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

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR U.S., ACCOUNTANT MEMBER

ITA No.1291/DEL/2022
(Assessment Year: 2018-19)

Ebro India Pvt. Ltd., 807, New Delhi House, Barakhamba Road, Connaught Place, New Delhi – 110 001.	vs.	ACIT, Circle 7 (1), Delhi.

(PAN : AAECT5502H)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Rohit Jain, Advocate
Shri Deepesh Jain, CA
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 11.06.2024
Date of Order : 09.09.2024

ORDER

PER S. RIFAUR RAHMAN, ACCOUNTANT MEMBER :

This appeal has been filed by the assessee against the final assessment order dated 29.04.2022 passed u/s 143(3) r.w.s.144C (13) of the Income Tax Act, 1961 (hereinafter called 'the Act') subsequent to the direction of the Ld. Dispute Resolution Panel (DRP)/TPO vide order dated 15/03/2022 for Assessment Year 2018-19.

2. Aggrieved of the above order, assessee is in appeal before us by raising following grounds of appeal :-

> *"Re: Violation of the section 144BI 144C and principles of natural justice*
>
> *1. That on the facts and circumstances of the case and in law, impugned assessment completed vide order dated 29.04.2022 passed under section 143(3) read with section 144C of the Income Tax Act, 1961 ('the Act') ['impugned order'] is illegal and bad in law.*
>
> *1.1. That on the facts and circumstances of the case and in law, the impugned assessment order having been passed not only in gross violation of principles of natural justice but also the mandatory procedure prescribed in section 144B of the Act is illegal, bad in law and liable to be quashed.*
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> *1.2. That on the facts and circumstances of the case and in law, the impugned assessment having been completed without passing and serving upon the appellant, the draft assessment order as per provisions of clause (xiv)(b) of sub-section (I) to section 144B of the Act, is non-est, illegal, bad in law and liable to be quashed.*
>
> *1.3. That the impugned assessment order [including draft order passed by National Faceless Assessment Centre (NF AC) under section 144C] having been passed without allowing personal hearing (either physically or virtually), in gross violation of mandatory provisions of the Act and principles of natural justice, is without jurisdiction, illegal, bad in law and liable to be quashed.*
>
> *1.4. That on the facts and circumstances of the case, the impugned final assessment order passed by the jurisdictional assessing officer, viz., Assistant Commissioner of Income tax, Circle 7(1), Delhi instead of NF AC, more so when draft assessment order under section 144C was passed by NFAC, is beyond jurisdiction and illegal in terms of section 144B of the Act.*
>
> *2. That on the facts and circumstances of the case and in law, the impugned assessment completed in violation of mandatory directions of the Dispute Resolution Panel (DRP) is illegal and bad in law.*

2.1. That on the facts and circumstances of the case and in law, the impugned assessment completed without considering the submissions/ evidence filed by the appellant is bad in law.

Without Prejudice- On Merits

3. That the assessing officer erred on facts and in law in assessing total income of the appellant Rs.146, 19, 11 ,543 as against returned/ declared income of Rs.l1,01,94,540.

Re: Addition under section 68 of the Act on account of share capital from non- resident holding company

4. That the assessing officer erred on facts and in law in making addition of Rs.134,99,99,904 under section 68 of the Act on account of share capital (including premium) received by the appellant from its non-resident holding company, alleging the same to be unexplained credits.

4.1. That the assessing officer erred on facts and in law in not considering the evidence placed on record by the appellant despite binding directions of the DRP, which is in gross violation of the provisions of the Act and consequentially, the addition calls for being deleted on the said ground alone.

4.2. That the assessing officer erred on facts and in law in alleging that the appellant had failed to submit relevant documents to establish the nature and source of share capital received during the year.

4.3. That the assessing officer erred on facts and in law in not appreciating that the onus cast upon the appellant to justify identity and creditworthiness of the shareholder and genuineness of the transaction was duly discharged by placing on record contemporaneous documents as required under law, which are in fact not considered/ examined by the assessing officer despite directions of the DRP.

4.4. That the assessing officer erred in not appreciating that the capital was received by the appellant by way of right issue to existing non-resident shareholders.

4.5. That the assessing officer erred on facts and in law in not appreciating that similar capital was received by the appellant from same non-resident shareholder in preceding year(s) which have been accepted as genuine after due examination in completed scrutiny assessments.

Re: Disallowance of PF/ ESI Contribution

5. That the assessing officer erred on facts and in law in disallowing an amount of Rs.54,031 under section 36(1)(va) of the Act, being employees' contribution to Employee State Insurance Fund ("ES),') and other welfare funds on the ground that the same was deposited beyond the time specified under relevant statute.

5.1. That the assessing officer erred on facts and in law not appreciating that employees' contribution had been deposited before the due date of filing return of income as prescribed under section 139(1) of the Act and the same is, therefore, allowable as deduction.

5.2. That the assessing officer erred on facts and in law in making the aforesaid disallowance without considering the legal position/ judicial pronouncements, and in gross violation of binding directions of the DRP.

5.3. That the assessing officer erred in making double adjustment of the aforesaid disallowance inasmuch - (i) income determined under section 143(1) of the Act is taken as the starting point for computing total income wherein the adjustment is already made; and (ii) the disallowance of Rs.54,031 is again made while computing total income in impugned order.

Re: Others

6. That the assessing officer erred on facts and in law in charging/ computing interest under sections 234c and 234d of the Act.

7. That the assessing officer erred on facts and in law in initiating penalty under sections 27IAAC and 270A of the Act."

3. Brief facts of the case are, assessee filed its return of income for AY 2018-19 on 30.11.2018 declaring an income of Rs.11,01,94,540/-. The return was processed under section 143 (1) of the Act on 01.10.2019 at an income of Rs.11,02,48,570/-. Subsequently, the case was selected for scrutiny through CASS and the reasons of selection for case were (i) substantial increase in share capital in a year; and (ii) large value of international transactions in the nature of guarantee. The statutory notices u/s 143(2) and 142 (1) of the Act were issued and served on the assessee through e-proceedings module.

4. Assessee is a wholly owned subsidiary of Herba Foods S.L.U., Spain and is engaged in rice milling activities in India. It procures raw paddy from the farmers and processed the same to produce rice.

5. The case of the assessee was referred to Transfer Pricing Officer (TPO) and TPO has passed his order dated 25.07.2021 determining the total adjustment of Rs.141,09,056/-, which was subsequently rectified vide order dated 29.07.2021 proposing TP adjustment of Rs.16,09,038/- u/s 154 of the Act.

6. Draft assessment order u/s 144C of the Act was passed on 21.09.2021, proposing to assess the income of the assessee at Rs.147,43,57,530/- which consists of TP adjustment of Rs.141,09,056/-, addition u/s 68 of Rs.134,99,99,904/- qua share capital receipt from non-resident parent company and disallowance of Rs.54,031/- relating to delayed deposit of ESI/PF.

7. Aggrieved with the draft assessment order, assessee filed objections before the Dispute Resolution Panel (DRP)-1, New Delhi and filed objections challenging validity of the assessment proceedings and seeking directions for deletion of various proposed additions/disallowances. Ld. DRP gave a direction to Assessing Officer to record reasons for valuation and pass speaking/reasoned order in this regard and also directed to restrict the TP adjustment as per rectification order passed u/s 154 of the Act and directed the Assessing Officer to consider the evidences and submissions filed by the assessee with regard to addition u/s 68 of the Act.

8. After considering the directions of the ld. DRP, final assessment order was passed by the jurisdictional Assessing Officer (JAO) on 29.04.2022 assessing the total income of the assessee at Rs.146,19,11,543/-.

9. Aggrieved with the above order, assessee is in appeal before us.

10. At the time of hearing, the assessee first pressed the jurisdictional issues raised by the assessee in grounds no.1 to 2.1 and also made submissions alongwith filed a synopsis. The same is reproduced as under :-

> 11. *It is respectfully submitted that the assessment completed under section 143(3)/ 144C of the Act is illegal and bad in law since the same has been passed in gross violation of provisions of sections 144B, 144C of the Act as also principles of natural justice inasmuch as:*
>
> ***(a) the impugned assessment has been completed without passing and serving upon the appellant show cause notice- cum- draft order as mandated by provisions of clause (xvi)(b) of sub-section (1) to section 144B,prior to passing of the draft assessment order under section 144C(1) of the Act; no opportunity of personal hearing (through video conferencing) was allowed to the assessee by the assessing officer prior to completion of assessment;***

(b) the final assessment order has been passed by the jurisdictional assessing officer, viz., Assistant Commissioner of Income tax, Circle-7(1), Delhi instead of NFAC;

(c) the final assessment order having been passed in blatant violation of specific directions issued by the DRP to, inter alia,: (i) adjudicate the issue of violation of mandatory procedure under section 144B; (ii) pass a speaking order after considering details and evidences filed by the appellant; is non-est, illegal and bad in law, in view of section 144C(10) of the Act;

(d) the submissions/ evidence(s) placed on record has not been considered by the assessing officer, in blatant violation of fundamental principles of assessment. Further, additions/ disallowances have been made contrary to the dictum laid down by various Courts.

12. *Each of the aforesaid contention is briefly elaborated hereunder:*

Re (a): Assessment completed without issuance of show cause notice cum draft assessment order prior to draft order passed under section 144C(1) of the Act and without providing opportunity of hearing is bad in law

13. *Section 144B of the Act [as it stood at relevant time- prior to amendment by Financial Act, 2022] statutorily mandates the procedure to be followed by the NFAC while conducting faceless assessment, with sub-section (1) thereto clearly providing, ".....**the assessment under sub-section (3) of section 143 or under section 144, in cases referred of in sub-section (2), SHALL be made in a faceless manner AS PER THE PROCEDURE, namely**:" (capitalized for emphasis).*

14. *Briefly stated, the mandatory procedure of assessment by the NFAC is, to the extent relevant is set out as under:*

*(a) Firstly, as per provisions of **clause (xiv) of sub-section (1) to section 144B**, for framing assessment under section 143(3) or section 144 of the Act, **the assessment unit of NFAC is**, after taking into consideration relevant information/ documents submitted, **mandated to pass draft assessment order** either accepting the income **declared in return of income** or making variation to the said income and forward the copy of such draft assessment order to the NFAC.*

*(b) Thereafter, the NFAC, in terms of **clause (xvi) of sub-section (1) to section 144B of the Act**, is, upon receipt of such draft order, **mandated to examine the same in accordance with the risk management strategy and then, to either**:*

a) finalise the assessment, in case no variation is proposed which is prejudicial to the interest of the assessee, by passing and serving such final assessment order accompanied with notice of demand specifying

the amount payable along with notice for initiating of penalty proceedings, if any, to the assessee; or

b) provide an opportunity to the assessee, in case any variation is proposed, by serving a notice directing the assessee to show-cause as to why the proposed variation should not be made; or

c) assign the draft assessment order to the review unit.

(c) That thereafter, it is only in cases where no response to the show-cause notice is received from the assessee, that the NaFAC is, on the basis of material available on record, permitted to finalise the assessment on the basis of draft assessment order [refer section 144B(1)(xxiii)(a) of the Act].

(d) In cases where inputs/ response is received from the assessee, NaFAC, in accordance with section 144B(1)(xxiii)(b) of the Act, is statutorily required to forward the response received from the assessee to the assessment unit to formulate a revised draft assessment order. In case any variation is proposed to be made to revised draft assessment order which are prejudicial to the interest of assessee in comparison to the original draft assessment order, then the procedural steps as outlined hereinabove shall apply until the finalization of assessment resulting in passing of final draft assessment order [refer section 144B(1)(xxv)-(xxvi) of the Act].

15. *Though provisions of section 144B of the Act were amended vide Finance Act, 2022;however, the aforesaid procedure/ requirement of issuance of show cause notice cum draft order materially remains the same [refer clauses (xii) to (xvi) of amended section 144B(1)].*

16. ***In the facts of the present case, the assessment was completed without passing and serving upon the appellant show cause notice- cum- draft order as mandated by provisions of clause (xvi)(b) of sub-section (1) to section 144B, prior to passing of the draft assessment order under section 144C(1) of the Act.***

17. *Any assessment completed in violation of the aforesaid mandatory and binding procedure more particularly without issuing show-cause notice cum draft order is, in our respectful submissions, beyond jurisdiction, illegal and bad in law.*

18. ***Specific attention, in this regard, is invited to the following decisions of the jurisdictional Delhi High Court wherein assessment orders passed under section 144B of the Act without issuance of show-cause notice cum draft assessment order have been held to be invalid:***

✓ *In the case of **Modicare Foundation V. NFAC: WP(C) No. 5535/ 2021 dated 06.08.2021**, the **Delhi HighCourt** while setting aside the order passed without issuance of show cause notice-cum-draft assessment order, observed as under:*

"3. A perusal of the impugned assessment order would show that, variation has been made in the taxable income to the prejudice of the assessee.

3.1. The record shows that, the assessee had claimed exemptions under Section 11/12 of the Act, and thus, declared its income in the relevant AY i.e., 2018-2019, as ―Nil.

3.2. The Assessing Officer (in short 'AO'), via the impugned assessment order dated 15.04.2021, has made an addition of Rs. 75,79,981/- to the taxable income of the assessee. Thus, the assessee has been assessed at Rs. 75,79,980/- (rounded off).

3.3. ***In view of this, it is evident that variation was made to declared taxable income of the assessee which, as noticed above, was Nil, albeit, without issuance of a show cause notice-cum-draft assessment order. Admittedly, the assessee had no opportunity to respond to the additions made****.*

4. ***Given these admitted circumstances, the impugned assessment order as also the consequential notices, issued under Section 156 and 270A of the Act, dated 15.04.2021, would have to be set aside. It is ordered accordingly****.*

4.1. Liberty, however, is granted to the revenue to take next steps in the matter, in accordance with the law.

5. The writ petition and the pending applications are disposed of in the aforesaid terms." (emphasis supplied)

✓ *Reliance is also placed on the decision of the* ***Bombay High Court*** *in the case of* ***Shreeji Investment & Advisory Services v. National Faceless Assessment Centre: (2021) 323 CTR 505/ WP No.13235 of 2021.*** *In that case, the Petitioner challenged in assessment order passed under section 143(3) r.w.s section 144B of the Act for assessment year 2018-19 on the grounds that- a) no draft assessment order was issued as required under sub clause (xvi) of sub Section (1) of Section 144B; b) addition under section 68 of the Act has been made without even giving an opportunity by issuing a show cause notice and ; (c) no personal hearing was granted despite petitioner requesting for the same. The Hon'ble High Court quashed the said assessment order passed in violation of section 144B of the Act observing as under:*

> *"3. Moreover, as regards draft assessment order, the impugned order does not state that any draft assessment order was given but in the affidavit in reply filed by one Sreekala S. Nair affirmed on 21st September 2021, it is stated that the show cause notice dated 18th February 2021 had a heading "show cause notice as to why assessment should not be completed as per draft assessment order and "the notice further states that if no reply is received, the assessment will be completed as per the draft assessment order".In*

our view, this is one of the most preposterous stand take in as much as in the notice dated 18th February 2021 cannot, by any stretch of imagination, be called the draft assessment order. In paragraph 3 of the notice it is stated "please explain the tax impact if it should be 8,41,03,800/- instead of 6,54,05,508/-". Then it is stated in paragraph 4 "in this regard please produce the ITR/P&L / and balance sheet of the partners". In paragraph 5 it is stated "please explain the method of accounting adopted by you" and in paragraph 6 it is stated "please produce copy DEMAT account with a chart showing the entry date of purchase of share on which short term capital losses occurred and chart showing sale date of these shares supported with the bank details". In our view, this is nothing but a notice seeking further details, information, documents and cannot be called the draft assessment order. Therefore, on this ground also the assessment order has to be set aside.

4. The final nail in the coffin is addition of Rs.3,24,98,451/- and Rs.3,79,58,450/-, both under Section 68 of the Act. In the petition, in one of the grounds there is a specific allegation that there is not even a whisper of these additions either in the alleged draft assessment order or in any of the notices issued in the course of assessment proceedings and no opportunity whatsoever was given to petitioner to file its objections against these additions. In the affidavit in reply of respondent, there is no denial of this fact. In the affidavit in reply, the affiant has gone on the merits of the two additions but does not deny the fact that neither the alleged draft assessment order or any of the notices have not even referred to this proposed additions under Section 68 of the Act. ***Issuance of show cause notice is the preliminary step which is required to be undertaken. The purpose of show cause notice is to enable a party to effectively deal with the case made out by respondent (Om Shri Jigar Association Vs. Union of India) 1 Therefore, on this ground also the impugned order is required to be set aside.***

5 In our view, having heard Mr. Syal and Mr. Pinto and having considered the petition and the affidavit in reply, the prayer as prayed for in prayer clauses (a) and (c) of the petition has to be granted and is hereby granted. The same read as under:

> *"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the passing of the impugned order dated 24 th May 2021 under Section 143(3) r.w.s. 144B of the Act for the assessment year 2018-19 and after going through the same and examining the question of legality thereof quash, cancel and set aside such impugned order .*

(c) that this Hon'ble Court be pleased to issue a Writ of Prohibition or any other writ, order or direction under Article 226 of the Constitution of India ordering and directing respondent no.1 not to take any action in furtherance to the impugned order."

