

| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

I.T.A. No. 1484/Mum/2021
Assessment Year: 2016-17

Goldman Sachs (India) Securities Private Limited 951A, Rational House Appasaheb Marathe Marg Prabhadevi Mumbai - 400025 [PAN: AAFCA6819F]	Vs	Assistant Commissioner of Income Tax - 7(1)(1), Mumbai
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Madhur Agrawal, A/R
Revenue by :	Shri Vachaspati Tripathi, CIT, D/R

सुनवाई की तारीख/**Date of Hearing** : 03/07/2024
घोषणा की तारीख /**Date of Pronouncement**: 16/07/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order dt. 30/06/2021, framed u/s 144C(13) r.w.s. 143(3) of the Income Tax Act, 1961 ('the Act'), pertaining to Assessment Year 2016-17.

2. The grievance of the assessee reads as under:-

"Based on the facts and circumstances of the case, Goldman Sachs (India) Securities Private Limited (hereinafter referred to as 'the Appellant') respectfully craves leave to prefer an appeal under section 253(1) of the Income-tax Act, 1961 (hereinafter referred to as 'Act'), against the order dated 30 June 2021 passed by the Assistant Commissioner of Income-tax, Circle -7(1)(1), Mumbai, under section 143(3) read with section 144C(13) of the Act, in pursuance of the directions issued by Dispute Resolution Panel-1,

Mumbai (hereinafter referred to as 'learned DRP'), on the following grounds, which are independent of and without prejudice to each other.

On the facts and in the circumstances of the case and in law, the learned Assessing Officer (hereinafter referred to as the 'learned AO')/ learned Transfer Pricing Officer (hereinafter referred to as the 'learned TPO) erred and Hon'ble DRP further erred:

Validity of final assessment order

1. *In directly passing the final assessment order under section 143(3) of the Act, without passing the draft assessment order as applicable in case of Appellant being 'eligible Assessee' as per section 144C(1) of the Act, thereby entire order which not in consonance of the Act should be quashed.*

In upholding the validity of corrigendum order in spite of the fact that the corrigendum cannot be resorted to cure an error of jurisdictional nature and in cases where the order proposed to be rectified by the corrigendum is in itself void ab initio on account of violation of the correct procedure prescribed in the law.

Validity of transfer pricing order

2. *By passing an order under Section 92CA (3) dated 1 November 2019 which was barred by limitation, thereby rendering the resultant final assessment order null and void as per the provisions under Section 153 of the Act.*

Transfer pricing grounds - Adjustment under Section 92CA of the Act

3. *In making an upward transfer pricing adjustment to the extent of Rs 19,80,000 by re-computing the Arm's Length Price (ALP) of the international transaction pertaining to provision of non-binding investment advisory and support services (A services) by the Appellant to its associated enterprises (AEs), inter alia, on following grounds:*

a) Rejecting the transfer pricing documentation maintained by the Appellant in accordance with provisions of the Act read with the Income-tax Rules, 1962 (Rules); and

b) Including the carried interest received by the employees of the Appellant in the cost base of the Appellant for the purpose of charging cost plus mark-ups for provision of IA services;

4. In not appreciating that the Appellant is mainly a routine Information Technology enabled Services (ITes) service provider and incorrectly categorizing the Appellant as a knowledge process outsourcing (KPO) service provider, thereby making an upward transfer pricing adjustment to the extent of Rs 14,06,67,354 by re-computing the ALP under the TNMM, inter alia, on following grounds:

a) Rejecting the transfer pricing documentation maintained by the Appellant in accordance with provisions of the Act read with the Rules;
b) Cherry picking and not following a scientific search process in identifying companies and not providing the search criteria/ strategy adopted for identifying such additional comparable companies;
c) Rejecting the following functionally similar companies selected as comparables by the Appellant in the transfer pricing documentation:

