assessment order in the case of an eligible company, i.e. a foreign company."**

7. For the sake of ready reference, the facts from the Assessment Year 2008-09 in the case of M/s Rolland Enterprises Ltd. has been taken as a lead case.

**Issues examined:**

- Facts
- Provisions of Section 144C
- Explanatory note to Finance (No.2) Act
- CBDT Circulars
- Orders of the ITAT
- Judgment of Hon'ble Gujarat High Court
- Judgment of Hon'ble Jurisdictional High Court

**Facts:**

8. A search & seizure operation u/s 132 of the Income Tax Act, 1961 was conducted by the Investigation Wing of the Income Tax Department on 22.03.2012 in M/s Focus Energy

Group of cases. In the course of search operation, certain incriminating documents pertaining to the assessee were found and seized. Accordingly, notice u/s 153C was issued on the assessee and assessment has been completed u/s 153C/144 of the Income Tax Act on 28.03.2014.

9. The pertinent facts are that the assessee is a non-resident corporate entity, BVI based company incorporated in 1994 owns equipments related to exploration and development of oil fields and lease them to company named "Focus Energy Ltd." which is deducting tax on lease rent paid to assessee as per the provisions of TDS.

10. It was brought to our notice that the assessee is an 'eligible assessee' for the purpose of Section 144C(15)(b) of the Income Tax Act, 1961. The said provision reads as under:

*"(15) For the purposes of this section,—*

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

*(b) "eligible assessee" means,—*

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

*(ii) any foreign company.]"*

11. The fact that the assessee is an 'eligible assessee' is not in dispute. The assessee being an 'eligible assessee', the procedure prescribed u/s 144C(1) of the Act is applicable and the Assessing Officer should forward a draft of the proposed

order of the assessment to the eligible assessee if the Assessing Officer proposes to make any variation which is prejudicial to the interest of such assessee. The said provisions of Section 144C(1) of the Income Tax Act, 1961 are as under:

*"144C(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee."*

12. It was brought to our notice that instead of following the mandatory procedure laid down u/s 144C(1) of the Income Tax Act, 1961, the Assessing Officer has completed the assessment u/s 153C without forwarding any draft of the proposed order of assessment to the assessee, which is in divergence to the procedure laid down in the Act. In this case, the Assessment Order has been passed on 28.03.2014, which is after the amendment brought to the statute by Finance (No. 2) Act, 2009. This fact is not in dispute.

13. Having gone through the record before us wherein the Assessment Order has been passed on 28.03.2014 and also that no draft order has been issued by the assessee, the legal position on this issue has been examined.

**Section 144C:**

14. The provisions of Section 144C introduced by Finance Act, 2009 w.e.f. 01.04.2009 reads as under:

"144C(1) *The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.*

*(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—*

- (a) file his acceptance of the variations to the Assessing Officer; or*
- (b) file his objections, if any, to such variation with,—*
  - (i) the Dispute Resolution Panel; and*
  - (ii) the Assessing Officer.*

*(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—*

- (a) the assessee intimates to the Assessing Officer the acceptance of the variation; or*
- (b) no objections are received within the period specified in sub-section (2).*

*(4) The Assessing Officer shall, notwithstanding anything contained in section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which,—*

- (a) the acceptance is received; or*
- (b) the period of filing of objections under sub-section (2) expires.*

*(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.*

*(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—*

- (a) *draft order;*
- (b) *objections filed by the assessee;*
- (c) *evidence furnished by the assessee;*
- (d) *report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;*
- (e) *records relating to the draft order;*
- (f) *evidence collected by, or caused to be collected by, it; and*
- (g) *result of any enquiry made by, or caused to be made by, it.*

(7) *The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—*

- (a) *make such further enquiry, as it thinks fit; or*
- (b) *cause any further enquiry to be made by any income-tax authority and report the result of the same to it.*

(8) *The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.*

(9) *If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.*

(10) *Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.*

(11) *No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.*

(12) *No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.*

(13) *Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete,*

*notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.*

*(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.*

*(15) For the purposes of this section,—*

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

*(b) "eligible assessee" means,—*

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

*(ii) any foreign company.]”*

15. A plain reading of Section indicates that it is obligatory on the part of the AO to forward a draft Assessment Order as per the provisions of Section 144C(1) of the Act. The sub-Section (1) of Section 144C being a non-obstante clause overrides all the provisions of the Act if they are contrary to Section 144C of the Act. This provision is applicable from 1<sup>st</sup> October 2009 in all the cases where the Assessing Officer proposes any variation to the income returned by an 'eligible assessee'.

16. We have examined the expression of 'eligible assessee' as per the Act. The expression 'eligible assessee' has been defined under sub-Section (15) of Section 144C of the Act. As per sub-Section (15)(b)(i) of Section 144C of the Act, 'eligible assessee' means any person in whose case the variation referred to in

sub-Section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-Section (3) of Section 92CA of the Act.