7. Petition disposed with no order as to costs."

To the similar effect are the following decisions:

- ✓ *Toplight Corporate Management Pvt Ltd vs NFAC: W.P.(C) 6223/2021 (Del)*
- ✓ *International Management vs NFAC: [2021] 283 Taxman 78 (Del)*
- ✓ *Bhabani Pigments Pvt Ltd vs NFAC: W.P.(C) 5783/2021(Del)*
- ✓ *YCD Industries vs NFAC: W.P.(C) 5552/2021(Del)*
- ✓ *Smart Vishwas Society vs NFAC: W.P.(C) 5348/2021(Del)*
- ✓ *PB Fintech Private Limited Vs NeAC: W.P.(C) 5425/2021(Del)*
- ✓ *Globe Capital Foundation vs NeAC: W.P.(C) 5298/2021(Del)*
- ✓ *Idex India (P.) Ltd. v. ACIT: 441 ITR 616 (Guj.)*

19. ***In view of the aforesaid, in view of non-compliance of mandatory procedure laid down in section 144B of the Act, more particularly non-issuance of show cause notice cum draft order, the assessment order dated 29.04.2022 is beyond jurisdiction, illegal and bad in law. The impugned order is, therefore, liable to be quashed, on this ground itself.***

20. ***That apart, it is undisputed that no opportunity of hearing oral arguments/ representation was granted to the appellant by – (i) NFAC prior to passing of draft assessment order dated 21.09.2021; or (ii) the JAO before passing the impugned final assessment order dated 29.04.2022****; even though the same was specifically sought by the appellant [refer reply dated 11.04.2022 @* ***page 159 of paperbook****]*

21. *It is settled law that any assessment concluded without affording opportunity of being heard is non-est, illegal and bad in law.*

22. *On the issue of denial of opportunity of hearing, specific attention is invited to the ruling of the* ***jurisdictional Delhi High Court*** *in the case of* ***Bharat Aluminium Company Ltd. vs. Union of India [2022] 134 taxmann.com 187 (Del),*** *wherein in the context of section 144B of the Act, after exhaustively analyzing the scheme of faceless assessment, the Hon'ble Court,* ***specifically observed that grant of personal hearing is, in case of a specific request to that effect having been made by the assessee, mandatory and not discretionary****.*

23. *The* ***Gujarat High Court*** *in the case of* ***Dr. K R Shroff Foundation v. ACIT: R/Special Civil Application No. 14779 of 2021 dated 11.03.2022*** *emphasized on the effective and real opportunity of hearing to be granted to the assessee before conclusion of assessment. The Court was pleased to*

quash the assessment order that resulted in demand of Rs.633.50 crores over disrupted VC hearing provided prior to completion of assessment.

24. *Attention is also invited to the observations* ***Sanjay Aggarwal vs National Faceless Assessment Centre, Delhi: [2021] 436 ITR 180 (Del)****:*

"Conclusion:

12. Therefore, in our view, given the aforesaid facts and circumstances, it was incumbent upon the respondent/revenue to accord a personal hearing to the petitioner As noted above, several requests had been made for personal hearing by the petitioner none of which were dealt with by the respondent/revenue.

12.1 The net impact of this infraction would be that, the impugned orders will have to be set aside. It is ordered accordingly.

13. This brings us to Mr. Chandra's submission that; the respondent/revenue should be allowed to proceed afresh in the matter, in accordance with the law. To our minds if the law permits the respondent/revenue to take further steps in the matter, the Court, at this stage, need not make any observations in that regard. If and when such steps are taken, and there is a grievance, the petitioner can take recourse to the relevant provisions of the Act.

14. At this stage, Mr. Goel says that the entire scheme, encapsulated under section 144B of the Act, was laid down to bring transparency as well as accountability in the system.

14.1 According to us, irrespective of whether such a statutory scheme was framed or not, the system has to be both, transparent, and the persons administering it, have to remain accountable. Therefore, what Mr. Goel has said is something, which is, obvious.

15. The writ petition and the pending application are disposed of in the aforesaid term. The case papers shall stand consigned to the record." (emphasis supplied)

25. *To similar effect are the following judgments rendered in this context of faceless assessment scheme under section 144B of the Act:*

- ✓ *Mudar Sudheer vs. Union of India: [2022] 287 Taxman213 (AP)*
- ✓ *Floral Realcon(P.) Ltd Vs. National Faceless Assessment Centre; 283 Taxman 488*
- ✓ *Dar Housing Ltd. Vs. National E Assessment Center Delhi ; 441 ITR 285(del)*
- ✓ *Devanshu Infin Ltd. Vs. National E Assessment Center Delhi ;284 Taxman 36*
- ✓ *Ramprastha Buildwell (P.) Ltd. Vs. National E Assessment Center, Delhi; 283 Taxman 235*

- ✓ *KRS Home Developers (P.) Ltd. Vs. National Faceless Assessment Centre ;283 Taxman 413*
- ✓ *Umkal Healthcare (P.) Ltd. Vs. National Faceless Assessment Centre ;283 Taxman 504*
- ✓ *Piramal Enterprises Limited vs. Addl./Jt./DY./Asstt. Commissioner of Income Tax/Income Tax Officer, Delhi [WP(L) 11040/2021; decided on 30.07.2021] (Bom)*
- ✓ *NainaLal Kidwai vs. National Faceless Assessment Centre [WP(C) 5775/2021; decided on 03.06.2021] (Del)*
- ✓ *Ritnand Balved Education Foundation (Umbrella Organisation of Amity Group of Institutions) vs. National Faceless Assessment Centre &Ors. [WP(C) 5537/2021; decided on 27.05.2021] (Del)*
- ✓ *Antony Alphonse Kevin Alphonse vs. ITO, National E-Assessment Centre [W.P. No.8379-2021; decided on 01.04.2021] (Mad)*
- ✓ *Magick Woods Exports Private Limited vs. National E-Assessment Centre [W.P. No.10693-2021; decided on 28.04.2021] (Mad)*
- ✓ *Orissa Stevedores Ltd. vs. Union of India [WP(C) No.19402/2021; decided on 08.07.2021] (Ori)*

26. ***In view of the aforesaid, the impugned assessment completed without providing any opportunity, much less adequate opportunity, of being heard to the appellant calls for being quashed at the threshold****.*

Re (c): Impugned assessment order passed by JAO instead of NFAC bad in law

27. *In terms of mandatory provisions of section 144B of the Act, the assessment is required to be in a "faceless manner"; the notices are required to be issued by NFAC and also the assessment order(s) are required to be passed by NFAC.*

28. *In the facts of the present case, it may be noted that:*

(a) various notices from time to time during the course of assessment proceedings were issued by the National e-Assessment Centre/ NFAC;
*(b) the **draft assessment order** dated 21.09.2021 under section 144C of the Act was passed by **NFAC**;*
*(c) **pursuant to directions of the DRP, a notice** dated 30.03.2022 requiring the appellant to file information was also **issued by the NFAC** [refer **pages 155-156 of paperbook],**which was duly complied with by the appellant vide reply dated 11.04.2022;*
(d) a notice dated 13.04.2022 was received from TPO which was replied to by the appellant vide letter dated 18.04.2022;
(e) no notice was, during the course of assessment, issued by the jurisdictional assessing officer, viz., Asst. Commissioner of Income Tax, Circle 7(1).

29. *Kind attention is invited to section 144B(1) of the Act, which reads as under [relevant extracts]:*

"(1) Notwithstanding anything to the contrary contained in any other provisions of this Act, the assessment under sub-section (3) of section 143 or under section 144, in the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—

(i) the National Faceless Assessment Centre shall serve a notice on the assessee under sub-section (2) of section 143;

……..

(iii) where the assessee—

(a) has furnished his return of income under section 139 or in response to a notice issued under sub-section (1) of section 142 or under sub-section (1) of section 148, and a notice under sub-section (2) of section 143 has been issued by the Assessing Officer or the prescribed income-tax authority, as the case may be; or

(b) has not furnished his return of income in response to a notice issued under sub-section (1) of section 142 by the Assessing Officer; or

(c) has not furnished his return of income under sub-section (1) of section 148 and a notice under sub-section (1) of section 142 has been issued by the Assessing Officer,

the National Faceless Assessment Centre shall intimate the assessee that assessment in his case shall be completed in accordance with the procedure laid down under this section

……..

(xiv) the assessment unit shall, after taking into account all the relevant material available on the record make in writing, a draft assessment order or, in a case where intimation referred to in clause (xiii) is received from the National Faceless Assessment Centre, make in writing, a draft assessment order to the best of its judgment, either accepting the income or sum payable by, or sum refundable to, the assessee as per his return or making variation to the said income or sum, and send a copy of such order to the National Faceless Assessment Centre

……..

(xxx) the assessment unit shall in conformity of the directions issued by the Dispute Resolution Panel under sub-section (5) of section 144C, prepare a draft assessment order in accordance with sub-section (13) of section 144C and send a copy of such order to the National Faceless Assessment Centre;

(xxxi) the National Faceless Assessment Centre shall, upon receipt of draft assessment order referred to in clause (xxx), finalise the assessment within the time allowed under sub-section (13) of section 144C and serve a copy of such order and notice for initiating penalty proceedings, if any, to the

assessee, alongwith the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment;"

30. ***On perusal of the aforesaid, it will kindly be appreciated that section 144B clearly mandates that notwithstanding the provisions of section 143, NFAC shall pass the final assessment order. In fact, clause (xxx) of section 144B(1) mandates the NFAC to pass an order in conformity with the directions of the DRP, which is thereafter, to the finalized and served on the assessee.***

31. ***In blatant violation of the aforesaid statutory mandate, to the utter shock of the appellant, the final assessment order dated 29.04.2022 impugned in the present appeal was passed by the jurisdictional assessing officer, viz., Asst. Commissioner of Income Tax, Circle 7(1) and not by NFAC. The said action is clearly in gross violation of the statutory mandate of section 144B of the Act, which required only the NFAC to pass the assessment order and hence the impugned order is invalid and bad in law.***

32. *It is trite law that an authority conducting or hearing the proceedings must only pass the order [Refer: Automorive Tyre Manufactures Association v. Designated Authority: (2011) 2 SCC 258 (para 83-86); Gullapalli Nageshwara Rao and Ors v. AP State Road Transport Corporation: AIR 1959 SC 308 (para 31)]. Further, an order passed by authority not having jurisdiction is patently illegal and bad in law.*

33. *For sake of completeness, attention is also invited to section 144B(8) of the Act [as relevant] which reads as "8) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Principal Chief Commissioner or the Principal Director General, as the case may be, in-charge of National Faceless Assessment Centre may, at any stage of the assessment, if considered necessary, transfer the case to the Assessing Officer having jurisdiction over such case, with the prior approval of the Board"*

34. *In the present case, no direction or order transferring the case of the appellant from NFAC to jurisdictional assessing officer has been served on the appellant; no approval of the Board as contemplated in the aforesaid section is brought on record; and there is no mention of any transfer of jurisdiction to the JAO in the impugned assessment order and/ or any other communication to the appellant.*

35. ***Being so, the impugned order passed by Asst. Commissioner of Income Tax, Circle 7(1) and not by NFAC is, in our respectful submissions, beyond jurisdiction, illegal and bad in law being passed by officer not having jurisdiction**.*

Re (d): Final assessment order having been passed in blatant violation of specific directions issued by the DRP- invalid and bad in law

36. *Strictly without prejudice to the aforesaid, it is further pertinent to note that the impugned assessment order has been passed by the assessing officer without following the binding directions of the DRP as is explained hereunder:*

(a) The DRP had held that draft assessment order under section 144C(1) was passed in breach of the provisions of section 144B of the Act and directed the assessing officer to spell out the reasons for the same in the final assessment order.

*The DRP, in **para 3.1.1 of DRP order** observed that ".....An order u/s 144C was issued subsequent to the aforesaid notice vide order dated 21.09.2021, **breeching the provisions of section 144B of the Act. The Panel directs the AO to spell out the reasons in this regard, while passing the final order in this case**. The Panel reiterates the need to pass a speaking order in this regard." (emphasis supplied)*

Despite the aforesaid specific direction of the DRP,the assessing officer has failed to record any reasons for violation of provisions of section 144B of the Act in the impugned order. In fact, the assessing authority continued to conduct assessment in violation of section 144B of the Act and passed the impugned order as explained supra in violation of the mandatory provisions.

*(b) In respect of addition under section 68 of the Act, the DRP had directed the assessing officer to consider the material/ evidence placed on record before passing the final order [refer **para 3.2.3 of DRP order**]. The assessing officer has without considering the said directions, proceeded to repeat the addition as made in the draft order.*

***Most importantly, paras 6.1 to 6.8 of the final assessment order dated 29.04.2022 are verbatim copied from the very same paras in the draft assessment order dated 21.09.2021 [except that some reproductions in the draft order as missing in the final assessment order].**There is thus, not only blatant violation of the directions of the DRP but complete non-application of mind while passing the final assessment order.*

*(c) Regarding disallowance of delayed payment of contribution, the DRP had directed that assessing officer to consider the judicial precedents as highlighted by the appellant [refer **para 3.4.2 of DRP order**], which has again been completely ignored by the assessing officer while passing the final order.*

37. ***As per provisions of section 144C(10) read with section 144C(13) of the Act, it is mandatory for the assessing officer to pass the final order in conformity with the directions issued by the DRP.** Not following the directions of the DRP renders the final assessment order as beyond jurisdiction, illegal and bad in law.*

38. *Reliance in this regard is placed on the following decisions:*

- ✓ ***ESPN Star Sports Mauritius SNCET Companies vs. UoI: 388 ITR 383 (Del.)***
- ✓ ***Addl CIT vs. Oracle India (P) Ltd: 93 taxmann.com 8 (Del Trib.)***
- ✓ ***Global One India Pvt. Ltd. v. DCIT: I.T.A NO. 1980/Del/2014 (Del Trib.)***
- ✓ *Aricent Technologies (Holdings) Ltd: ITA No.90/Del/2013 (Del Trib.)*
- ✓ *Flextronics Technologies (India) Pvt Ltd: IT(TP)A 823/Bang/2017 (Bang Trib.)*
- ✓ *Yokogawa India Ltd vs. ACIT: ITA(TP) 1715/Bang/2016 (Bang Trib.)*
- ✓ *Dongfang Electric (India) Pvt Ltd: ITA No.2356/Kol/2017 (Kol Trib.)*

39. ***For the aforesaid reason, too, the final assessment order passed is beyond jurisdiction, illegal and bad in law and calls for being quashed at the threshold***.