- Sundaram Business Services Limited*
- ACE Software Exports Limited*
- Allsec Technologies Ltd*
- Crystal Hues Limited*
- Suprawin Technologies Limited*
- Cosmic Global Limited*
- Ultramarine & Pigments Limited (Segmental)*
- Datamatics Financial Services Limited*

d) Rejecting R Systems International Limited (BPO Segment) merely on account of different financial year (FY);

e) Rejecting Allsec Technologies Ltd and Jintal Intelicom Private Limited, by applying export turnover filter;

f) Rejecting Sundaram Business Services Limited by on account of persistent losses in the past three years, despite in FY 2015-16 the company has earned profits;

g) Rejecting Hartron Communications Limited (Segmental), on account of negative margin earned by the comparable company;

h) Accepting following companies as comparables to the Appellant, despite the same not being comparable to that of the Appellant due to following factors such as functional dissimilarity, insufficient segmental informing, super normal profits, etc.

- *MPS Limited*
- *Thirdware Solutions Limited*

Corporate tax grounds

5. In disallowing the amortization cost in respect of employee stock option plans (ESOP) granted to its employees [hereinafter collectively referred as ESOP cost] amounting to INR 8,95,03,698 incurred by the Appellant, on the basis that the ESOP costs are notional/contingent in nature.

In disregarding the order of Hon'ble ITAT in the appellant's own case for AY 2008-09, AY 2009-10, AY 2011-12, AY 2012-13, AY 2014-15 and AY 2015-16 where the amount of ESOP cost was allowed as a deductible expenditure in the year of amortization.

Without prejudice to the above, where your Honours seek to uphold the action of the learned AO, a deduction with respect to the amount actually paid for the value of shares delivered should be granted to the Appellant.

6. In disallowing an amount of INR 19,22,903 paid to the stock exchanges for non-confirmation of clearing house trades, client code modification, etc. on the basis that the payment made is in the nature of penalties/fine.

In disregarding the order of Hon'ble ITAT in appellant's own case for AY 2008-09, AY 2009-10, AY 2011-12, AY 2012-13, AY 2014-15 and AY 2015-16 where the amount paid to the stock exchanges was allowed as a deductible expenditure.

In further disregarding the order of Hon'ble Bombay High Court in Appellant's own case for AY 2008-09 and AY 2009-10 where this ground of the Revenue has not been admitted.

7. In not allowing the deduction in respect of education cess paid on income-tax amounting to INR 5,50,32,424 and education cess paid on dividend distribution tax (DDT) amounting to INR 4,85,09,297.

Without prejudice to above, upon adjudication, where your Honours decide the aforesaid Ground No. 7 in favour of the Appellant and any other grounds

against the Appellant, then the Appellant humbly requests your Honours to allow the deduction of total education cess paid on income-tax after considering the additional education cess payable on the tax effect relating to such ground(s) which is/ are decided against the Appellant.

8. *In not allowing the credit of taxes withheld at source amounting to INR 1,54,97,043 as claimed in the return of income by the Appellant.*

9. *In not granting the consequential interest under section 244A of the Act.*

10. *In initiating penalty proceedings under section 271(1)(c) of the Act.*

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble ITAT to decide this appeal according to law."

3. Vide Ground No. 1 (*supra*), the assessee has challenged the validity of the draft assessment order dt. 28/12/2019 and also legality and validity of subsequent DRP and final assessment order.

4. Representatives of both the sides were heard at length. Case records carefully perused and judicial decision relied on have been carefully considered.

5. The quarrel revolves around the provisions of Section 144C of the Act and the same reads as under:-

"11. Provisions of section 144C read 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. *Most relevant clauses pertinent for adjudication of the quarrel reads as under:*

"(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).

(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 [or section 153B], 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."

6. In the light of the aforestated provisions of Section 144C and relevant sub-Sections of the Act, the Id. Counsel for the assessee vehemently argued that the assessment proceedings concluded on 28/12/2019 and, therefore, any orders passed thereafter, are *non-est* to which the Id. D/R rebutted by referring to the concluding para of the assessment order dt. 28/12/2019 which reads as under:-

"Assessed u/s 143(3) r.w.s. 144C(1) of the I.T. Act, 1961. Tax and interest will be charged as per law when final order is passed. Credit for prepaid taxes after due verification will be given. Income tax computation in ITNS 150A will form integral part of final order. Penalty notice u/s 274 r.w.s. 271(1)(c) will be issued separately. Demand notice and challan will also be issued with final order."