**Explanatory Note to Finance (No. 2) Act:**

**CBDT Circulars:**

17. We have gone through the Circular No. 5/2010 dated 03.06.2010 which reads as under:

*"45. Provision for constitution of alternate dispute resolution mechanism*

*45.1 The dispute resolution mechanism presently in place is time consuming and finality in high demand cases is attained after long drawn litigation till Supreme Court. In order to address the concern of the multi-national companies and to provide mechanism for speedy disposal of their cases so as to attain finality, a new section 144C is inserted in the Income-tax Act to facilitate expeditious resolution of disputes.*

*45.2 The salient features of the alternate dispute resolution mechanism are as under:-*

*(1) The Assessing Officer shall, forward a draft of the proposed order of assessment (hereinafter referred to as the draft order) to the eligible assessee if he proposes to make on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.*

*(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,-*

- (a) file his acceptance of the variations to the Assessing Officer; or*
- (b) file his objections, if any, to such variation with –*
  - (i) the Dispute Resolution Panel; and*
  - (ii) the Assessing Officer.*

(3) *The Assessing Officer shall complete the assessment on the basis of the draft order, if -*

- (a) *the assessee intimates to the Assessing Officer the acceptance of the variation; or*
- (b) *no objections are received within the period specified in sub-section (2).*

(4) *The Assessing Officer shall, notwithstanding anything contained in section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which,-*

- (a) *the acceptance is received; or*
- (b) *the period of filing of objections under sub-section (2) expires.*

(5) *The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.*

(6) *The Dispute Resolution Panel shall issue the directions referred to in subsection (5), after considering the, -*

- (a) *draft order;*
- (b) *objections filed by the assessee;*
- (c) *evidence furnished by the assessee;*
- (d) *report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;*
- (e) *records relating to the draft order;*
- (f) *evidence collected by, or caused to be collected by, it; and*
- (g) *result of any enquiry made by, or caused to be made by it.*

(7) *The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5), -*

- (a) *make such further enquiry, as it thinks fit; or*

*(b) cause any further enquiry to be made by any income tax authority and report the result of the same to it.*

*(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.*

*(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.*

*(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.*

*(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to their interest.*

*(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.*

*(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete the assessment without giving any further opportunity of being heard, within one month from the end of the month in which the direction is received notwithstanding anything to the contrary contained in section 153.*

*(14) The Board may make rules for the efficient functioning of the Dispute Resolution Panel with a view to expeditiously dispose of the objections filed, under sub-section(2), by the eligible assessee.*

*(15) For the purposes of this section, -*

- (a) *"Dispute Resolution Panel" means a collegium comprising of three commissioners of Income-tax constituted by the Board for this purpose;*
- (b) *"eligible assessee" means,-*
  - (i) *any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and*
  - (j) *any foreign company.*

*45.3 Further, consequential amendments have been made -*

- (i) *in sub-section (1) of section 131 so as to provide that the "Dispute Resolution Panel" shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908);*
- (ii) *in clause (a) of sub-section (1) of section 246A so as to exclude the order of assessment passed under sub-section (3) of section 143 or under section 147 in pursuance of the directions of the "Dispute Resolution Panel" as an appealable order and in clause (c) of sub-section (1) of section 246 so as to exclude an order passed under section 154 of such order as an appealable order;*
- (iii) *in sub-section (1) of section 253 so as to include an order of assessment passed under sub-section (3) of section 143 or under section 147 in pursuance of the directions of the "Dispute Resolution Panel" as an appealable order.*

*45.4 It would be the choice of the assessee whether to file an objection against the draft assessment order before the Dispute Resolution Panel (DRP) or to pursue the normal channel of filing an appeal against the assessment order before the Commissioner of Income Tax (Appeals). In order to approach the DRP, the assessee must file an objection against the draft assessment order within the prescribed time limit. In case the assessee does not file an objection, the assessing officer shall pass the assessment order. The assessee can file an appeal against such*

*assessment order before the CIT (Appeals). Once the option of filing an objection against the draft assessment order before the DRP has been exercised, the assessee cannot withdraw the objection and opt for the normal channel of filing appeal before CIT(Appeals).*

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

18. Further, we have gone through the Circular No. 9/2013 dated 19.11.2013 where by the AO is required to forward a draft Assessment Order to the 'eligible assessee' if it is proposed to make any variation to the returned income after 1<sup>st</sup> October 2009. The said Circular of CBDT is as under:

*Circular No. 09/2013*

*File No. 142/20/2013-TPL*

*Government of India*

*Ministry of Finance*

*Department of Revenue*

*Central Board of Direct Taxes*

.....  
*Dated, the 19<sup>th</sup> November, 2013*

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

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

*"The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereinafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1<sup>st</sup>*