Re (e): Non consideration of submissions/ evidences- violative of principles of natural justice

40. *It is respectfully submitted that the additions/ disallowances have been made by the assessing officer without considering the relevant submissions and detailed documentary evidences placed on record by the appellant, despite the specific directions of the DRP. Further, the documentary evidences have not been controverted by the assessing officer before making the additions.*

41. *In fact, the appellant had, during the course of assessment proceedings even offered that if any additional document/ information is required, the appellant would be pleased to submit the same [refer letters dated 11.12.2020 and 10.09.2021] however, no further requirement was raised, and the assessing officer proceeded to pass the final order straight away. That apart, additions have been made which are contrary to the principles/ law settled by the apex Court and various High Courts. Assessment conducted in such a manner ignoring the submissions of the appellant is illegal and bad in law [Refer: RKKR Foundation vs NFAC: W.P.(C) 5277/2021 (Del.), KBB Nuts Pvt Ltd vs NFAC: W.P.(C) 5234/2021 (Del.), DJ Surfactants vs NeAC: W.P.(C) 4814/2021 (Del.)].*

42. *For the aforesaid cumulative reasons, it is patently clear that the impugned assessment order is beyond jurisdiction, illegal and bad in law and thus calls for being quashed at the threshold.*

(II) WITHOUT PREJUDICE- ON MERITS

Re: Ground of Appeal No. 3: *General*

Re: Grounds of Appeal Nos.4-4.5: ***Addition u/s 68 on account of share capital received from non-resident holding company***

43. *The appellant is a closely held company and was incorporated in March 2013.The shareholding pattern of the appellant as on 01.04.2017 [opening balance at beginning of relevant year] was as under:*

Name of shareholder	***Number of shares***	***% Shareholding***
Herba Foods SLU, Spain	*13,99,91,856*	*99.99%*
Herba Rice Mills SLU, Spain	*8,144*	*0.01%*
Total	***14,00,00,000***	

44. *During the year under consideration, i.e., previous year relevant to assessment year 2018-19, assessee issued equity shares to the aforesaid* ***existing non-resident shareholders*** *in following manner-* ***(in INR)***

Name of shareholder	***Number of shares issued***	***Value***	***Total value [including premium]***
Herba Foods SLU, Spain	*4,95,81,800*	*FV- Rs.10/shares issued on 30.06.2017 at Rs.18.15 per share*	*89,99,09,670*
	2,20,24,221	*FV- Rs.10/shares issued on 27.02.2018 at Rs.20.43 per share*	*44,99,54,835*
Sub-total	*7,16,06,021*		*134,98,64,505*
Herba Rice Mills SLU, Spain	*4,960*	*FV- Rs.10/shares issued on 30.06.2017 at Rs.18.15 per share*	*90,024*
	2,221	*FV- Rs.10/shares issued on 27.02.2018 at Rs.20.43 per share*	*45,375*
Sub-total	*7,181*		*1,35,399*
Total	*7,16,13,202*		***134,99,99,904***

45. *It is pertinent to note that even after issue of aforesaid equity shares by assessee to the existing shareholders, the percentage shareholding of existing shareholders remained same, i.e., 99.99 %: 0.01%.*

Re: Assessment proceedings (prior to passing of draft assessment order):

46. *During the course of assessment proceedings before NFAC, the appellant, vide* ***replies dated 11.12.2020****[refer* ***pages 53-88 of paperbook] and 10.09.2021****[refer* ***pages 92-96 of paperbook****] duly submitted the following information/ documents:*

- *The shares were issued to the existing shareholders; the funds/ money aggregating to Rs.134.99 crores was received from the existing non-resident holding company only;*
- *Complete details such as name, address and PAN of the shareholders, face-value and premium per shares, number of shares, date of issue, etc., were duly submitted;*
- *Valuation reports justifying the price of the shares issued on 30.06.2017 (Rs.18.15 shares) and on 27.02.2018 (Rs.20.43 per shares) were duly placed on record;*

- *The history of issuance of shares to the said shareholders in preceding years was duly provided.*

47. *Also, the case of the assessee was also referred to the Transfer Pricing Officer (TPO) under section 92CA of the Act. During such proceedings,*

- *the TPO, vide **notice dated 25.02.2021**, inter-alia, required the assessee to submit the details of change in shareholding structure and other international transactions [refer **pages 97-98 of paperbook**]; and*

- *in response thereto, the appellant**vide reply dated 07.07.2021** submitted (as Annexure-11 to the reply), the details of fresh shares issued to the existing shareholder, without any change in the percentage shareholding [refer **pages 99-101 of paperbook**].*

48. *The aforesaid transaction of issuance of shares was duly accepted by the TPO vide order dated 25.07.2021 read with rectification order dated 29.07.2021 without any adverse inference or adjustment therefor.*

49. *The NFAC, however, vide draft assessment order dated 21.09.2021 passed under section 144C(1) of the Act proceeded to treat the aforesaid sum of Rs.134.99 crores as unexplained credit under section 68 of the Act. While making the said addition, the NFAC vaguely alleged that the assessee has not filed the requisite details/ documentary evidence to establish the nature and source of credit in the form of share capital, nor it is proved that the amount has been received from the non-resident.*

Re: Proceedings before DRP:

50. *In the objections filed against the addition proposed in the draft order, during the course of proceedings before the DRP, the appellant further submitted the following documentary evidence(s) to substantiate the nature/ source of the share capital:*

- ✓ *Confirmation from the shareholders/ subscriber [refer **pages 143-144 of paperbook**];*
- ✓ *Financial statement of assessee disclosing amount as share capital;*
- ✓ *Copy of bank account statements of the assessee highlighting the transaction of receipt of share application money [refer **pages 145-146 of paperbook**];*
- ✓ *Copy of Foreign Inward Remittance Certificate (FIRC) [refer **pages 147-150 of paperbook**];*
- ✓ *Copy of share certificates [refer **pages 151-154 of paperbook**].*

51. *Considering the objections and the documents/ evidences placed on record by the appellant, the DRP held as under:*

"3.2.3 It is submitted that the assessee has issued shares to its related party, i.e. Herba Foods SLU and had other transactions as well with the

said company. The case of the assessee was referred to the TPO. The TPO after analysing the related party transactions with related parties (including Herba Foods SLU) has held transactions are at Arm's Length (barring a few transactions). In addition, the TPO had also vide notice dated 25.02.2021 asked assessee to furnish details of equity shares issued by assessee. Assessee had filed its response on 07.07.2021 and has furnished the details relating to equity shares issued by assessee to its shareholders. It is accordingly pleaded that the identity of the foreign entity has duly been examined by the TPO vide analysing the related party transactions and that the TPO has drawn no adverse inference in reference to the share capital related party even after specific enquiry in this regard. Therefore, it can be deemed that the nature of transaction also stands verified by the TPO as well. It is also argued that there was no requirement to prove creditworthiness of shareholders u/s 68 where shareholder is non- resident. Further, under proviso to section 68, where the sum credited relates to share application money, share capital, share premium, the assessee shall be required to furnish source of source as well. However, it is clear that the proviso is applicable only to the person who is resident under the provisions of the Act. The above analysis of the provisions of section 68 of the Act would make it dear that where the sum received as share capital is from non-resident shareholders, then proviso to section 68 of the Act would not apply. Accordingly, there is no requirement to prove source of source of the non-resident shareholder. Reference in this regard may be made on Ms. Vodafone India Limited v DCIT [ITA No. 1835/Mum/2018]. Date of judgement: 28.08.2020, Syntensia Network Security India Pvt. Ltd. v ITO (Mumbai ITAT) ITA No. 2927/Mum/2017. It is further stated that the assessee was not afforded reasonable opportunity of being heard as discussed in facts above. Therefore, assessee was not able to furnish the details as desired by the Assessing Officer vide notice dated 03.09.2021. The Panel finds that the AO has not considered the evidence stated above. The Panel, accordingly, directs the Assessing Officer to consider this evidence and pass a speaking order in this regard." (Emphasis supplied)

Re: Final assessment order:

52. *Pursuant to the order/ directions of the DRP, the assessee, in response to notice dated 30.03.2022 issued by NFAC filed reply dated 11.04.2022 whereby all the documents/ evidences alongwith justification as to why no addition in respect of share capital issued is called for, was furnished by the appellant.*

53. *Later the jurisdictional assessing officer, as elaborately explained above, illegally usurped jurisdiction and without any further notice, passed the impugned final assessment order.*

54. *In the final assessment order dated 29.04.2022, the assessing officer, however, without considering the submissions and contemporaneous documentary evidence(s) proceeded to pass the final assessment order, in*

gross violation of the mandatory directions of the DRP, which categorically required/ directed the assessing officer to consider the evidence placed on record.

55. *It is pertinent to note that the averments made in the draft order are repeated verbatim in the final assessment order. As stated above,* ***paras 6.1 to 6.8 of the final assessment order dated 29.04.2022 are verbatim copied from the very same paras in the draft assessment order dated 21.09.2021 [except that some reproductions in the draft order as missing in the final assessment order].*** *There is thus, complete non-application of mind while passing the final assessment order.*

SUBMISSIONS:

56. *The aforesaid addition of Rs.134.99 crores made under section 68 of the Act is, it is submitted, beyond jurisdiction, illegal and bad in law for the reason explained hereunder:*

Re (a): Addition in gross violation of binding directions of the DRP

57. ***As explained supra, the DRP duly considered the submissions of the assessee including that the assessee is not required to prove source of source in respect of share capital received from the non-resident shareholder and held that the assessing officer had not considered the evidence on record. Thus, the assessing officer was directed to consider the documentary evidence and pass a speaking order****.*

58. *The assessing officer, however, in violation of the aforesaid directions verbatim repeated the contention in the draft order, while passing the impugned final assessment order, and hence the addition so made is beyond jurisdiction, illegal and bad in law. Legal position in this regard is explained supra and not repeated herein for sake of brevity.*

59. *In view of the aforesaid, the impugned addition calls for being deleted on the said ground alone.*

Re (b): Share capital from existing non-resident shareholder cannot be treated as unexplained as all documentary evidence filed and similar capital expressly accepted in past

60. *Section 68 of the Act reads as under"*

"Cash credits.

68. Where any sum is found credited in the books43 of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so

credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory
……."

61. *In terms of the aforesaid provisions of section 68 of the Act, where any amount is found "credited" in the books of the assessee, the assessing officer is empowered to make enquiry as to the nature and source of the sum so credited. If the assessee fails to offer any explanation or explanation offered by the assessee about the nature and source of the sum so found credited is, in the opinion of the assessing officer, unsatisfactory, the assessing officer may bring the amount to tax under section 68 of the Act.*

62. *It is well settled that to fall out of the rigors of deeming provisions of section 68 of the Act, the assessee has to prima facie prove: (i) the identity of the creditor/ lender/subscriber; (ii) the genuineness of the transaction; and (iii) the creditworthiness of the creditor/subscriber/ lender.*

63. *Further, on perusal of the proviso to section 68 of the Act, it becomes clear that the assessee is, in case of receipt of share capital from a non-resident party, not required to establish the source of source.*

64. *There is, it is submitted, no doubt that in terms of aforesaid provisions of section 68 of the Act the primary onus to explain the nature and source of the amount found credited is on the assessee. The expression `nature' encompasses bringing on record evidence about nature of the receipt, be it share application money, loan, advance, etc. The expression 'source' envisages establishing the identity and creditworthiness of the source/ person from whom the amount is received. However, once the assessee furnishes reasonable explanation, the onus, it is trite law, shifts to the Revenue.*

65. *The Courts have in various decisions summarized hereunder repeatedly held that where the assessee led evidence to prove the identity of the creditors and furnished confirmation letters indicating their PAN/GIRs, etc., the onus placed on the assessee was discharged and no addition*

could be made to the income of the assessee in terms of section 68 of the Act:

- ***PCIT v. Adamine Construction (P.) Ltd.: [2018] 99 taxmann.com 45 (SC) :*** *Where High Court confirmed Tribunal's order deleting addition made to assessee's income under section 68 on the ground that assessee had discharged initial burden cast upon it by providing necessary details, Department's SLP filed against said decision of High Court was to be dismissed.*

- *In the context of amount received towards share capital, the* ***Supreme Court*** *in the case of* ***CIT v. Stellar Investment Ltd: 251 ITR 263*** *upheld the decision of the Delhi High Court, stating that there can be no addition in the hands of a company for moneys received towards share capital. The Court held that, if necessary, the Revenue may reopen the assessment of the shareholders to bring to tax the alleged undisclosed amount.*

- ***CIT v. ARL Infratech Ltd.: [2017] 394 ITR 383 (Raj.):*** *Where PAN of share applicants have been given and the mode of payment has been explained, in absence of any direct/ indirect relation between the assessee and the applicants, application money received cannot be doubted and added under section 68 of the Act.*

- ***Pr. CIT vs. Softline Creations (P) Ltd: 387 ITR 636 (Del):*** *The Hon'ble Court held that where the assessee has provided sufficient indication(s) including by way of permanent account number, to highlight the identity of the share applicants and produced affidavits of directors of the companies along with bank details of share applicants, then it would be a valid discharge of the identity of the share applicants, genuineness of the transaction and their creditworthiness.*

- ***CIT v. Som Tobacco India Ltd.: 222 Taxman 58 (All.)(Mag.)****- Where names, addresses and PAN of depositors were provided to assessing officer, which were sufficient to prove their identity and creditworthiness, addition under section 68 was held to be unsustainable.*

- ***CIT v. Green Infra Ltd.: [2017] 78 taxmann.com 340 (Bom.)-*** *Where* ***i****dentity of subscribers was confirmed and genuineness of entire transaction was recorded in books of account and reflected in financial statements of assessee company since subscription was done through banking channels as evidenced by bank statements and other documents relating to subscriber placed on record, no addition under section 68 of the Act could have been made.*

- *The* ***Delhi High Court*** *in the case of* ***CIT v. Value Capital Services (P) Ltd.: 307 ITR 334*** *has, while reiterating the dictum laid in successive decisions, held that there was additional burden cast on the Revenue to prove that the investment made by the assessee actually emanated from*

the coffers of the assessee so as to enable the same to be treated as undisclosed income of the assessee.

- *Further reliance is made on the decision of **Hon'ble Madras High Court** in the case of **CIT v. Victory Spinning Mills Ltd.: 228 Taxman 69**, wherein it has been held that addition under section 68 of the Act could not be made where the investors had accepted the investment made in the assessee company and necessary documents evidencing share applicants' names and identity were on record.*

- *Recently, the **Delhi Bench of the Tribunal** in the case of **ACIT v. Enrish Agro Food Producs (P) Ltd.: [2022] 217 TTJ 815 dated 29.04.2022** held that addition under section 68 of the Act qua share capital is not sustainable whether the assessee has duly filed Form PAS 3, confirmation, statement of back of subscriber, copy of PPAN card, copy of IT return etc.*

- *To the similar effect are the following decisions:*

✓ *Orissa Corporation (P) Limited: 159 ITR 78 (SC)*
✓ *CIT v. Dolphin Canpack Ltd.: 283 ITR 190 (Del.)*
✓ *CIT v. Illac Investment (P) Ltd.: 287 ITR 135 (Del.)*
✓ *CIT v. Oasis Hospitalities P. Ltd: 333 ITR 119 (Del.)*
✓ *CIT v. Kamdhenu Steel and Alloys Ltd: 361 ITR 220 (Del.)*
✓ *CIT v. Victor Electodes Ltd.: 329 ITR 271 (Del.)*
✓ *CIT v. Nipuan Auto (P.) Ltd. 361 ITR 155 (Delhi)*
✓ *CIT v. Sophia Finance Ltd.: 205 ITR 98 (Del)(FB)*
✓ *Divine Leasing and Finance Ltd. &Ors: 299 ITR 268 (Del.) affirmed in Lovely Export (P) Ltd.: 319 ITR (St.) 5*
✓ *CIT v. Dwarkadhish Investment Ltd: 194 Taxman 43 (Del.)*
✓ *CIT v Antartica Investment (P) Ltd. 262 ITR 493 (Del)*
✓ *PCIT vs Ami Industries India (P) Ltd: 424 ITR 219 (Bom.)*
✓ *Orient Trading Co. Limited: 49 ITR 723 (Bom.)*
✓ *CIT v. Gagandeep Infrastructure (P.) Ltd. – [2017] 80 taxmann.com 272 (Bombay)*
✓ *CIT v. Vacmet Packaging India (P) Ltd.: 367 ITR 217 (All.)*
✓ *CIT v. Arunanada Textiles P. Ltd: 333 ITR 116 (Kar)*
✓ *CIT v. Metachem Industries: 245 ITR 160 (MP)*
✓ *DCIT v. Rohini Builders: 256 ITR 360 (Guj)*
✓ *CIT v. Shree Rama Multi Tech Ltd.: 215 Taxman 157 (Guj.)(Mag.)*
✓ *Nemichand Kothari V. CIT: 264 ITR 254 (Gauhati)*
✓ *CIT v. Talbros Engineering Ltd.: 386 ITR 454 (P&H)*
✓ *CIT v. Pranav Foundations Ltd.: T. C. (A.) NO. 262 OF 2014 (Mad.)*

66. *The ratio decidendi emanating from the aforesaid decisions may be summarized as under:*

(i) The assessee has to provide documents to prove the identity and creditworthiness of the creditor as well as genuineness of the transaction;

(ii) The identity stands established if any information regarding PAN or other identity/ document is provided;

(iii) The creditworthiness of the investor needs to be proved by the assessee to establish that the creditor was having sufficient source wherefrom credit has been given. The assessee is, however, not required to prove source of source.

(iv) The genuineness of the transaction shall, prima facie, stand established where the amount has been transmitted through banking or other indisputable channels;

(v) Once identity and genuineness of transaction is prima facie established as aforesaid, the burden of proof shifts on the Revenue;

(vi) The Revenue, then, in order to invoke the provisions of section 68 has to bring on record, evidence to controvert the evidence furnished by the assessee;

(vii) The Revenue should prove that the money introduced as subscription to share capital was, in fact, emanating from the coffers of the assessee.