6.1. It is the say of the ld. D/R that since the AO has made his intention very clear that this is not the final order, therefore, it cannot be said that the assessment proceedings have concluded on 28/12/2019. Pointing out to the corrigendum order dt. 29/12/2019, exhibited at page 610 of the paper book, the ld. D/R stated that the AO has made it very clear that order dt. 28/12/2019 may be treated as draft order u/s 144C of the Act.

7. We have given a thoughtful consideration to the aforementioned submissions of the ld. D/R and have carefully perused the relevant documents referred. Firstly, we fail to understand that under which provision of the Act the AO has issued the corrigendum and secondly assuming that the order dt. 28/12/2019 is a draft assessment order, as alleged by the ld. D/R, we find that the notice of demand issued u/s 156 of the Act is dt. 28/12/2019, the tax computation sheet is also dt. 28/12/2019 and the penalty notice is also issued on the very same date i.e., 28/12/2019. These facts go to show that on 28/12/2019, the AO quantified the taxable income and determined the tax payable by issuing and serving demand notice u/s 156 of the Act. In our considered opinion, this action of the AO has brought the proceedings to an end and the proceedings initiated u/s 144C of the Act stands concluded.

7.1. In our considered view, the provisions of Section 144C of the Act triggers a series of steps prescribed in sub-Section (2) to Section 12 of the Act and as can be seen from the most relevant sub-Sections (3) and

(13) (extracted *supra*), the assessment is completed either under sub-Section (3) or (13). A perusal of Section 144C of the Act shows that the AO shall, at the first instance forward the draft order of the proposed assessment and on receiving the said order, the assessee may approach the Dispute Resolution Panel (DRP), by raising objections. If the assessee accepts the variations, then the AO shall proceed by framing the final assessment order and if the objections are raised by the DRP, then, upon receipt of the directions issued by the DPR, the AO shall complete the assessment. However, we find that while drafting the said draft assessment order, the AO not only issued and served demand notice but has also initiated the penalty proceedings. Vide order dt. 10/01/2020, framed u/s 154 of the Act, the AO has decided as under:-

"In this case, for A.Y. 2016-17, a draft assessment order u/s 144C was passed on 30.12.2019 vide DIN ITBA/AST/S/ 143(3)/2019-20/1023352392(1) dated 28.12.2019. However, the demand notice u/s 156 of the I.T. Act determining demand of Rs. 252,54,84,961/- (Rs. 61,26,061/- & Rs. 251,93,58,900/-, being regular demand and DDT demand respectively) payable was inadvertently issued with DIN ITBA/AST/S/156/2019-20/1023352459(1) dated 28.12. 2019. Similarly penalty notice u/s 274 r.w.s. 271(1)(c) was also issued with DIN DIN ITBA/PNL/S/271(1)(c)/2019-20/1023352480(1) dated 28.12.2019.

Since the aforesaid assessment order is a draft assessment order, the aforesaid notices issued u/s 156 and u/s 274 r.w.s 271(1) (c) are hereby cancelled. Accordingly, the tax demand of Rs. 252,54,84,961/- is also hereby cancelled."

8. In our considered view, the assessment order dt. 28/12/2019 when once become invalid and *non-est*, we do not find any provision to rectify a non-existing order. Therefore, the aforementioned effort of the AO would do no good to the revenue.