*day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee."*

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

*"45.5 Applicability: These amendments have been made applicable with effect from 1<sup>st</sup> October, 2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. The Dispute Resolution Panel Rules have been notified by S.O. No. 2958 (E) dated 20<sup>th</sup> November, 2009."* **In the above extracted Para 45.5 there has been an inadvertent error in stating the applicability of the provisions of section 144C inserted vide Finance (No.2) Act, 2009 that amendments will apply in relation to the assessment year 2010-11 and subsequent assessment years. Accordingly, para 45.5 is replaced with the following:**

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

-sd-

[Ashis Mohanty]

Under Secretary [Tax Policy & Legislation-IV]

**Orders of the ITAT:**

19. Based on the provisions of the Act and the CBDT Circulars, the Co-ordinate Bench of ITAT Delhi in the case of DCIT Vs. Newbury Oil Company Ltd. in ITA Nos. 5398 & 5399/Del/2015, order dated 20.07.2021 and in the case of Xander Advisors India Pvt. Ltd. Vs. ACIT in ITA Nos. 1376 & 1377/Del/2016, order dated 30.08.2022 highlighted necessity of forwarding a draft Assessment Order.

**Judgment of Hon'ble High Court of Gujarat:**

20. We have also gone through jurisprudence on the issue of non-forwarding of the draft Assessment Order and consequence thereof as per Section 144C(1) of the Act and. On this issue, the Hon'ble High Court of Gujarat in the case of CIT Vs. C-Sam (India) Pvt. Ltd. (84 taxmann.com 261) held as under:

*"6. These statutory provisions make & 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 1440 makes such directions binding on the Assessing Officer. As per sub-section (13) of Section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.*

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

8. *Reference by the Revenue to the circulars dated 03.06.2010 and 19.11.2013 in this regard would be of no avail. First of these circulars was an explanatory circular issued by the Finance Ministry in which it was provided that these amendments (which included Section 144C of the Act) are made applicable with effect from 01.10.2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years. In the latter clarificatory circular dated 19.11.2013, it was provided that in the earlier circular there was an inadvertent error and Section 144C would apply to any order which is being passed after 01.10.2009 irrespective of*

*the concerned assessment year. The latter circular was thus merely in the nature of a clarificatory circular and clarified which all along was the correct position in law. Sub-section (1) of Section 144C itself in no uncertain terms provides that the Assessing Officer shall forward a draft order to the eligible assessee, if he proposes to make any variation in the income or loss which is prejudicial to the interest of the assessee on or after 01 st day of October 2009. The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the Assessing Officer proposed to make after 01.10.2009. The earlier circular dated 03.06.2010 did not lay down the correct criteria in this regard. The assessee cannot be made to suffer on account of any inadvertent error which runs contrary to the statutory provisions. No question of law arises. Tax appeal is therefore dismissed."*

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

### **Judgment of Hon'ble Jurisdictional High Court:**

21. Similarly, the Hon'ble Delhi High Court in the case of Turner International India Pvt. Ltd. vs. DCIT held as under:

*"10. The short ground on which the aforementioned final assessment orders and the consequent demand notices have been challenged is that there was non-compliance with the mandatory provision contained in Section 144C(1) of the Act requiring the AO to first frame draft assessment orders.*

11. *The question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirements of first passing draft assessment order in terms of Section 144C(1) of the Act is no longer res integra. There is a long series of decisions to which reference would be made presently.*

12. *In Zuari Cement Ltd. v. ACIT (decision dated 21<sup>st</sup> February, 2013 in WP© 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 © [CC No. 16694/2013] on 27<sup>th</sup> September, 2013.*

13. *In Vijay Television (P) Ltd. v. Dispute Resolution Panel [2014] 369ITR 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 Indi [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.*

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.*

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.*

17. *For the aforementioned reasons, the final assessment orders dated 31<sup>st</sup> March, 2015 passed by the AO for AYs 2007-08 and 2008-09, the consequential demand notices issued by the AO and the initiation of penalty proceedings are hereby set aside.*

18. *The petitions are allowed in the above terms. No order as to costs."*

**Conclusion:**

22. Thus, on going through the provisions of Section 144C(1) of the Income Tax Act, 1961 mandating forwarding of a draft Assessment Order, Explanatory notes to the Finance (2) Act, 2009, Circular No. 05/2010 and Circular No. 09/2013 of the CBDT, judgments of Hon'ble High Court of Gujarat and the Hon'ble jurisdictional High Court, we hold that the Assessment Orders passed by the Assessing Officer are bad in law, hence, unsustainable for not passing the draft Assessment Order as per the provisions of Section 144C(1) of the Income Tax Act, 1961.

23. In the result, the Cross Objections of the assesseees are allowed and consequently the appeals of the revenue are liable to be dismissed.

Order Pronounced in the Open Court on 10/01/2024.

Sd/-

**(Saktijit Dey)**  
**Vice President**

**Dated: 10/01/2024**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**