67. *On perusal of the aforesaid, it would be noticed that the initial burden to satisfy the ingredients of section 68 of the Act is on the assessee and once the primary onus is discharged and there is nothing to controvert the evidence placed on record by the assessee, no addition can be made by the assessing officer under the said section.*

68. ***In the facts of present case, no addition should have been made under section 68 of the Act since the assessee had, during the course of assessment proceedings, discharged the primary onus by placing on record various contemporaneous and <u>unrebutted/ uncontroverted</u> documentary evidence(s) in support of the share capital monies received from existing shareholders, as detailed hereunder****:*

*i. It was duly explained that the share capital (including premium) have been received by the appellant **from its non-resident holding company which holds the entire share capital even prior to the issue under dispute**. During the relevant year, the appellant had made right issue of shares which has been subscribed by the existing shareholder; the shareholding ratio has not changed even after such fresh issue calling for any adverse inference.*

ii. As stated supra, the appellant has duly placed on record the following details/ information:

- ***Details of equity shares issued including name of the shareholder, complete address, PAN, number of shares issued, face value, premium, date of issue and total amount received;***
- ***The valuation reports to justify the premium/ issue value has also been placed on record;***

- ***Shares certificates issued for allotment of shares;***

- ***Copy of Bank statements of the assessee highlighting the transactions of receipt application money is placed on record; the transactions are proved to be through banking channels;***

- ***Copy of Foreign Inward Remittance Certificate (FIRC) to justify/ prove the money received from non-resident shareholder is duly filed by the appellant;***

- ***The confirmations from the shareholders on their letter heads wherein the shareholders have categorically mentioned and clarified qua the number of shares and the amount invested in the assessee-company.***

iii. ***The money was received from the non-resident shareholder after compliances with all the norms of FDI Scheme governed by RBI. Necessary filings like Form FC-GRP, etc., before the RBI was duly done by the appellant. Thus, the money has been received after complying with the applicable RBI norms.***

iv. *The receipt of share capital and premium have been duly disclosed in the* ***audited financial statements****.*

v. *It is pertinent to note that the shareholder had in fact earlier invested in the assessee-company as under:*

Date	***Face Value- INR***	***Issue price- INR***	***Number of shares***	***Total value received- INR***
18.4.2013	*10*	*10*	*8,59,50,121*	*85,95,01,210*
23.10.2013	*10*	*16.47*	*5,40,49,879*	*89,02,01,507*
			Total	*174,97,02,717*

vi. ***The aforesaid receipt of share capital by the very same shareholder to the tune of Rs.175 crores in financial year 2013-14 (relevant assessment year 2014-15) was accepted and genuine by the Revenue Department*** *after thorough examination as explained hereunder:*

- *During the assessment proceedings for assessment year 2014-15, the assessing officer vide notice dated 26.07.2016 required the assessee to file details of the share capital receipt [refer* ***pages 165-166 of paperbook****].*

- *In response thereto, the appellant vide reply dated 29.08.2016 duly submitted the details of the share application money received alongwith Form-2 filed for allotment of shares [refer* ***pages 167-177 of paperbook****].*

- *Subsequently, on further enquiry in raised the appellant vide reply dated 07.09.2016 duly placed on record the valuation report towards issuance of shares, copy of RBI approval and the relevant remittance certificates (FIRCs) [refer* ***pages 178-201 of paperbook****].*

After considering the aforesaid documents and evidences, the assessing officer vide order dated 23.12.2016 passed under section 143(3) of the Act accepted the returned income without any adjustments/ modifications, thereby, accepting the genuineness of the share capital, identity and creditworthiness of the shareholders. Thus, the nature and source of the capital stood accepted [refer pages 202-205 of paperbook].

It is pertinent to mention that during the relevant year, the appellant has received the share capital, from the said existing shareholders only, which is cannot thus be doubted without any cogent basis.

vii. *The receipt of impugned capital was also* ***examined by the TPO and was accepted*** *to be genuine.*

viii. *Undisputedly,* ***no enquiry or examination was done by the assessing officer nor has any tangible material been brought*** *on record to support the allegation that the capital received from unexplained money.*

It has been held in the following decisions that where the initial onus to prove identity, creditworthiness and genuineness of the transaction has been discharged by the assessee and the Revenue has not carried out any inquiry/ verification, or has not been able to controvert the evidence furnished by the assessee, no addition under section 68 could be made:

- ✓ *CIT v. Sidhi Vinayak Metcon Ltd: 414 ITR 402 (Jhar.)*
- ✓ *Prayag Polytech Pvt. Ltd. v. ACIT: ITA No. 6015/Del/2017 (Delhi Trib.)*
- ✓ *Prime Comfort Products (P.) Ltd v. ACIT: 111 taxmann.com 89 (Del Trib.)*
- ✓ *Flourish Builders and Developers Pvt. Ltd. v. DCIT: 176 ITD 409 (Del Trib.)*
- ✓ *Axisline Investment Consultants (P.) Ltd. v. ITO: 178 ITD 402 (Kol Trib.)*
- ✓ *Baba Bhootnath Trade & Commerce Ltd. v. ITO Kolkata: I.T.A. No.1494/Kol/2017 (Kol Trib.)*
- ✓ *DCIT v. M/s. Gladiolus Property & Inv. Pvt. Ltd.: ITA No. 2924/Mum/2017 (Mum. Trib.)*
- ✓ *DCIT v. Pali Fabrics P. Ltd.: 110 taxmann.com 310 (Mum Trib.)*
- ✓ *DCIT v. Acro Exports Trade (P.) Ltd: 111 taxmann.com 51 (Mum Trib.)*
- ✓ *Carmel Asia Holdings Pvt. Ltd. v. ACIT: ITA No.700 & 701/Bang/2018 (Bang. Trib.)*

ix. *Additionally,* ***it is incumbent upon Revenue to prove that the alleged money to be taxed under section 68 of the Act has, in fact, emanated from the coffers of the assessee which found its way back in the form of share capital (refer Delhi High Court decision in the case of CIT vs. Value Capital Services (P.) Ltd: 307 ITR 334****). In the facts of the present case, no such allegation has been made in assessment order much less any evidence being brought on record to substantiate the same.*

69. *In view of the aforesaid, it would be appreciated that addition in respect of share capital received by the appellant is liable to be deleted.*

70. *Reliance in this regard is also placed on the decision of the* ***Delhi Bench of the Tribunal*** *in the case of* ***Russian Technology Centre Pvt Ltd. v. DCIT: 155 TTJ 316****, wherein it was held that the funds received could not be deemed as income under section 68 of the Act considering that the identity of the non-resident remitter and flow/ source of funds stood established through FIPB approval and FIRCs issued by the authorized dealer/ RBI. The relevant observations of the Tribunal as under:*

*"**11.** We have heard rival contentions and perused the material available on record. The first and foremost question to be decided is whether on the basis of material furnished by the assessee and available on the record, the assessee has discharged its onus as cast by s. 68 in terms of identity and creditworthiness of the shareholders and genuineness of the transaction.* ***The availability of balance sheet, certificate of incorporation, confirmations and certificates of good standing etc. filed by the assessee in respect of shareholders establish that they are non-resident entities, having independent and legal existence. The moneys have come to assessee through banking channels as is evident from FIRC, which also mentions the purpose of remittance and also the particulars of the remitting bank. FIPB approval that too with a liberty to collect share capital up to Rs. 600 crores and ROC compliance etc. clearly indicate the stand of the assessee. In our considered view, the plethora of the evidence filed by the assessee amounts to discharge of primary burden cast on the assessee in terms of s. 68 of the IT Act for identity and creditworthiness of the creditors and genuineness of transaction.***

……..

11.5 *We find merit in the contentions of learned counsel and reliance on the decisions of the Tribunal in the cases of Finlay Corporation Ltd. (supra), Smt. Susila Ramasamy (supra) and Saraswati Holding Corpn. Inc. (supra) and the import of CBDT circular referred to above.* ***Whenever remittances are made by the non-resident holding company for purchase of shares of its subsidiary in India, the money undoubtedly is capital in the nature and if documents like FIRC etc. are produced, it can safely be stated that the said money came in through banking channels.***

11.6 *In the absence of any evidence to show that the money remitted by the non-resident accrued in India, it cannot be held to be taxable in India. Hence, moneys remitted by non-residents whose identity is not in question through their bank accounts outside India have to be held as capital receipts not exigible to tax.* ***It therefore naturally follows that if the identity of the non-resident remitter is established and the money has come in through banking channels, it would constitute a capital receipt***

and ordinarily cannot be treated as deemed income under s. 68 or 69 of the Act. This is clarified by the CBDT circular itself.

11.7 *Taking into consideration of all the above, we find merit in the argument of the learned counsel for the assessee that the primary burden cast on the assessee was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the assessee is also to be decided on the basis of documents filed by the assessee and facts and circumstances of each case and on that basis a reasonable view is to be taken as to whether the assessee has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and genuineness of the transaction.* ***From the documents filed during the course of assessment and before CIT(A), the independent existence of the share applicants in Russia is clearly established. The assessee's application to FIPB for raising the capital contains all the relevant details which is favourably accepted by the Board, particularly by allowing the assessee to raise further capital without approaching the FIPB. The transactions are through banking channels. Thus, the gamut of evidence does not leave any doubt in the discharge of primary burden of the assessee. On the issue CBDT circular and Finlay Corporation Ltd. Judgment (supra) also we are in agreement with the learned counsel for the assessee that in these circumstances of the case, moneys remitted by non-residents through banking channel outside India have to be held as capital receipts, not exigible to tax and cannot be treated as deemed income on the fictions created by ss. 68 and 69 of the Act. In consideration of all these observations, we are inclined to hold that the share application money as raised in the grounds of appeal cannot be held as non-genuine and added as income of the assessee under s. 68 of the Act.*** *Consequently, additions made on this count as raised in grounds of appeal are deleted. Assessee's grounds of appeal on this issue are allowed." (emphasis supplied)*

The aforesaid decision of the Tribunal has been affirmed by the ***Delhi High Court*** *in the case of* ***CIT v. Russian Technology Centre Pvt. Ltd.: ITA No.547 of 2015.***

71. *The* ***Delhi Bench of the Tribunal*** *in the case of* ***Bycell Telecommunications India (P.) Ltd vs. PCIT: 193 TTJ 565*** *held that share capital received from holding company located abroad cannot be treated as unexplained, once the assessee proved that money was flowing from books of investor as certified by Swiss Tax Authorities.*

72. *Reliance in this regard may be made to the decision of the* ***Mumbai Bench of the Tribunal*** *in the case of* ***Vodafone India Limited v DCIT: ITA No. 1835/Mum/2018.*** *In that case, share capital was received by the assessee from its existing Mauritius based shareholders on subscription to right issue of shares. The assessing officer added the said capital received under section 68 of the Act. On second appeal, the Tribunal held that where the assessee has duly discharged its onus to prove the identity,*

genuineness, and creditworthiness of the shareholder by submitting various documentary evidences which have not been refuted by the lower authorities, no addition can be made merely on the basis that 'source of source' of funds was not established. The Tribunal held that the amendment in Section 68 is applicable w.e.f 01.04.2013 and is applicable only where the shareholder is a resident in India and not when the shareholder is a non-resident. The relevant observation of the Court are as under:

"2.31 We also observed that the increase in share capital was not on account of any new shareholders being brought in, rather it was a rights issue which was extended to the existing shareholders. The balance sheet of the Assessee and the Shareholders register evidence that these same parties were already subscribers to the share capital and hence already stood identified and accepted. Therefore, once in earlier year the AO has accepted such fact then there remains no question of any doubt on the same. 2.32 From the record, we found that the identity and genuineness of the said entities is clearly established from the following documents which has been conveniently ignored by the AO.

2.32 From the record, we found that the identity and genuineness of the said entities is clearly established from the following documents which has been conveniently ignored by the AO.

- Financial Statements (attached as Annexure 8a to 8i of paper book)

- Tax Returns (attached as Annexure 9a to 9i of paper book)

- Letters of Mauritius Revenue Authorities (attached as Annexure 10a to 10i);

- Bank Statements (attached as Annexure 11a to 11h)

Additionally, to further establish the identity and genuineness of the shareholding entities, the Certificate of Incorporation and Tax Residency Certificates of each of the said entities were also furnished by the Assessee. The Copies of the same are attached as Annexure 12a to 12i and 13a to 13i respectively. Further, we observed that the Foreign Investment Promotion Board („FIPB"), Ministry of Finance, Government of India has also granted approval in respect of such entities, which itself establishes the identity and genuineness of such shareholders. Copy of FIPB application made by the assessee and approval is placed on record as per Annexure 14 and 15 respectively.

2.34 As per our considered view, the aforesaid documents clearly establishes the identity and genuineness of the shareholders, and in any case the letters issued by Mauritius Revenue Authorities to the Foreign Tax Division, categorically prove that aforesaid parties are tax residents

of Mauritius and hence the identity and genuineness of these entities is beyond doubt.

2.35 We further observed that the letters issued by Mauritius Revenue Authorities (Annexure 10a to 10i), not only establish, beyond doubt, the identity and genuineness of the aforesaid entities, but also establish the source of funds/creditworthiness.

……..

2.39 Further more, we observed that that Section 68 would not apply to remittances made in India by non-resident is strengthened by the proviso to Section 68 inserted w.e.f. A.Y. 2013-14. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital, then the source of funds of resident share holder has to be established by the assessee in order to get out of the kin of the deeming provision under section 68. The proviso talks of the source being established only when the shareholder is a resident of India. There is no such requirement if shareholder is a non-resident. Hence, the creditworthiness of the shareholders, if he is a non-resident, does not have to be established by the assessee in respect of remittance received by him. For this purpose, reliance is placed on the judgment of the Hon"ble Delhi Tribunal in the case of M/s Russian Technology Center (P) Ltd Vs DCIT, New Delhi, (supra), wherein the Hon"ble tribunal observed that the provisions of Section 68 though inserted w.e.f. 01.04.2013 also reveals the legislative intent that if the shareholder is a non-resident and the money is by way of remittance from his account, the rigor of Section 68 would not be applicable.

……..

2.42 In the instant case, from the documents furnished before lower authorities it is abundantly clear that the assessee has not only furnished irrefutable documentary evidence to establish identity and genuineness of shareholders but has also established the source of funds of such shareholders. Therefore, since the assessee has fully discharged its onus in this regard, there is clearly no case of unexplained credit." (emphasis supplied)

73. *Reference may also be made to the observation of the* ***Mumbai Bench of the Tribunal*** *in the case of* ***Syntensia Network Security India Pvt. Ltd. v ITO: ITA No. 2927/Mum/2017****:*

"9. Furthermore, the law is section 68 is not apply to remittances made in India by non- resident is strengthened by the proviso to u/s.68 inserted w.e.f. asst. yr. 2013-14. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital, then the source of funds of resident shareholder has to be established by the assessee in order to get out of the kin of the deeming provision under s. 68. Hence, the proviso talks of the source being established only when the shareholder is a resident of India. There is no such requirement if shareholder is a non-resident. Therefore, the creditworthiness of the shareholders, if he is a non-resident, does not have

to be established by the assessee in respect of remittance received by him."

74. *Attention is also invited to the decision of the Mumbai Bench of the Tribunal in the case of* ***Hinduja Realty Ventures Ltd v. DCIT: ITA No.1090 & 2569/Mum/2019****. In that case, M/s. Rabna Holding Ltd ("RHL"), a Mauritius based entity, a group company of Hinduja group had invested in share capital of the assessee company at a premium of Rs.4990 per share. RHL had received loan from M/s. Amas Ltd, a company incorporated in Bahamas. The loan was used to make investment in shares of the assessee company. The money was received in India through normal banking channels under the FDI route after obtaining approvals from FIPB & RBI. In view of the said facts, the Tribunal deleted the addition made under section 68 of the Act holding that the assessee had successfully established the nature and source of investment so made; the fact that the monies were received through normal banking channels duly approved by FIPB & RBI proved the genuineness of the transaction.*

75. *In the case of* ***Pondi Metal &Roling Mills****,* ***ITA No.788/2016****, the* ***Delhi High Court*** *held that once it is proved that money was received by assessee from a corporate shareholder incorporated in Mauritius, no addition could be made in the hands of the assessee; at best, the addition/ investment could be examined in the hands of the Mauritius Company. SLP filed by the department against the aforesaid order of the High Court has been dismissed.*

76. *In view of the aforesaid factual and legal position, the action of the assessing officer in invoking section 68 of the Act is unwarranted and the addition made calls for being deleted.*

Re: Ground of Appeal Nos.5-5.3:Disallowance u/s36(1)(va)- PF/ESI contribution

77. *The undisputed facts relating to the issue are as under:*

(a) For the year under consideration, the appellant had deposited a sum aggregating to Rs.54,031 [Rs.42321 under ESI Act and Rs.11,710 under other welfare funds] towards employees' contribution in a delayed manner.

(b) The aforesaid contributions have, however, been deposited mush before the due date of furnishing return under section 139(1) of the Act for the relevant year.