9. So far as the question, whether demand notice is an integral part of the assessment order in concerned, the same has been answered by the Hon'ble High Court of Gujarat in the case of *CIT Vs. Purshottam Das T Patel* 209 ITR 52 wherein the Hon'ble High Court has relied on the decision of the Hon'ble Supreme Court in the case of *Kalyan Kumar Ray Vs. CIT* 191 ITR 634. The relevant findings of Hon'ble High Court read as under:

"Assessment' is one integrated process involving not only the assessment of the total income but also the determination of the tax. The latter is as crucial as the former. The Income-tax Officer has to determine, by an order in writing, not only the total income but also the net sum which will be payable by the assessee for the assessment year in question and the demand notice has to be issued under section 156 of the Incometax Act, 1961, in consequence of such an order. The statute does not, Page No : 55 however, require that both the computations (i.e., of the total income as well as of the sum payable) should be done on the same sheet of paper, the sheet that is superscribed 'assessment order'. It does not prescribe any form for the purpose. Once the assessment of the total income is complete with indications of the deductions, rebates, reliefs and adjustments available to the assessee, the calculation of the net tax payable is a process which is mostly arithmetical but generally time-consuming. If, therefore, the Income-tax Officer first draws up an order assessing the total income and, indicating the adjustments to be made, directs the office to compute the tax payable on that basis and then approves of it, either immediately or sometime later, no fault can be found with the process, though it is only when both the computation sheets are signed or initialled by the Income-tax Officer that the process described in section 143(3) will be complete." In our opinion, this decision, far from helping the Revenue, goes against it. The Supreme Court has in terms stated that assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax. It has further observed that the latter is as crucial as the former. Therefore, unless the total income is determined and the determination of tax is also done, it cannot be said that the process of assessment is complete. What section 153 requires is that the assessment should be completed within the prescribed time-limit. The words "order of assessment" cannot be construed to mean assessment of total income only. Those words would mean an order in writing whereby

the total income of the assessee is assessed and the tax payable by him is determined. When an order in writing in respect of both these things is passed, it can be said that there is a complete order of assessment. These two steps may be taken simultaneously or separately, but it cannot be gainsaid that both of them will have to be taken within the time prescribed by the Act. Admittedly, in this case the second step was not taken within the prescribed time. After determining the total income, the Income-tax Officer possibly left the matter to his subordinates for the purpose of calculating the tax payable by the assessee on the basis of the assessed total income. Even if we assume in favour of the Assessing Officer that he approved the said calculation when the papers were put before him for signing the demand notice, and that he signed the same, the fact remains that that step was taken by him after the prescribed period was over. The Tribunal was, therefore, right in holding that the assessment in this respect was time-barred. We, therefore, answer the question in the affirmative, i.e., against the Revenue and in favour of the assessee. No order as to costs"

10. The contention of the Id. D/R that vide order dt. 10/01/2020, the Officer has rectified the apparent mistakes and has withdrawn the demand notice, is not acceptable as, in our understanding of the law, there is no provision in the Act which provides for proposed/draft notice of demand and secondly whether the demand has been entered in the demand and collection register, is an internal matter/procedure of the revenue and cannot be taken into consideration to decide whether the demand notice issued along with order dt. 28/12/2019 complete the proceedings. In our considered opinion, the AO has bypassed the relevant sub-Sections i.e., sub-Sections (3) and (13) to Section 144C of the Act mentioned elsewhere.

11. 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* 3 SCC 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.

12. 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 28/12/2019 itself the Assessing Officer has by passed all the mandatory sub-sections of section 144C of the Act.

13. The question whether participation in subsequent proceedings would estop the assessee from challenging the validity of the order dated 28/12/2019 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 place 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."

14. On identical set of facts, Hon'ble High Court of Madras in the case of *Vijay Television Private Limited* reported in 369 ITR 113 (Mad.) has reported as under:-

"21. As rightly pointed out by the learned senior counsel for the petitioners, in the order passed on 26.03.2013, the second respondent even raised a demand as also imposed penalty. Such demand has to be raised only after a final order has been passed determining the tax liability. The very fact that the taxable amount has been determined itself would show that it was passed as a final order. In fact, a notice for

demand under [Section 156](#) of the Act was issued pursuant to such order dated 26.03.2013 of the second respondent. Both the order dated 26.03.2013 and the notice for demand thereof have been served simultaneously on the petitioner. Therefore, not only the assessment is complete, but also a notice dated 28.03.2013 was issued thereon calling upon the petitioner to pay the tax amount as also penalty under [Section 271](#) of the Act. Thereafter, the petitioner was given an opportunity of hearing on 12.04.2013. Subsequently, the second respondent realised the mistake in passing a final order instead of a draft assessment order which resulted in issuing a corrigendum on 15.04.2013. In the corrigendum it was only stated that the order passed on 26.03.2013 under [Section 143C](#) of the Act has to be read and treated as a draft assessment order as per [Section 143C](#) read with [Section 93CA \(4\)](#) read with [Section 143 \(3\)](#) of the Act. In and by the order dated 15.04.2013, the second respondent granted thirty days time to enable the assessee to file their objections. On receipt of the corrigendum dated 15.04.2013, the petitioner company approached the first respondent, but the first respondent declined to issue any direction to the assessment officer on the ground that the first respondent has got jurisdiction only to entertain such an appeal if the order passed by the second respondent is a pre-assessment order. Therefore, it is evident that the first respondent declined to entertain the objections raised by the petitioner company on the ground that the order passed by the second respondent is not a draft assessment order, rather it is a final order. Thus, the first respondent had treated the order dated 26.03.2013 of the second respondent as a final order and therefore it refused to entertain the objections filed on behalf of the petitioner company.

22. As mentioned supra, as per [Section 144C \(1\)](#) of the Act, the second respondent-assessing officer has no right to pass a final order pursuant to the recommendations made by the TPO. In fact, the second respondent-assessing officer himself has admitted by virtue of the corrigendum dated 15.04.2013, that the order dated 26.03.2013 is only a final order and it was directed to be treated as a draft assessment order. In this context, it is worthwhile to refer to the decision of the Honourable Supreme Court in the decision reported in ([Deepak Agro Foods vs. State of Rajasthan and others](#)) reported in (2008) 16 VST 454 (SC) wherein in Para No.10, the Honourable Supreme Court discussed as to when an order could be construed as a final order:-

“10. Shri Rajiv Dutta, learned senior counsel appearing on behalf of the appellant, submitted that in the light of its afore-extracted observations and a clear finding that the assessment order for the assessment year 1995-96 had been anti-dated, the order was null and void. It was urged that assessment proceedings after the expiry of the period of limitation being a nullity in law, the High Court should have annulled the assessment and there was no question of a fresh assessment. Thus, the nub of the grievance of the appellant is that in remanding the matter back to the Assessing

Officer, the High Court has not only extended the statutory period prescribed for completion of assessment, it has also conferred jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period.”

23. It is evident from [the above decision](#) of the Honourable Supreme Court that if an order is passed beyond the statutory period prescribed, such order is a nullity and has no force of law. In that case before the Honourable Supreme Court, the period for assessment proceedings expired and thereafter, fresh assessment orders have been issued by anti-dating it. In those circumstances, it was held that the High Court ought not to have remanded the matter back to the assessment officer and by doing so, the statutory period prescribed for completion of assessment has been extended by conferring jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period. In that case, the Honourable Supreme Court also held that there is a distinction between an order which is a nullity and an order which is irregular and illegal. Where an authority making order lacks inherent jurisdiction, such an order will be null and void ab initio, as the defect of jurisdiction goes to the root of the matter and strikes at his very authority to pass any order and such a defect cannot be cured even by consent of the parties.

24. This decision squarely applies to the facts of this case. In this case, the order passed by the second respondent lacks jurisdiction especially when it is beyond the period of limitation prescribed by the statute. When there is a statutory violation in not following the procedures prescribed, such an order cannot be cured by merely issuing a corrigendum.