78. *The assessing officer, in the draft order, disallowed the aforesaid delayed payment of employee contributions applying provisions of section 36(1)(va) of the Act.*

79. *The appellant filed objections before the DRP submitting that since the contributions were undisputedly deposited prior tot due date for filing return of income under section 139(1), the same calls for being allowed under section 36(1)(va) read with section 43B of the Act. The DRP directed the assessing officer to consider the judicial precedents referred by the appellant and pass a speaking order.*

80. *The assessing officer, however, in violation of the directions of the DRP, without considering the legal position, repeated the disallowance.*

81. *In this regard, it is respectfully submitted that the aforesaid issue is squarely covered in favour of the appellant by the following judgements:*

- ✓ *CIT v. AlomExtrustions Ltd.: 319 ITR 306 (SC)*
- ✓ *CIT vs. AIMIL Limited: 321 ITR 508 (Del.)*
- ✓ *CIT v. Dharmendra Sharma: 297 ITR 320 (Del.)*
- ✓ *Pr. CIT vs. Pro Interactive Service (India) Pvt. Ltd. [ITA 983/2018; decided on 10.09.2018] (Del. HC)*
- ✓ *Pr. CIT vs. Planman Consulting Pvt. Ltd. [ITA 1221/2018; decided on 02.11.2018] (Del. HC)*
- ✓ *Spectrum Consultants India (P) Ltd. v. CIT: 215 Taxman 597 (Kar.)*
- ✓ *CIT v. Kichha Sugar Company Ltd.: ITA No.50 of 2009 (Utt.)*
- ✓ *CIT vs. Ghatge Patil Transports Ltd : 368 ITR 749 (Bom.)*
- ✓ *S.R Batliboi& Co. vs ACIT : 100 taxmann.com 328 (Cal.)*
- ✓ *Sagun foundry (P.) Ltd. vs. CIT : 291 CTR 557 (All.)*
- ✓ *Pr. CIT vs. Rajasthan State Beverages Corpn. Ltd. 250 Taxman 32 (Raj) – Revenue's SLP dismissed – reported @ 250 Taxman 16 (SC)*
- ✓ *CIT v. Lakhani Rubber Works: 326 ITR 415 (P&H)*
- ✓ *Hitech India (P.) Ltd. vs. Union of India: 227 ITR 446 (AP)*

82. *It is pertinent to note that there has also been an **Internal Circulation dated 10th September 2018** from the office of Pr. DGIT (Legal and Research) suggesting withdrawal of Departmental SLPs on this issue since the Hon'ble Supreme Court has dismissed the SLP filed by the Revenue in the case of Rajasthan State Beverages Corpn. Ltd.: 250 Taxman 16 (SC) and thus, a decision was taken not to contest this issue further.*

83. *Kind attention is drawn to the latest decision of the **Delhi Bench of the Tribunal**, wherein the Tribunal in a batch of matters reported in **Raj Kumar and Ors. vs. ITD, CPC: 136 taxmann.com 244 / 194 ITD 802 (dated 28.02.2022)**while disposing of 114 appeals held that amendment to section 36(1)(va) of the Act is prospective in nature and therefore applicable only from assessment year 2021-22. It was held that delayed payment of employee's contribution is allowed if the same is deposited within due date of filing return of income for the relevant year.*

84. *It has been held similarly in the case of **Shankar Fenestration & Glasses India Pvt Ltd.: ITA 97/Del/2022 (Del.) and Crescent Roadways Private Limited vs. DCIT: ITA No. 1952/Hyd./2018 (Hyd. Trib.).***

85. *In view of aforesaid settled legal position, it is respectfully submitted that employees' contribution undisputedly deposited by the appellant much before the due date of furnishing of return of income under section 139(1) was clearly allowable as deduction in terms of section 36(1)(va) read with section 43B of the Act and the action of the CPC in disallowing the same was erroneous and bad in law.*

86. *That apart, the assessing officer erred in making double adjustment of the aforesaid disallowance inasmuch – (i) income determined under section 143(1) of the Act is taken as the starting point for computing total income wherein the adjustment is already made; and (ii) the disallowance of Rs.54,031 is again made while computing total income in impugned order.*

Re: Ground of Appeal No.6: ***Interest u/s 234B/D***

87. *The assessing officer erred on facts and in law in charging/ computing interest under sections 234B and 234D of the Act.*

Re: Ground of Appeal No.7:Penalty u/s 271AAC and 270A

88. *The assessing officer grossly erred on facts and in law in initiating penalty under sections 271AAC and 270A of the Act."*

11. On the other hand, ld. DR for the Revenue argued the matter and filed the written submissions which are reproduced below :-

"After the introduction of faceless assessment scheme, lot of legislative changes were also made in the Income Tax Act, for example till 31.03.2022 the NeAC was mandated to pass all the assessment orders. From 01.04.2022, the Act has been amended and instead of NeAC, assessment order was required to be passed by the faceless AO or the jurisdictional AO and requisite amendment has been made in the Act. From 01.04.2022 section 144B was amended and the NeAC was no longer remained the AO and it was given the task of coordination. The amended provisions have been discussed in detail during the course of physical hearing. Further, after the receipt of DRP directions, the NeAC was required only to ensure that the AO receives the DRP directions and passed the orders in line with the provisions of section 144C(13 r.w.s section 144B xxix. Also section 144C(8) has also been introduced in the Act and the legislature authorized the Pr. CCIT or the Pr. DG of National Faceless Assessment Center to transfer the case from any AO at any stage of the assessment with prior approval of the board. Thus as the faceless scheme was implemented, accordingly changes in the Income Tax Act were brought in to implement the faceless scheme in letter and spirit based on the challenges faced in the initial phase of implementation of faceless scheme.

In the present case, the assessment proceedings were conducted by the faceless AO and draft order U/s 144C was duly passed by the faceless AO on 21.09.2021.

The assessee's case was a typical case taken up during the implementation of the faceless scheme.

After the DRP directions were passed on 15.03.2022 and based on those directions the NeAC AO issued the letter dated 30.03.2022 to the assessee requesting for documents with regard to the additions, in line with the DRP direction. As already mentioned, Act has been amended w.e.f 01.04.2022 and in line with the section 144B(8) of the IT Act, the case was duly transferred from faceless AO to IAO by the Pro CC, NeAC (taking approval of CBDT). The case history notings' has been duly submitted during the course of hearing along with the copy to the assessee counsel and duly explained to the Hon'ble bench of the contents there in.

(C) The assessee has only argued on legal/technical grounds and its argument can be summed up as follows:

(i) Draft assessment order cum show cause notice u/s 144B(i)(xvi)(b) has not been served on the assessee

(ii) Personal hearing has not been provided

(iii) Order passed by the jurisdictional AO i.e. ACIT, Circle-7(1) instead by NeFC

(iv) Evidence/documents have not been considered

(v) AO passed the order in violation of DRP directions

(D) The assessee objections are dealt as under:

1. On ground no. 1: Draft assessment order cum show cause notice u/s 144B(i)(xvi)(b) has not been served on the assessee

The assessee argued that show cause notice has not been served. The assessee case is covered by the provision of section 144C of the IT Act and in line with the provisions U/s 144C, the draft order was duly served on 21.09.2021 which is evident from the order sheet notings.

Before serving the draft assessment order, notice Vis 142(1) was duly served on the assessee on 03.09.2021, asking for various clarifications and the assessee also submitted its response on 10.09.2021 though e-proceedings module. Besides this, the TPO has also provided due opportunity to the assessee. In the draft assessment order, the assessee response dated 10.09.2021 has been duly considered, as evident from the order. Thus the assessee was duly provided opportunity to submit the documents and its reply which has been duly considered by the AO. So it cannot be said that no opportunity was provided to assessee. The assessee main grievance is that show cause notice u/s 144B 1 (xvi)b was not served.

The assessee has mentioned in Ground of Appeal no. 1.2 that draft assessment order, as per provisions of section 144 B (1) (xvi) has not been served on the assessee. The assessee contentions are without any basis, incorrect and also misleading. At the outset, it is submitted that assessee is "eligible assessee" as per section 144C (15) (b) of the I.T Act, and this fact is not disputed. As the assessee, is eligible assessee, it is covered under section 144C of the I.T Act. For the assessee covered under section 144C, draft assessment order is required to be forwarded to the eligible assessee, if the AO proposes a variation, which is prejudicial to the interest of such assessee. For ready reference, the provision of section 144C (1) is reproduced below:

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 32.[***] which is prejudicial to the interest of such assessee.

Thus, as the assessee is eligible assessee, a draft assessment order is required to be forwarded to assessee, in line with section 144 B (1) (xxvii) (Pre amended) or section 144 B (1) (xxi) (amended from 1.04.2022). For ready reference, the provisions of section 144 B (1) (xxvii), (pre amended) is reproduced below.

(xxvii) where the draft assessment order or final draft assessment order or revised draft assessment order is forwarded to the eligible assessee as per item (A) of sub-clause (a) of clause (xxiii) or item (A) of sub-clause (a) of clause (xxv), such assessee shall, within the period specified in sub-section (2) of section 144[' file his acceptance of the variations to the National Faceless Assessment Centre;

From the perusal of the above provisions, it is clear that for the eligible assessee, the draft assessment order required to be forwarded as per provisions of section (xxv) to (xx vii) and that was precisely done in the case.

Also, without prejudice to the above, it is submitted that the intention behind issue of draft assessment order as per section 144 B of the I.T act is to provide an opportunity to the assessee to present his case before finalization of the assessment order or crystallization of demand. The intention of the legislature can never be to issue repeated show case notices/ opportunities to the assessee. The purpose of providing opportunity stems from the Principle of National Justice and the same get fulfilled when draft notice is issued to the assessee u/s 144 C (1) and providing assessee an opportunity to file objections before DRP, so that a proper opportunity is afforded before finalization of final assessment order or crystallization of demand by DRP also, which in this case has duly been provided. Thus, as assessee has been issued a draft assessment order u/s 144 B (1) (xxvii), it cannot take the stand that no draft assessment order I show cause notice was issued to the assessee.

Though the opportunity was provided but still even if for a moment assessee's ground is accepted for speculative purposes, even then it is humbly submitted that this issue is squarely covered by the decision of the Hon'ble Supreme Court in the

case of NeAC Faceless Assessment Center Vs Automotive Manufacture Pvt. Ltd. in Civil no.1829 of 2023 and other appeals like DCIT and other vs. Abacus Real Estate Pvt. Ltd. in Civil Appeal no. 1830 of 2023. On identical issue, violation of 144B(xxvi) the Hon'ble Supreme Court has remanded the matter back to the AO and the relevant extract of the facts of the case and decision of the Supreme Court is reproduced below:

The facts of the case are identical to the assessee's case and for ready reference are reproduced below

2. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of judicature at Bombay in Writ Petition (L) No. 16281/2021, by which the High Court in exercise of powers under Article 226 of the Constitution of India has set aside the Assessment Order declaring it as non est as the mandatory requirement under Section 144B of the Income Tax Act, 1961 for short "the Act"), namely, the show cause notice with a draft Assessment Order was not issued and served upon the assessee.

Decision

4. Having heard Shri Balbir Singh, learned ASG, appearing of the Revenue and Shri Dharan Gandhi, learned counsel appearing for the respondent-assessee and having gone through the impugned judgment and order passed by the High Court and considering the fact that the Assessment Order was passed without issuing a show cause notice with a draft Assessment Order, as was mandatorily required, under Section 144B of the Act, as such, it cannot be said that the High Court has committed any error. However, at the same time, considering the fact that the Faceless Assessment Scheme has been introduced recently and therefore, the Revenue ought to have been given some leverage to correct themselves and take corrective measures and therefore the High Court ought to have remanded the matter to the Assessment Officer to pass a fresh order in accordance with law, after following the due procedure, as required under the law, namely, more particularly, under Section 1448 of the Act.

The following facts clearly emerge out from the perusal of the above decision of the Hon'ble Supreme Court, which substantiates the case of the revenue:

(1) The Hon'ble Supreme Court has duly taken note of the faceless scheme introduced by the Government and clearly held that because of the launch of the new scheme, the revenue has to be given some leverage to correct themselves and take corrective measures.

(2) Even though prayer has been made in that case to quash the assessment proceedings, however the Supreme Court has rejected the prayer and instead remanded the matter back to the AO to pass further-order in accordance with law. It is absolutely clear that even though the Hon'ble Supreme Court found that the department is in breach of Provision of 144B, but considering the launch of new faceless scheme, allowed department to take corrective measure.

Though the draft assessment order was duly issued to the assessee but still if the Hon'ble Bench accept the assessee plea of violation of u/s 144B provisions, then it is humbly submitted that the proceedings may be remitted back to the AO in line with the Hon'ble Supreme Court decisions. Even at the cost of repetition, it is submitted that the present case was also passed immediately after launch of faceless scheme and the directions of the Hon'ble Supreme Courts on identical issues I facts is fully binding on the Hon'ble Tribunal.

[2] On ground no. 2: Personal hearing not provided to the assessee.

As it is proved from the above discussion that due opportunity was provided to the assessee and its reply I contentions was duly considered in the draft assessment order /final order, but still the assessee has raised the baseless allegations/ ground that personal hearing has not been provided to the assessee. The assessee's case, indisputably is covered under the section 144 C of the IT Act and it is submitted that, after the receipt of the DRP directions, no personal hearing is required to be given by the AO, in line with section 144C(13) of the IT Act and accordingly no personal hearing was provided. Further it is fully established in the case that assessee was given reasonable opportunity to represent its case till passing of such of draft assessment order.

Also, as the assessee contentions are duly considered, accordingly no prejudice is caused if personal hearing is not provided which is clearly in line with the provisions of law i.e. 144 C (13) of the IT Act. Though no opportunity was required as per law but still if the Hon'ble Bench feels that personal hearing was required under section 144 C (13) then, reliance is placed on the decision of the Delhi High Court in the case of Export capital services Pvt. Ltd. Vs. NFAC (2021) 129 Taxmann.com 239 (Delhi) wherein similar request was made for assessment other than covered section 144 C of the IT Act. After considering various judgments, including judgments cited by the assessee in the case of Sanjay Aggarwal vs. NFAC and after considering the facts and the provisions of the law, the Hon'ble High Court has set aside the matter and remitted back to the AO to pass a fresh order after giving an opportunity. The relevant extract of the decision is reproduced below:

12. Keeping in view the aforesaid facts and mandate of law, the impugned assessment order dated 30th April, 2021 as well as notice of demand are set aside and the matter is remanded back to the Assessing Officer, who shall grant an opportunity of hearing to the petitioner by way of Video Conferencing and thereafter pass a reasoned order in accordance with law.

The above decision is squarely applicable to the assessee [if the Hon'ble Bench feels that personal hearing was required under section 144 C (13)] and with the utmost respect, it is submitted that being a jurisdictional High Court decisions it is binding of the Hon'ble Bench. Thus though reasonable opportunity was provided to the assessee and no opportunity of personal hearing can be granted after DRP directions, in line with specific provision u/s 144C(13) but still if the Hon'ble Bench desires then atmax, the case can be remitted back to the AO for

providing fresh opportunity and the assessee prayer for quashing the assessment proceedings cannot accepted by any stretch of imagination.

[3] On ground no. 3: Order passed by the jurisdictional AO i.e. ACIT, Circle-7(1) instead by NeFC. The assessee has taken the ground, that the order is passed by the ACIT, Circle-7(1) instead of passing the order by NeAC. The assessee's objection are baseless and made in complete ignorance of the provisions of the IT Act. As stated above also, till 31.03.2021, the national faceless scheme center NeAC was given the mandate to pass the order which has been duly demonstrated to the Hon'ble Bench by referring to the various provisions of section 144B as applicable before 31.03.2022. From 01.04.2022, the provision of section 144B(1) has been amended and after that the assessment order is passed by the respective AO i.e. faceless Assessing Officer (FAO) or Jurisdictional Assessing Officer (JAO). The reference is also invited to provision of section 144B(8) of the IT Act introduced from 01.04.2022 which for ready reference is reproduced below:

8) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Principal Chief Commissioner or the Principal Director General, as the case may be, in-charge of National Faceless Assessment Centre may, at any stage of the assessment, if considered necessary, transfer the case to the Assessing Officer having jurisdiction over such case, with the prior approval of the Board.]

Thus in line with the provision of section 144C(8) with the approval of the board, the assessee case was duly transferred on 15.04.2022 from faceless AO to the jurisdictional AO and the same has been duly mentioned in the case history noting, a copy of which has already been given to the Hon'ble bench. It is respectfully submitted that the provisions of section 144B(8) are not challenged before the Hon'ble Bench. Thus, as authorized by the legislature and in line with the provision u/s 144C(8), the case of the assessee was duly transferred to JAO i.e. ACIT, Circle-7(1) and in line with the provision of the Act, he has duly passed the final assessment order. Also it is difficult to understand what prejudice is caused to the assessee if order is passed by JAO than a faceless AO. Further, it is department's prerogative to get the order passed from any AO, in accordance with the provisions of IT Act. Thus the assessee's contention on this ground are totally baseless and deserve to be rejected.