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33. The decision of the Division Bench of the Andhra Pradesh High Court deals with an identical issue as that of the present case. In this case, against the order passed by the second respondent on 26.03.2013, the petitioner filed objections before the DRP, the first respondent herein and the first respondent refused to entertain it by stating that the order passed by the second respondent is a final order and it had jurisdiction to entertain objections only if it is a draft assessment order. While so, the order dated 26.03.2013 of the second respondent can only be termed as a final order and in such event it is contrary to [Section 144C](#) of the Act. As mentioned supra, in and by the order dated 26.03.2013, the second respondent determined the taxable amount and also imposed penalty payable by the petitioner. According to the learned senior counsel for the petitioners, even as on this date, the website of the department indicate the amount determined by the second respondent payable by the company inspite of issuance of the corrigendum on 15.04.2013 as a tax due amount. Thus, while issuing the corrigendum, the second respondent did not even withdraw the taxable amount determined by him or updated the status in the website. In any event, such an order dated 26.03.2013 passed by the second

respondent can only be construed as a final order passed in violation of the statutory provisions of the Act. The corrigendum dated 15.04.2013 is also beyond the period prescribed for limitation. Such a defect or failure on the part of the second respondent to adhere to the statutory provisions is not a curable defect by virtue of the corrigendum dated 15.04.2013. By issuing the corrigendum, the respondents cannot be allowed to develop their own case. Therefore, following the order passed by the Division Bench of the Andhra Pradesh High Court, which was also affirmed by the Honourable Supreme Court by dismissing the Special Leave Petition filed thereof, on 27.09.2013, the orders, which are impugned in these writ petitions are liable to be set aside."

15. The Hon'ble High Court of Karnataka in the case of *CIT(IT) vs. Cisco Systems Services B.V.* reported in [2023] 456 ITR 50 (Karnataka) has considered the similar grievance and held as under:-

"13. Undisputed facts of the case are, in the draft assessment order, the ACIT has ordered issuance of demand notice and to initiate penalty proceeding under section 271(1)(c) of the Act. Both the draft assessment order and the demand notice are dated December 28, 2018.

*14. Argument canvassed by the Revenue is, though demand notice has been issued, assessee had understood the order dated December 28, 2018 as a draft assessment order and filed its objections before the DRP. The defect if any is a curable one. On the other hand, Shri. Nageshwar Rao's argument is that the ACIT had completed the assessment at the stage of passing the draft assessment order and issued the demand notice. Thus, the re-assessment proceeding was complete. This procedure followed by ACIT is contrary to law laid down in *Vijay Television (P.) Ltd. case (supra)* and other authorities.*

15. Section 144C lays down a detailed procedure. Under Section 144C(1), the AO is required to forward a draft of the proposed order of assessment to the assessee. Assessee may file its acceptance or objection before the DRP and the AO. If assessee intimates its acceptance or no objections are received within 30 days, the AO shall complete the assessment. Where the DRP receives any objection from the assessee, it shall issue necessary directions to the AO to enable him to complete the assessment after considering the documents/material mentioned in Section 144C (6)(a) to (g) which includes the draft order. Before issuing the directions, the DRP may also make such further enquiry by any Income-tax Authority.

16. Upon receipt of the directions from DRP under sub-section 5, the AO shall, in conformity with the directions, complete the assessment within one month from the end of the month in which such direction is received. A notice of demand under section 156 may be issued after completion of the assessment under section 144C(13).

*17. In *Vijay Television (P.) Ltd.'s case (supra)*, it is held as follows:*

"21. As rightly pointed out by the learned senior counsel for the petitioners, in the order passed on 26-3-2013, the second respondent even raised a demand as also imposed penalty. Such demand has to be raised only after a final order has been passed determining the tax liability. The very fact that the taxable amount has been determined itself would show that it was passed as a final order. In fact, a notice for demand under section 156 of the Act was issued pursuant to such order dated 26-3-2013 of the second respondent. Both the order dated 26-3-2013 and the notice for demand thereof have been served simultaneously on the petitioner. Therefore, not only the assessment is complete, but also a notice dated 28-3-2013 was issued thereon calling upon the petitioner to pay the tax amount as also penalty under section 271 of the Act."

(Emphasis Supplied)

18. In the case on hand, though it is claimed by the Revenue that order dated December 28, 2018 was a draft assessment order, we may record that the ACIT has directed issuance of demand notice and also initiated penalty proceedings. As in *Vijay Television (P.) Ltd.*'s case (*supra*) case, the said order along with demand notice was served on the assessee.

19. In *Vijay Television Case*, instead of passing the draft assessment order, the final assessment order was passed. Subsequently, Revenue sought to correct the mistake by issuing corrigendum. Following the decision of Andhra Pradesh High Court in *Zuari Cement Ltd. v. Asstt. CIT* [W.P. No. 5557 of 2012, dated 21-2-2013] the Madras High Court set aside the order in *Vijay Television (P.) Ltd.*'s case (*supra*).

20. In *Kalyan Kumar Ray v. CIT* [\[1991\] 191 ITR 634 \(SC\)](#) relied upon by Shri. Nageshwar Rao, it is held that assessment is one integrated process involving not only the assessment of total income but also determination of the tax. In this case at the stage of passing the draft order, the ACIT had assessed the tax, passed a final order and also issued a demand notice.

21. Mr. Aravind also contended that the demand notice was not enforced. It is settled that demand notice stems out of an order of assessment and it is enforceable. It meets the assessee with civil consequences. The argument on behalf of the Revenue that the demand notice was not enforced is fallacious and noted only to be rejected.

22. We have carefully considered section 292B of the Act. The mistake which the ACIT has done in passing the final order at the stage of draft order is not curable under section 292B of the Act.

23. We have considered the appeals both on delay and merits. In the light of discussion made hereinabove, these appeals are devoid of merit and they are accordingly, dismissed. The questions of law are answered in favour of the Assessee and against the Revenue.

16. The Hon'ble Jurisdictional High Court of Bombay in the case of *PCIT vs. Lionbridge Technologies (P.) Ltd.*, reported in [2018] 100 *taxmann.com* 413 (Bombay), on identical set of facts has held as under:-

*“11. It must be noted that in respect of the procedure and determination of the ALP of International Transaction between related person, the law provides a special dispensation. In terms of Section 144C(I) of the Act, the Assessing Officer is to first pass a draft Assessment Order which is subject to challenge, by way of representation to the DRP. It is only after the DRP disposes of the representation, that the Assessing Officer passes a final order in terms of the directions of the DRP and such final order is appellable to the Tribunal. In this case, it is undisputed that on 12th March, 2014, the Assessing Officer passed a final Assessment Order in terms of the directions made by the DRP in the earlier round. The time to pass any such order, would expire in the present facts on 31st March, 2014, however, in case a Draft Assessment Order is issued, then the time to pass a final Assessment Order gets extended to one month after the passing of the directions by the DRP in terms of Section 144C(13) of the Act. Nevertheless, the Draft Assessment Order should have in the present facts been passed before 31st March, 2014 in terms of Section 153A(2A) of the Act. In this case, undisputedly, a final order was passed on 12th March, 2014 and is being sought to be corrected by issue of corrigendum on 16th April, 2014 i.e. after the time to pass the Draft Assessment Order has expired. In fact, the Tribunal placed reliance upon the decision of a single judge of the Madras High Court in *Vijay Television (P.) Ltd.* (supra). This, decision has now been upheld by the Division Bench of the Madras High Court in *Asstt. CIT v. Vijay Television (P.) Ltd.* [2018] 95 *taxmann.com* 101/407 ITR 642. In the above case, non issue of Draft Assessment Order could not be corrected by issuing a corrigendum to a final Assessment Order. Just as in the facts before the Madras High Court, here also the demand notice and institution of pending proceedings were not withdrawn by the corrigendum. Besides, in *International Air Transport Association v. Dy. CIT* [2016] 68 *taxmann.com* 246/241 *Taxman* 249 this Court has held that the Draft Assessment Order is necessary in terms of Section 144 C(1) of the Act before the Assessing Officer can proceed to pass a final Assessment Order. In the absence thereof, the order is without jurisdiction. So far the contention on behalf of the Revenue that the Respondent was estopped from challenging the corrigendum dated 16th April, 2004, as it was accepted by it and a representation also filed to the DRP. This submission overlooks the fact that there can be no estoppel on issue of law pertaining to jurisdiction. Therefore, if the corrigendum dated 16th April, 2014 and the order dated 12th March, 2014 of the Assessing Officer is without jurisdiction, the same can be raised at any time and the principle of estoppel will not apply. Mere consent of parties does not bestow jurisdiction, if the order is beyond jurisdiction. Therefore, we do not find any substance in this objection of the Revenue. Besides, the finding of the Tribunal in*