[4] On ground no. 4 and 5: Evidence/documents have not been considered

(i) AO passed the order in violation of DRP directions Both the above objections, being interrelated are taken up together. There are basically two additions, i.e. additions u/s 68 and Late deposit of PF IESI, which are contested by the assessee before the Hon'ble ITAT.

a) For additions u/s 68. During the course of assessment, the AO, vide notice dated 3.9.2021, had asked the assessee to provide the following details:

i) Provide documentary evidence to substantiate the identity and ITR of last 3 years of the shareholders to substantiate creditworthiness and shareholders as

well as the proof of genuineness of transaction in respect of fresh credit of the share capital account.

ii] Please furnish confirmation account of the shareholders along with the blank account statement of the shareholders for the year under consideration.

iii] Please provide balance sheet of the shareholders for the year under consideration.

iv) Please explain the source of money in the hands of the shareholders for the amount invested by them with you in the form of share capital.

In response, the assessee could not submit the requisite details mainly bank statement of the investor company, sources of the money invested etc. and as the assessee has failed to prove the credit worthiness, additions were duly made in the draft assessment order. Further, the Hon'ble DRP gave the directions to the AO to consider evidence and pass a speaking order. Afterwards vide notice at 30/3/22 (Pg.1SS/1S6 of paper book), the NeAC AO had given an opportunity to the assessee to furnish the documents. However, as stated above, because of change in the provision of section 1448 of IT Act, the case was duly transferred to the jurisdiction AO, who has no previous idea about the assessment proceedings in the case. However it is pointed out, that, even during the DRP stage and even after providing opportunity by AO, the assessee could not submit any evidence with respect to bank statement of assessee and also about sources of funds contributed. Thus till the completion of assessment proceedings, the assessee couldn't file the complete documents to prove credit worthiness of the investor company. Moreover, the AO in this final order has again stated the same facts that the assessee has failed to prove the conditions stipulated in section 68 of the I.T act and made additions. In fact, it appears that the assessee is raising jurisdictional grounds only to hide its failure in submitting the documents to prove credit worthiness of the investors companies and genuineness of transactions.

(E) DRP Directions Fully Followed By AO:

It is submitted that the AO took the cognizance of the DRP objections and also of the letter issued by NeAC (Please refer second last Para of Pg no. 02 of final assessment order) and after considering the documents filed, has framed his order. Thus from the perusal of the order, it is seen that the AO has considered the documents and come to the conclusion, which is open to judicial scrutiny. Thus, it is incorrect on part of assessee to say that the AO has not followed the DRP directions. It is respectfully submitted that the assessee can not dictate the manner and the language to be followed by the AO in framing his assessment order, which prima facie proves the fact that AO took complete cognizance of the DRP directions and after considering the same has came to the conclusion that the assessee has failed to prove the credit worthiness in the case and failed to discharge the primary onus as required under section 68 of the I.T act. Only after considering the documents on record and following the directions of the DRP, the

AO treated the amount received of Rs 134,99,99,904 as unexplained cash credits in the hands of the company under sections 68 of the I.T act 61.

Same holds true for the other addition related to late deposit of employee contribution of PF /ESI. Even though, this additions was part of assessment order under section 143 (1) of the I.T act, but considering the DRP directions, the AO has discussed this issue in detail and made additions of Rs 54,031/- and the AO also mentioned in order that she is not making the addition separately as these are already covered under order pass under section 143 (1) of the I.T act. Thus, it is crystal clear that the AO has duly followed the direction of the DPR for both the additions and it is unfair and wrong on part of the assessee to claim that DRP direction are not followed.

Though the DRP directions were fully followed by the AO but at the same time nobody can deny the right to assessee to question, in its wisdom, that the AO could have passed more speaking under, but that accusation can't change the fact that the AO duly considered, acknowledged and followed the DRP directions. Thus the assessee contention that the AO has not followed the DRP directions is not correct, though assessee can always argue and canvas the fact that the AO should have passed more detailed order. However, even for speculation purposes, it is accepted that the AO should have passed more detailed order but one must consider the fact that because of recent launch of faceless regime at that time and the departmental officer were also new to faceless regime, the AO had passed an order which was passed in full compliance of the DRP directions. The fact of recent launch of faceless regime, has been duly acknowledged by Hon'ble Supreme Court also.

(F) Without prejudiced to the fact that the AO has passed the order in compliance with the DRP directions, even then for a moment, for speculative purposes, the Hon'ble Bench accepts the assessee's contention that the AO should have passed more speaking order and somehow has not fully followed the DRP directions, but still the department case is fully covered by the Decision of the Hon'ble coordinate bench in the case of Hitachi Astemo Haryana (P) Ltd VS DCIT Circle 22(2) Delhi, in ITA no. 100S/Delhi/22. The facts of the Hitachi Astemo case are that the AO has not completely followed the DRP directions and for making additions in the final order has relied on the additions in draft assessment order. The assessee has raised the similar ground of AO not following the directions of the DRP completely in framing the final assessment order. In that case also, the assessee has relied on the same case laws i.e, the decision of the Hon'ble High Courts/Delhi Tribunal/other Tribunal decisions mentioned in para 4 of the Hitachi Astemo order). The department vehemently argued that the action of the AO, even though the AO has made an error(in that case error was there on part of the AO) however, the same is rectifiable and it is more of technical/procedural lapse which can be cured and not fatal, which call for quashing of assessment proceedings. Further, the department has also relied on several judgements of Supreme Court and High Court. (para 5). After considering the submissions and the case laws filed by both the parties and after considering the Hon'ble Jurisdictional High Court decisions (para 7), the Hon'ble Bench has

agreed with the stand taken by the department and remitted the matter back to AO to give effect to DRPs/TPOs OGE.

At worst, the facts of the present case and the facts of the Hitachi Astemo (cited supra) are similar and it is respectfully submitted that being the judgment of the Hon'ble coordinate bench, the same should be followed because in that case also, the case laws cited by the assessee and the department has been duly considered.

(ii) Further it is submitted that with regard to 144C violations, the assessee case is fully covered by the decisions of Hon'ble jurisdictional Delhi High Court, Karnataka High Court and Hon'ble Madras High Court in several cases, which for ready reference are mentioned below-

1) Anand NVH Products Pvt. Ltd. vs. National E Assessment Centre ANR dated 06.08.2021 WP(C) 7936/Del/ 2021

2) Fiber Home India Vs. National E Assessment Centre ANR 15.12.2021 WP(C) 11609/2021

3) SRF Ltd. Vs. National E Assessment Centre and ANR WP(C) 6484/2021

4) Marvel India Pvt. Ltd. vs. National faceless Assessment Centre, Delhi 138 taxmann.com145 (Karnataka) (2022)

5) TT Steel Service India Pvt. Ltd. 137 taxmann.com 151 (Karnataka) (2022)

6) Ford India Pvt. Ltd. Vs. National E Assessment Centre WP(C) 12701/2021, Madras High Court

All the above cases were duly considered by the Hon'ble Coordinate Bench in the case of Hitachi Astemo (some of them are mentioned in the order of the ITAT also) and only for the sake of brevity, the above cases are not discussed in detail.

In fact, reference is made to the decision of_Hon'ble Karnataka High Court in the case of TT Steel Service India Pvt. Ltd. 137 taxmann.com 151 (Karnataka) (2022) wherein the Hon'ble High Court considered the order passed by the AO as arbitrary, illegal and without jurisdiction or authority of law. For ready reference the relevant extract of the order of Hon'ble High Court is reproduced below:-

7. As rightly contended by the learned counsel for the petitioner, the undisputed material on record clearly indicates that in response to the draft Assessment Order dated 29-9-2021 issued to the petitioner, petitioner submitted objections before the DR? on 28-10-2021, within the prescribed period and intimated the same to the Assessing Officer on 15-11-2021 pursuant to clarification sought for by the Assessing Officer on 12-11-2021; the explanation offered by the petitioner as regards his inability and omission to file objections with the Assessing Officer earlier in addition to the DRP merits acceptance, particularly in view of the Government Orders, circulars etc. as well as the orders of the Apex Courts extending the period of limitation coupled with the intimation

provided by the petitioner to the Assessing Officer as sought for by him prior to passing the Assessment Order. At any rate, the petitioner had chosen to exercise the option of filing objections to the draft Assessment Order warranting the DRP to proceed further before the Assessing Officer takes further steps as provided under sub-sections (5) to (13) to section 144C. Under these circumstances, I am of the considered opinion that the impugned Assessment Order passed by respondent No. 1- Assessing Officer without awaiting directions from the DRP, before whom the matter was pending pursuant to the petitioner filing his objections within the prescribed period is clearly arbitrary, illegal and without jurisdiction or authority of law and the same deserves to be quashed and necessary directions are to be issued to the DRP as well as the Assessing Officer in this regard.

8. In the result, I pass the following:

ORDER.:

[iii] The Dispute Resolution Panel (DRP) is directed to conclude the proceedings by considering the objections filed by the petitioner, in accordance with law and section144C of the Income-tax Act, 1961.

(iv) Upon the DRP concluding the proceedings as provided under section 144C referred to supra, respondent No.1 - Assessing Officer shall proceed further and pass appropriate orders in accordance with law.

Thus though the Hon'ble High Court found the order passed by the AO as arbitrary, illegal and without jurisdiction/ authority of law but still the Hon'ble High Court has not quashed the entire assessment proceedings and in fact, restored the proceedings to DRP to conclude in accordance with law and section 144C of the IT Act.

Thus as the Hon'ble Delhi High Court, Hon'ble Karnataka High Court and the Madras High Court, on the same facts, did not quash the entire proceedings accordingly it is humbly prayed that in the instant case also, at worst, the proceedings may kindly be remitted back to the Assessing Officer for passing the assessment order after incorporating DRPs directions.

(G) As the issues in both the cases are almost identical, reliance is placed on the decision of the Hon'ble Supreme Court is the case of Gammon India Ltd,. Vs. Commissioner of Customs Mumbai in Civil appeal no. 5166 of 2003 and it is prayed that the same should be followed.

24. Before parting, we wish to place on record our deep concern on the conduct of the two Benches of the Tribunal deciding appeals in the cases of IVRCL Infrastructures & Projects Ltd. (supra) & Techni Bharathi Ltd. (supra). After noticing the decision of a co-ordinate Bench in the present case, they still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in respect of the same Exemption

Notification. It needs to be emphasised that if a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integrity itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself. In this behalf, the following observations by a three judge Bench of this Court in Subinspector Rooplal & Anr. Vs. Lt. Governor & Ors. are quite apposite:

"At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.

We respectfully concur with these observations and are confident that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit.

Thus it is humbly prayed that in line with the above noted decision of the Hon'ble Supreme Court, the decision of the Hon'ble coordinate bench in the case of Hitachi Astemo (Cited Supra) on identical facts is binding on the Hon'ble bench.

(H) Further the assessee counsel has also relied on certain decisions of the Hon'ble Courts/Tribunals which are clearly distinguishable.

(1) Global one India Pvt. Ltd. Vs. DCIT in ITA No. 1980/Del/2004 (Delhi Tribunal) : this case was duly considered by Hon'ble Delhi Tribunal in recent decision of Hitachi Astemo case (cited supra) (para 4) and for the sake of brevity, the facts are not repeated.

(2) ESPN Star Sports Mauritius SNCET Companies vs. UOI 388 ITR 383 (Delhi) : The facts of the case are clearly distinguishable as in this case the Assessing Officer disagreed with the binding order of the DRP. In fact, as mentioned in para 31 of the Hon'ble High Court order, the AO has also chosen to label the order of the DRP is invalid and refused to follow the DRP directions. In the instant case, the AO has followed the DRP directions.

(3) I.A.R. System Aktiebolag Vs. DCIT 152 taxmann.com 626 (Mumbai Tribunal)(2023) : it is a Mumbai ITAT order and as mentioned in para 18, the AO in that case has taken a divergent view that the DRP directions and not followed the DRP directions of treating the receipt as FTS and passed his own assessment order against the directions of the DRP on the basis of draft order. Further, the assessee in that case, has relied on the decisions of Hon'ble Bangalore ITAT in the case of Software Paradigm vs. ACIT (2018) 89 taxmann.com 339, which has been duly considered by Hon'ble Delhi Tribunal in the case of Hitachi Astemo.

(4) Oxbow Energy Solutions LLC, USA vs. DCIT, International Taxation 2(2)(2), New Delhi ITA No. 574/Del/2021 for A.Y. 2012-13. The facts of this case are also different as the DRP has deleted the additions of Rs. 53,14,19,634/- whereas the Assessing Officer in total defiance, has made addition of Rs.26,56,35,337/- which he himself accepted as explained in the draft assessment order. No such facts exists in the instant case.

(I) Assessee's counsel could not contradict the fact that the facts of Hitachi Aestemo case are identical with assessee's case.

It is further submitted that the assessee counsel, also, did not dispute the fact that the facts of the present case and Hitachi Astemo case are identical. Also the Hitachi Astemo decision, being recent covers almost all the decisions relied upon by assessee and also of a jurisdiction Tribunal.

(J) Assessee's prayer for quashing of assessment proceedings.

The assessee counsel, very surprisingly has also prayed for quashing of assessment proceedings which appears to be made only to hide its failure in discharging the primary onus cast u/s 68 of the IT Act. As it is discussed and explained in detail that the AO has followed the DRPs directions in totality and the assessee's contentions are without any basis and misleading but even without prejudice to that even asking for quashing of assessment proceedings is very far fetched prayer considering the facts of the instant case. Also quashing of assessment proceedings is an extreme step and the Hon'ble Apex Court in series of judgements have directed the Tribunals to desist from taking such steps as it results in a undue loss of revenue to the Government exchequer and at max, if the Tribunal finds any error in the order, then the same should be rectified. Some of the judgements of Hon'ble Apex Court are mentioned below for the reference of the Hon'ble Bench.

(K) Tribunals duty does not end with merely cancelling the assessment orders:

It is further prayed that the entire assessment proceedings should not be quashed because as held by Hon'ble apex court in the case of Kapur Chand Shrimal Vs CIT in 7 taxmann 6 (SC), 1981, it is held that duty of the Tribunal does not end by merely cancelling the assessment orders and not issuing any further direction of rectifications of the errors. Being pertinent the relevant extract of the decision is reproduced below:

13. From a fair reading of section 25A it appears that the ITO is bound to hold an inquiry into the claim of partition if it is made by or on behalf of any member of the HUF which is being assessed hitherto as such and record a finding thereon. If no such finding is recorded, sub-section (3) of section 25A becomes clearly attracted. When a claim is made in time and the assessment is made on the HUF without holding an inquiry as contemplated by section 25A(1), the assessment is liable to be set aside in appeal as it is in clear violation of the procedure prescribed for that purpose. The Tribunal was, therefore, right in holding that the assessments in question were liable to be set aside as there was no compliance with section 25A(l). It is, however, difficult to agree with the submission made on behalf of the assessee that the duty of the Tribunal ends with making a declaration that the assessments are illegal and it has no duty to issue any further direction. It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeals and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute. The statute does not say that such a direction cannot be issued by the appellate authority in a case of this nature. In interpreting section 25A(1), we cannot also be oblivious to cases where there is a possibility of claims of partition being made almost at the end of the period within which assessments can be completed making it impossible for the ITO to hold an inquiry as required by section 25A(l) by following the procedure prescribed therefor. We, however, do not propose to express any opinion on the consequence that may ensue in a case where the claim of partition is made at a very late stage where it may not be reasonably possible at all to complete the inquiry before the last date before which the assessment must be completed. In the instant case, however, since it is not established that the claim was a belated one the proper order to be passed is to set aside the assessments and to direct the ITO to make fresh assessments in accordance with the procedure prescribed by law. The Tribunal, therefore, erred in merely cancelling the assessment orders and in not issuing further directions as stated above.

[L] Reliance is also placed on the decision of Hon'ble Supreme court in the case of THE PRINCIPAL COMMISSIONER OF INCOME TAX-4, MUMBAI Vs Mis. S.G. ASIA HOLDINGS (INDIA)PVT. LTD. in CIVIL APPEAL NO.6144 OF 2019, wherein the Hon'ble court did not quash the entire assessment proceedings even when no reference was made by AO to TPO with regard to transfer pricing issues and decided the ALP on his own in complete violation of the instruction of the department. The relevant extract of the relevant portion is reproduced below:

7. In view of the guidelines issued by the CEDT in Instruction No.3/2003 the Tribunal was right in observing that by not making reference to the TPO, the

Assessing Officer had breached the mandatory instructions issued by the CEDT. We do not find the conclusion so arrived at by the Tribunal to be incorrect.

8. However, the Tribunal ought to have accepted the submission made by the Department Representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the Assessing Officer so that appropriate reference could be made to the TPO. It would there be upto the authorities and the Commissioner concerned to consider the matter in terms of Sub- Section (1) of Section 92CA of the Act.