the impugned order that the order of the Assessing Officer was beyond the scope of the remand by order dated 25th January, 2012 of the Tribunal. This more particularly so as the remand by the Tribunal was occasioned on account of failure of the DRP to deal with the objections of the Respondent to the Draft Assessment Order. Therefore, making a reference again to the TPO for fixing the ALP, was not called for. Nothing has been pointed out to us which would even remotely suggest that the same is not correct.

12. Therefore, in the above view, the question as proposed, does not give rise to any substantial question of law.

13. Accordingly, Appeal dismissed."

17. 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 28/12/2019, when the demand notice was issued and served upon the assessee along with the penalty notice u/s 274 of the Act and, therefore, all the subsequent proceedings and orders become *non-est*. Ground No. 1 is accordingly allowed.

18. 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 with the grounds raised in the appeal memo. Before closing, it would be pertinent to refer to the following application for withdrawal of Transfer Pricing grounds on account of signing of Advance Pricing Agreement (APA):-

"We refer to the appeal preferred in the case of Goldman Sachs (India) Securities Private Limited (GSISPL) or Company) against the order dated 30 June 2021 issued under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (the 'Act') passed by the Assistant Commissioner of Income Tax, Circle 7(1)(1), Mumbai (learned 'Ao) in pursuance of the directions issued by the Dispute Resolution Panel - 1, Mumbai In this connection, we wish to state as under:

- 1. The Company had applied for Unilateral and Bilateral Advance Pricing Agreement (APA) (with the United States of America) for five consecutive years covering Financial Year ('FY) 2015-16 to FY 2019-20 for the following transactions:*

- A. Provision of non-binding investment advisory services ("IA") by GSISPL to its AEs
B. Provision of Information technology enabled services (ITES") by GSISPL to its AEs;
C. Reimbursement and recovery of expenses paid/received;
D. Receivables and payables arising from provision of aforementioned transactions;
and
E. Other closely linked transactions relating to the transactions in (A) and (B) above
2. With respect to the abovementioned APA applications, we wish to inform Your Honour that the Bilateral agreement was signed between the Central Board of Direct Taxes ((CBDT) and GSISPL on 30 January 2023 whereas the Unilateral agreement was signed between the CBDT and GSISPL on 16 February 2024. We have attached a copy of the signed agreements as Annexure 1 for your perusal.
3. Basis the above facts, we wish to submit that since the abovementioned APA agreements signed between the CBDT and GSISPL, cover the transactions of provision of IA and ITeS, the Company wishes to suo-moto withdraw the Ground Nos. 3 and 4 of the grounds of appeal of the captioned appeal for AY 2016-17 (including any sub-grounds) related to transfer pricing grounds related to adjustment under section 92CA of the Act and wishes not to press on this ground further. We have attached a copy of the captioned appeal as Annexure 2 for your ready reference.

We hope your Honours will accept our application and consider the same."

19. In the result, appeal of the assessee is allowed.

Order pronounced on 16th July, 2024 at Mumbai.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Kolkata, Dated 16/07/2024

SC S/P

आदेश की प्रतिलिपि ढ ग्रेषरत/Copy of the Order forwarded to :

1. ढ पीलररर / The Appellant
2. प्रतररर / The Respondent
3. संबधरत आरकर आरुकर / Concerned Pr. CIT
4. आरकर आरुकर (ढ पील) / The CIT(A)-
5. वरभरणीय प्रतरनरधर ,आरकर अपीलीय अधरकरण, मुंरई /DR,ITAT, Mumbai,
6. गार्ड फार्ई/ Guard file.

आदेशानुसर/ BY ORDER,
TRUE COPY

Assistant Registrar
आरकर अपीलीय अधरकरण
ITAT, Mumbai