(M) Reliance is also placed on the decision of Hon'ble Supreme Court of India in the case of M. Pirai Choodi v. ITO (2012) 20 taxmann.com. 733 (SC) wherein the Hon'ble Supreme Court set aside the order of the Hon'ble High Court which quashed the entire assessment proceedings because opportunity to cross examine was not granted to the assessee. In this case, the Hon'ble Supreme Court has held that the Hon'ble High Court should not have quashed the entire assessment proceedings and instead should have directed the AO to grant an opportunity to the assessee to cross examine the concern witnesses. By applying the ratio laid down by the Hon'ble Supreme Court, it is humbly stated that the entire proceedings should not be quashed and if the Hon'ble bench holds that the assessing officer has committed some error with regard to wrong mention of two additions in the assessment order, then AO may kindly be directed to incorporate DRP directions / OGE of TPO.

(N) It is humbly submitted that the Hon'ble Supreme Court in several judgment including the seminal judgment in the case of Shyam Lal Murari and other (1976) 1 SCC 719 has repeatedly held that the prejudice caused should be the main factor in deciding the issues. Infact, the Hon'ble High Court of Bombay in the recent case of Income Tax Appeal no. 302 of 2002 in Veena Estate vis CIT, Mumbai City -IX, (11-Jan-2024) (copy enclosed) while deciding about the issue of Penalty order Vis 271(1)(C) becomes void as the AO had failed to tick mark in the show cause notice, has held that the Principle of prejudice has to be satisfied even in cases of grievance related to breach of principles of natural justice. While arriving at the decision and re emphasizing the significance of principle of prejudice, the Hon'ble Mumbai High Court has considered and relied upon several judgment of Hon'ble Supreme Court/High Courts.

(O) As several courts including the decisions placed above have held that the non following of DRPs directions is procedural/technical error, accordingly reliance is also placed on the judgment of Hon'ble Supreme Court in the case of Sugandi vs. P. Raj Kumar in 3427/2020 wherein the Hon'ble Supreme Court has held that the courts should decide on merit and not on procedural/technical issues. The decision of the Hon'ble Supreme Court is very pertinent and relevant extract is reproduced below:

9. It Is Often Said That Procedure Is The Handmaid Ofjustice. Procedural And Technical Hurdles Shall Not Be Allowed To Come In The Way Of The Court While Doing Substantial justice. If The Procedural Violation Does Not Seriously Cause Prejudice To The Adversary Party, Courts Must Lean Towards Doing

Substantial justice Rather Than Relying Upon Procedural And Technical Violation. We Should Not Forget The Fact That Litigation Is Nothing But A journey Towards Truth Which Is The Foundation Of Justice And The Court Is Required To Take Appropriate Steps To Thrash Out The Underlying Truth In Every Dispute. Therefore, The Court Should Take A Lenient View When An Application Is Made For Production Of The Documents Under Sub-Rule (3)."

Thus, in view of the above, it is respectfully submitted that the assessee's contentions on legal jurisdictional/ of AO not followed the DRP directions are without any basis, incorrect and misleading as the AD as duly followed the DRP directions. Also, it is submitted that the assessee cannot dictate the manner and the language used by the AD in passing the orders. Accordingly it is humbly prayed that the hearing on merits of the additions made, may kindly be fixed at the earliest."

12. In rejoinder, ld. AR for the assessee submitted his submissions which are as under :-

"Final order passed in violation of directions of DRP u/s 144C- invalid

4. *It is reiterated that the impugned assessment order has been passed by the JAO (and not by NFAC) without following the binding directions of the DRP as summarised hereunder:*

(a) ***First and foremost****, the impugned final assessment order has been passed by JAO and not by NFAC. It is emphatically reiterated that JAO had no authority whatsoever to pass the impugned final assessment order and therefore, the impugned order is wholly without jurisdiction, illegal and bad in law [refer detailed submissions at paras 27 to 35 of Synopsis].*

(b) ***Secondly****, the DRP had held that draft assessment order under section 144C(1) was passed in breach of the provisions of section 144B of the Act and directed the NFAC to spell out the reasons for the same in the final assessment order-* ***para 3.1.1 of DRP order****.*

Despite the aforesaid specific direction of the DRP, JAO has failed to record any reasons for violation of provisions of section 144B of the Act in the impugned order. *In fact, JAO continued to conduct assessment in violation of section 144B of the Act and passed the impugned order (as explained infra) in violation of the mandatory provisions.*

(c) ***Thirdly****, in respect of addition under section 68 of the Act, the DRP had directed the NFAC to consider the material/ evidence placed on record before passing the final order [refer* ***para 3.2.3 of DRP order****].*

The JAO has, however, without considering the said directions, proceeded to repeat the addition as made in the draft order.

Most importantly, paras 6.1 to 6.8 of the final assessment order dated 29.04.2022 passed by the JAO are verbatim copied from the very same paras in the draft assessment order dated 21.09.2021 [except that some reproductions in the draft order as missing in the final assessment order] passed by the NFAC.

There is thus, not only blatant violation of the directions of the DRP but complete non-application of mind while passing the final assessment order.

(d) ***Fourthly**, regarding disallowance of delayed payment of contribution, the DRP had directed the NFAC to consider the judicial precedents as highlighted by the appellant [refer **para 3.4.2 of DRP order**], which has again been completely ignored by the JAO while passing the final order.*

(e) ***Fifthly**, even while passing the impugned final order, JAO has not even cared to comply with the principles of natural justice and the mandatory requirement of granting personal hearing, thereby, perpetuating the jurisdictional error committed by the NFAC while passing the draft order.*

5. ***As per provisions of section 144C(10) read with section 144C(13) of the Act, it is mandatory for the assessing officer to pass the final order in conformity with the directions issued by the DRP. Not following the directions of the DRP renders the final assessment order as beyond jurisdiction, illegal and bad in law**.*

6. *During the course of last hearing, the Ld. DR submitted that although the impugned order was passed in violation of DRP's directions, the same ought not be quashed but may be remanded back; the ld. CIT(DR) placed reliance on decision in the case of **Hitachi Astemo Haryana Pvt. Ltd. vs. DCIT [ITA No.1005/Del/2022; decided on 23.11.2023].***

7. *Reliance on the aforesaid decision is, it is submitted, completely misplaced inasmuch in that case the Tribunal remanded the matter to the assessing officer on peculiar facts. In that case, the assessing officer, in order to pass the assessment order within one month from DRP's direction, passed the assessment order without incorporating the TPO's order giving effect in pursuance to the DRP's direction, since as on that date TPO's order was not received by the assessing officer; the said assessment order was, however, passed subject to modification on the basis of TPO's order. Thus, it was, in the light of the said peculiar factsthe Tribunal remanded the matter to the file of assessing officer. Further, the judgements relied upon by the Tribunal in that case are completed different since the same dealt with cases where the final order was passed without noticing that the assessee has filed objections before the DRP against the draft assessment order passed under section 144C of the Act.*

8. ***On the contrary, in the present case, the DRP issued specific and express directions in respect of various issues including satisfaction of conditions under section 144B of the Act, adjudication on the basis of evidence(s) placed with respect of merits and consideration of legal position.***

9. ***The impugned assessment order has, however, been passed by JAO (and not by the NFAC), that too, without following the express binding directions of the DRP.*** *Furthermore, it is evident from the records that paras 6.1 to 6.8 of the final assessment order are verbatim copied from the very same paras of the draft assessment order. These aspects were specifically taken note of by this Hon'ble Tribunal while adjudicating the original stay application bearing SA No.158/Del/2022 vide order dated 24.06.2022.*

10. *Being so, the final assessment order, being passed in blatant violation of the directions of DRP is violative of section 144C(10)/(13) is illegal and bad in law.*

11. *Reliance in this regard is placed on the observation of* ***the jurisdictional Delhi High Court*** *in the case of* ***ESPN Star Sports Mauritius SNCET Compagnie vs. UoI[2016] 388 ITR 383 (Del),*** *wherein the Hon'ble Delhi High Court has categorically held that- "section 144C(10) read with section 144C(13) makes it abundantly clear that there is no option with the assessing officer but to be bound by orders and subject to review by the Disputes Resolution Panel. It is bound by the Disputes Resolution Panel." Ergo,the Hon'ble High Court observed that since the final assessment order was passed in complete violation of the directions of the DRP, the same renders the final assessment order void ab intio and liable to be quashed on this account alone.*

12. *The* ***Bombay High Court*** *in the case of* ***Vodafone Idea Ltd v. CPC:[2023] 459 ITR 413 (Bom)****held that failure on part of department to follow procedure under section 144C of the Act is not merely a procedural irregularity but is an illegality and vitiates entire proceeding.*

13. *To the similar effect is the case of* ***Louis Dreyfus Co. India (P.) Ltd. vs. DCIT: [2024] 159 taxmann.com 244 (Del) dated 30.01.2024.***

14. *Attention is also invited to the following pertinent observations of the* ***Delhi Bench of the Tribunal*** *in the case of* ***Oxbow Energy Solutions LLC v. DCIT: 2023] 199 ITD 770 dated 31.01.2023:***

> *"10. As could be seen on a perusal of the final assessment order under challenge in the present appeal, while implementing the directions of learned DRP, the Assessing Officer, though, deleted the addition made of Rs. 53,14,19,634/-, however, he made the addition of Rs. 26,56,35,337/-, accepted as explained in the draft assessment order. The aforesaid action of the Assessing Officer is totally unacceptable as he has exceeded his jurisdiction provided under the statute. As could be seen from the observations of learned DRP reproduced above, a clear direction was*

issued to the Assessing Officer to delete the addition of Rs. 53,14,19,634/- proposed in the draft assessment order. There is no other direction by learned DRP. ***Instead of implementing the direction of learned DRP in letter and spirit, the Assessing Officer has attempted to overreach the direction of learned DRP by making addition of an item of income, which was not made at the draft assessment stage, hence, not a subject matter of dispute before learned DRP.***

11. At this stage, it is necessary to refer to certain provisions of section 144C of the Act. As per sub-section (8) of section 144C, the DRP may confirm, reduce or enhance the variation proposed in the draft assessment order and issue necessary direction to the Assessing Officer. Sub-section (10) of section 144C makes it clear that every direction issued by learned DRP shall be binding on the Assessing Officer. ***Sub-section (13) of section 144C provides that after receiving the direction of learned DRP, the Assessing Officers shall in conformity with the direction complete the assessment without providing any further opportunity of being heard to the assessee. The requirement of providing a personal hearing to the assessee at the final assessment stage has been dispensed with only for the reason that the Assessing Officer has no other scope but to implement the direction of learned DRP.***

12. In the facts of the present appeal, the only direction of learned DRP is to delete the addition made in the draft assessment order. Therefore, the clear mandate given to the Assessing Officer by learned DRP is to restrict himself to delete the addition of Rs. 53,14,19,634/-. Whereas, the Assessing Officer has travelled beyond the direction given by learned DRP and made addition of Rs. 26,56,35,337/-, which he himself accepted as explained in the draft assessment order. ***Thus, the impugned assessment order has been passed in clear violation of the directions of learned DRP. Therefore, the assessment order is a nullity in the eyes of law as it is against the provisions contained under sub-section (10) and (13) of section 144C of the Act. That being the factual and legal position, we quash the final assessment order.***

13. Before parting, we must observe, in recent times, we have come across several instances of open defiance and non-implementation of directions issued by DRP by the Assessing Officers. This, in our view, is a very disturbing trend and reflects poorly on the credibility of the department and shakes the confidence of tax payers. Therefore, it goes against the Government's policy of adopting taxpayer friendly approach. In any case of the matter, the DRP is constituted by three senior Commissioner level officers of the department and is a dispute resolution mechanism set up by the Government under the statute. As per the Statute, the Assessing Officer is duty-bound to implement the directions of the DRP. The Assessing Officer, being a statutory authority, is bound to act in accordance with the procedure laid down in Statute and cannot deviate. Since, we have come across several instances of non-implementation of directions given by the DRP to the Assessing Officers, it is high time to take appropriate corrective measures to stem the deficiencies. Therefore, we direct the

matter to be brought to the notice of the concerned higher Authorities so that necessary advisory/guidelines are issued to sensitize the Assessing Officers in the matter of implementation of directions of the DRP. We leave the matter at this.

14. In the result, the appeal is allowed, as indicated above."

15. ***Attention** is also invited to the decision of the **Mumbai Bench of the Tribunal** in the case of **I.A.R. System Aktiebolag v. DCIT: [2023] 152 taxmann.com 626 (Mumbai - Trib.)[02-05-2023]**wherein it has been held that where DRP had given clear cut finding that income earned by assessee, a foreign company supplying software through intermediaries in India and various companies, would fall under FTS but the assessing officer completed assessment treating income under head 'royalty', said assessment order passed by assessing officer was bad in law and against directions specified under section 144(13) of the Act and thus liable to be quashed. The pertinent observations of the Tribunal are reproduced hereunder for ready reference:*

"18. Considered the rival submissions and material placed on record, we observe from the record that assessee has received certain funds by supplying software through intermediaries in India and the various Companies are listed in Para No 3.1 of the Assessment Order. It is also fact on record that assessee has received the receipts as categorized by the Ld. DRP in their order at Page No. 32 as per which assessee has received income from sale of software licence, hardware, support services to those parties who are intended to purchase the latest software from IAR and certain freight charges. Which are part and parcel of the total services rendered by the assessee during the current Assessment Year. The Assessing Officer after considering the detailed submissions of the assessee and after detailed analyses of the issue on record and also relying on various case laws held that the receipts of income by the assessee are taxable under the head "Royalty" and in objection filed by the assessee before Ld. DRP and Ld. DRP has held that the above receipts received by the assessee is involvement of support services to the extent of Rs. 36,37,596/- and other portion of the income includes sale of software and hardware. Without going into merits of the findings of the Ld. DRP, we observe that Ld. DRP has come to the conclusion on their own analysis that the case of the assessee falls under FTS. We observe that while passing the final Assessment Order Assessing Officer has not followed the directions of the Ld. DRP and passed his own Assessment Order by merely reproducing his analysis in draft Assessment Order.

19. From the record we observe that the final Assessment Order passed by the Assessing Officer is not as per section 144C(13) of the Act. However, Assessing Officer has filed a note in support of his final Assessment Order in which he has made submissions that the order passed by him is analyzing the various issue which are without prejudice views which Ld. DRP has not rejected. He is of the view that the final Assessment Order passed by him is as per section 144C(13) of the Act. After considering the submissions of both the parties, we are of the view

that Assessing Officer has not followed the directions of the Ld. DRP and the directions of the Ld. DRP are very clear and Assessing Officer has not bothered to atleast classify the income earned by the assessee under the head FTS as per the directions of the Ld. DRP and royalty. He proceeded to complete the final Assessment Order based on his own analysis made by him in draft Assessment Order which is clearly a violation of not following the directions of the higher authorities and also the provisions of section 144C(13) of the Act. At the time of hearing, Ld. DR heavily relied on the decision of the ITAT Bangalore in the case of Yokogawa India Ltd. (supra) in which the bench has remitted the issue back to the file of the Assessing Officer/TPO to redo the assessment by following the directions of the Ld.DRP. We observe that in that case there is an issue of determination of arm's length price of payment towards management fees, global sales and marketing activities fees. We do not intend to follow this decision of the ITAT Bengaluru bench for the simple reason that the Assessing Officer will get extended period of time by passing such orders which are clearly violation of the specific direction specified u/s. 144C(13) of the Act. Therefore, such violation cannot be ignored and in the given case under consideration we observe that Ld. DRP has given clear cut finding that income earned by the assessee will fall under FTS and Assessing Officer by following his own analysis and applied and completed the final Assessment Order under the head Royalty and not even he has bothered to follow the directions of the Ld. DRP and he could have atleast followed the directions of the Ld. DRP to the extent of support services under the head FTS and balance he could have brought to tax under the head Royalty. Further, we observe that the majority of the receipts received by the assessee are for sale of software licence and hardware and portion of the receipt which are received towards support services to the extent of Rs. 36,37,596/- out of total receipt of Rs. 2,88,87,787/-. In our view, Assessing Officer and Ld. DRP has taken a divergent view and without going into merits of the issues raised, we are inclined to treat the Assessment Order passed by the Assessing Officer as bad in law and against the directions specified u/s.144(13) of the Act. Accordingly, we quash the assessment order passed by the Assessing Officer and grounds raised by the assessee are allowed in this regard."*(emphasis supplied)***

16. *To the similar effect is the decision of the Delhi Bench of the Tribunal in the case of* ***Bechtel Ltd. v. ACIT: [2024] 159 taxmann.com 319 (Delhi - Trib.)[31-01-2024].***

17. *For the aforesaid reason, the final assessment order passed is beyond jurisdiction, illegal and bad in law and calls for being quashed at the threshold.*

Re: Violation of section 144B of the Act

18. *During the course of last hearing, the ld. Departmental Representative (DR) cited certain case laws to contend/ argue that since the impugned order was passed without issuing SCN and without affording personal hearing, the matter may kindly be remanded to the file of the assessing officer.*

19. ***In respect of the aforesaid, it is vehemently submitted that the impugned order deserves to be quashed (and not remanded), inter alia, for the following reasons:***

20. *It is submitted that* ***provisions of section 144B of the Act provides for a mandatory procedure in law*** *to be followed for completion of assessment, which is sacrosanct and cannot be done away with; any violation to the mandatory procedure results in the order so passed being invalid and non-est in eyes of law.*

21. *In this regard, it is pertinent to note as under:*

(a) ***There is distinction between procedure mandated by law vis-à-vis procedure requiring compliance on account of natural justice. In case of violation of mandatory procedure prescribed in law, the assessment framed is nullity.*** *The option of remanding the matter to the file of the assessing officer could be relevant only in case of violation of principles of natural justice.*

(b) *It is settled law that if law prescribes an action to be performed in a particular manner, then, the same can only be performed in that manner and not otherwise-****if such mandatory procedure in law not followed, order is nullity and bad in law****.* ***Reference may be made to the following decisions:***

- *Turner International India (P) Ltd vs. DCIT [2017] 398 ITR 177 (Del)*
- *PCIT vs. Headstrong Services [2021] 278 Taxman 224 (Del)*
- *ACIT vs. Mon Mohan Kohli [2022] 441 ITR 207 (Del)*

Reference may also be made to the decision of ***the Hon'ble Delhi High Court*** *in* ***Haryana Acrylic Manufacturing Co. vs. CIT [2009] 308 ITR 38 (Del)****on the proposition that* ***s****teps/ procedure prescribed laid down must be strictly followed; any deviation would be fatal to validity of proceedings/ order [para 23 of judgement]*.

(c) *Moreover, it is submitted that the scheme of Act requires completion of entire* ***mandatory procedure/ proceedings within prescribed time limit.*** *In simple words, the provisions of limitation require the assessing officer to validly complete the assessment proceedings in the statutory time limit. No statutory authority, including this Hon'ble Tribunal, in our respectful submissions, has any power of extension of such statutory time limit.*

Remanding of the matter to conduct fresh assessment would, in our submissions, be in violation of the aforesaid statutory timelines and provisions of the Act. The law does not permit an interpretation which results in/ amounts to lifting the bar of limitation as prescribed under a statute [refer Assistant Commissioner (CT) LTU vs. Glaxo Smith Kline Consumer Health

Care Ltd. (2020) 19 SCC 681, Vijay Narayan Thatte vs. State of Maharashtra [2009] 9 SCC 92].

Reference in this regard may be made to decision in the case of Popat Bahiru Govardhane & Ors. v. Special land Acquisition Officer & Anr. (2013) 10 SCC 765, wherein the apex Court observed as under:

16. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." (See *Martin Burn Ltd.* v. *Corpn. of Calcutta*[10], AIR p. 535, para 14 and *Rohitash Kumar* v. *Om Prakash Sharma*[11].)

Emphatic reliance is placed on the decision of the apex Court in the case of ***Hope Textiles Ltd. v. UoI: [1994] 205 ITR 508 (SC).*** *In that case, the assessee filed a return on the basis of which an order of assessment was made on 27.3.1974 and certain losses disclosed by the assessee were accepted. A notice under section 148 of the Act was issued to the assessee on 21.2.1976, pursuant to which the assessee-company filed a return on 27.3.1976 disclosing further losses. Till September 1981, no orders were passed in the reassessment proceedings.*

On writ, the High Court dismissed the writ petition filed by the assessee for the issuance of a mandamus to the ITO to pass orders in pursuance of the notice, observing that no such mandamus could be issued to ITO to make an order of assessment beyond the period of limitation prescribed by section 153(2)of the Act.

On appeal to the Supreme Court, it was held that a writ of mandamus can be issued compelling a statutory authority to perform its statutory obligation and not to pass an order in violation of a statutory provision; the ITO has no power to make a reassessment beyond the period prescribed by sub-section (2) of section 153, unless the case falls under any of the other sub-sections under section 153 or other provision extending the said period of limitation; it cannot be understood as empowering the High Court to give a direction to the authority under the Act to ignore the period of limitation prescribed in the Act. Thus, it was held that the High Court was justified in holding that no direction could issue compelling the ITO to make an order of assessment beyond the period of limitation prescribed by section 153(2) of the Act.

In the present case, since the time limit for completion of entire procedure viz. issuance of SCN and draft order, hearing, passing of order under section 144C(1), filling of objections before DRP and passing of final assessment order already stands expired, the Tribunal, in our respectful submissions, has no power to extend time and confer jurisdiction to now undertake the mandatory assessment procedure again by remanding the matter back to the file of the assessing officer.

(d) Decisions relied by the ld. CIT(DR) not applicable to the facts of the present case:

S.no.	***Decision relied by CIT(DR)***	***Remarks of the Appellant***
1.	*NFAC vs. Mantra Industries Ltd. [CA No.1936/2023; order dated 21.03.2023]* *NFAC vs. Chander Arjandas Manwani [CA No.1937/2023; decided on 21.03.2023]*	*The said decisions are not applicable since the apex Court has merely set-aside the decision of the High Court and have remanded the matter to the High Court to consider the aspect that provisions of section 144B(9) of the Act have been omitted.* *The apex Court has not held that the matter is required to be remanded to the assessing officer in violation of section 144B of the Act.*
2.	*NFAC vs. Automotive Manufacturers Pvt. Ltd. [CA No.1829/2023]* *DCIT vs. Abacus Real Estate Pvt. Ltd. [CA No.1830/2023; decided on 21.03.2023]* *Additional Joint Deputy ACIT vs. Multiplier Brand Solutions Pvt. Ltd. [CA No.1831/2023; decided on 21.03.2023]*	*The said decisions are not applicable since:* - *the said decisions merely deal with issue where assessment order is passed with issuance of SCN.* *On the contrary, the case of the appellant deals with multiple jurisdictional defects as pointed out supra(and in earlier synopsis).* - *the matter has been remanded merely because in view of the Court, the Revenue ought to have been given some leverage to correct themselves since the faceless assessment scheme was introduced recently.* - *the judgments were, most importantly, rendered by the Court pursuant to writ petitions filed before the High Courts under Article 226 of the Constitution of India, wherein the Courts have been vested with extraordinary jurisdiction and wide powers.* *The said directions rendered exercising such extraordinarily constitutional powers cannot be held to be available with the statutory*

S.no.	***Decision relied by CIT(DR)***	***Remarks of the Appellant***
		appellate forums such as ITAT. The Hon'ble ITAT, in our submission, is a statutory body created under law and thus the provisions of the Act are binding on the statutory authorities including the ITAT. Any violation of provisions of law would result in quashing/ setting-aside of the order passed in violation of the statutory provision. - *various Courts have, in identical circumstances, quashed the assessment order as detailed in synopsis dated 29.08.2022.*
3.	*Expert Capital Services (P.) Ltd. vs. NFAC [2021] 129 taxmann.com 239 (Del.)*	*In the said decision, the Delhi High Court had remanded the matter to the file of the assessing officer since no opportunity of hearing was provided to the assessee.* *On the contrary, the case of the appellant deals with multiple jurisdictional defects as pointed out supra (and in earlier synopsis) and not just absence of opportunity of personal hearing.* *That apart, the subsequent decision of the jurisdictional Delhi* ***High Court*** *in the case of* ***D.B. Engineering (P.) Ltd. vs. NFAC[2023] 147 taxmann.com 472 (Del)*** *after taking due consideration of the earlier cases set aside the assessment order passed in contradiction to mandate of section 144B of the Act, i.e., without granting personal hearing to the assessee therein. Pertinently, the Hon'ble Court echoed the observation of the Court in* ***Sanjay Aggarwal (supra)*** *and allowed the Respondents therein to take next steps,* ***if, law permits****. Thus, even the Hon'ble Court deemed it unnecessary to remand the matter to the assessing officer rather granted liberty to the respondents to take next steps if legally permissible.*

22. ***It is important to note that apart from the fact that impugned order has been passed without issuance of SCN and allowing opportunity of hearing, the impugned assessment order has been passed by jurisdictional assessing officer (JAO), that too without any prior notice being issued by such assessing authority, and not NFAC, which is solely vested with jurisdiction in terms of section 144B of the Act. Thus, the order passed by JAO is completely beyond jurisdiction, illegal and liable to be quashed for the said reason alone.***

23. *In view of the aforesaid, it is submitted that the submissions of the CIT(DR) regarding remanding the matter to the assessing officer deserves to be dismissed and the impugned assessment calls for being quashed.*

24. *Submissions with respect to other issues and addition on merits are dealt with as part of synopsis dated 29.08.2022 already placed on record."*

13. Considered the rival submissions and material placed on record. We observe from the record that the case of the assessee was selected for scrutiny under faceless assessment scheme and accordingly the assessment was completed by issue of draft assessment order (DAO) by NFAC and subsequently final assessment order (FAO) passed by the jurisdictional assessing officer (JAO). Before us, the assessee has raised grounds expressing objections to the process adopted by the NFAC and JAO in completing the assessment in its case.

The assessee has raised following issues:

i. DAO was not passed as per sec.144B (1)(xiv)(b)
ii. NFAC passed the DAO without allowing personal hearing in gross violation of mandatory provisions of the Act.
iii. FAO passed by the JAO instead of NFAC is beyond jurisdiction as per section 144B of the Act.
iv. JAO has not followed the directions of the DRP
v. FAO passed without considering the submissions and evidences filed by the assessee.

14. After considering the issues under consideration, in our considered view, historically two types of assessee are assessed to tax, viz, regular assessee who are falling under the regular assessment proceedings viz., section 143(3), 144, 147 and another category falling under section 144C (eligible assessee – whose cases are referred to Transfer pricing officer and nonresident not being a company or any foreign company). The procedure for assessment for assessee falling u/s 144C are already coded in the section 144C itself prior to introduction of faceless assessment regime. When newly scheme of faceless assessment proceedings were announced, it was new to all the stake holders and the procedure was specifically designed to make assessment falling under section 143(3), 144 and 147 of the cases. The set procedure u/s 144B was codified to facilitate the process of completing the assessments. In the same codification of process of assessment, the procedure laid down for special category falling u/s 144C was also codified u/s 144B of the Act. The procedure laid out in such a way that after the initial assessment by the assessment units, they will forward the same to the NFAC, NFAC will send the draft assessment order, if required after the review of the same in special cases, to the respective assessee. After giving opportunity of being heard to the assessee or by allowing them to submit

relevant information through the e-portal, the final assessment orders are being finalized and forwarded to the respective assessee.

15. In our considered view, the process of one more opportunity at the stage of draft assessment order to the assessee are duplicate in nature, even if there is violation it is only curative in nature since the assessment is not complete. Whereas in the case of other assessment like assessments u/s 143(3), 144 and 147 of the Act, once the draft assessment are issued and after granting opportunity or non granting of opportunity to the assessee, the outcome is the final assessment order. The courts have held that the passing of FAO without granting opportunity of being heard is bad in law and held that the relevant assessment is deserves to be quashed. Whereas in the case of assessment u/s 144C is different, the final outcome of assessment from the NFAC is the draft assessment order, even there is violation, there is no prejudice caused to the assessee. Assessee gets one more opportunity before the Dispute Resolution Panel (DRP). The issue raised by the assessee that the draft assessment order passed without giving opportunity of being heard to the assessee at the stage of DAO is beyond comprehension and there is if at all violation of section 144B(1)(xiv) in the case of assessments falling u/s 144C of the Act, the same can be rectified at the stage of DRP by filing the relevant

objections, this will fall under the category of rectifiable mistake. Therefore this is issue accordingly dismissed.

16. In this regard, we observed that Ld AR has relied on several case law to make submissions that not giving opportunity of being heard to the assessee before forwarding the DAO is bad in law and deserves to be quashed. We observed that all the case law relied by the assessee are relating to the assessments framed u/s 143(3), 144 and 147 of the Act. There is no case wherein the issue of 144C was adjudicated. This is the peculiar case and we already held that the procedure u/s 144C is different and outcome of the NFAC in this case is only the DAO not FAO. There is considerable difference in both the type of assessments. In the case of section 144C assessment, the assessee gets one more opportunity to represent his issues before DRP. Hence there is no prejudicial caused to the assessee. Therefore, the case law relied by the assessee are distinguishable hence not considered.

17. Coming to the issue of passing of FAO by the JAO beyond the jurisdiction of section 144B of the Act. We observed from the record that the assessment was initiated by the NFAC and after following the coded process u/s 144B, NFAC has passed the DAO. The assessee chose to refer the matter to DRP by raising objections on the DAO. After the direction of DRP, the FAO was passed by the JAO. In our considered

view, assessment procedure laid down in section 144B is common and the assessment once initiated u/s 144B, it has to be completed in the same way. But this involves administration interference to smooth functioning of the assessment process. We are aware that at the time of introduction of faceless assessment scheme, there were several confusions and were several administrative constrains. In order to cope up with the administrative constrains, the relevant administrative heads were given several directions to ease the assessment process and take corrective measures. One of them, in our view, is to transfer certain cases to JAO. There is no illegality involved in the finalizing the FAO, Ld DR has brought to our notice that the respective administrative heads/NFAC were given suitable permission to transfer the cases to JAO. Therefore, as far as assessee is concerned, the FAO has to be completed within the statutory period. In this case, the assessment was completed within the time and the assessment was completed by the JAO and not any other officer. As per system, the jurisdiction always lies with the JAO. In our view, there is no prejudicial caused to the assessee by this FAO.

18. Next on the issue of JAO not followed the directions of DRP, we observed that Ld DRP has directed the AO to verify and spell out the reasons on breaching the provisions of section 144B of the Act. We

observed that no doubt Ld DRP has given direction with regard to spell out the reasons for breaching the provisions of section 144B, we noticed that the FAO was passed by JAO and has no authority to give reasons on the issues of NFAC. Beyond his capacity, therefore, we do not see any violation on the part of JAO. Ld DRP gave direction to the NFAC and ultimately the assessment was completed by the JAO. Hence, we do not see any reason to make the assessment bad in law.

19. With regard to next issue of FAO passed without considering the submissions and evidences before the AO, is a serious issue and needs to be addressed. This issue can be resolved by remitting the issue back to the file of AO. However, we observed that the issue relating to section 68 is issue of share capital to its AE's and this issue was already considered in the TP stage itself and TPO has not passed any adverse comments and accepted that there is no variation. Instead of remitting the issue back to the file of AO, we are inclined to adjudicate the issue on merit.

20. The relevant facts are, the assessee has issued share capital to its AE's during the current assessment year along with the share premium. The assessee has submitted all the details of the shareholders, complete address, PAN, number of shares issued, face value, details of share premium, total amount received. Further they have already filed the

justification of issue of shares at the price issued by them by submitting the valuation report before the authorities. Further we observed that the shares were issued to its AE's outside India and they have also filed the relevant inward remittance certificates (FIRC) to justify the receipt of money from the nonresident shareholders. Further they have also filed the confirmations from them and also they have complied with the FDI norms and relevant documents were also filed before the authorities below. We observed that the same documents were submitted before TPO and also before AO. But the JAO has completed the assessment by making addition u/s 68 on the same reasons recorded in the DAO. Aggrieved, the assessee filed the objections before DRP and they have remitted the issue back to the file of AO to verify the relevant information filed by the assessee. However, the JAO has sustained the additions.

21. Further it is brought to our notice that the assessee has received similar share capital from the same share holders in the AY 2014-15 and the same was accepted by the revenue as genuine after due verification while passing the assessment order vide order dated 23.12.2016, the same is submitted in the form of paper book before us. In the impugned assessment year, the assessee has received investment from the same share holders thru banking channel with the prior approval of the RBI

and relevant documents were submitted before the authorities below. In our considered view and in several decisions of the coordinate benches have decided the similar issues that the share capital subscribed by a non resident and received through proper banking channel, the same cannot be disallowed invoking the provisions of section 68 of the Act. Particularly, the coordinate bench in the case of Russian Technology Centre P.Ltd (supra) held as under:

"11. We have heard rival contentions and perused the material available on record. The first and foremost question to be decided is whether on the basis of material furnished by the assessee and available on the record, the assessee has discharged its onus as cast by s. 68 in terms of identity and creditworthiness of the shareholders and genuineness of the transaction. The availability of balance sheet, certificate of incorporation, confirmations and certificates of good standing etc. filed by the assessee in respect of shareholders establish that they are non-resident entities, having independent and legal existence. The moneys have come to assessee through banking channels as is evident from FIRC, which also mentions the purpose of remittance and also the particulars of the remitting bank. FIPB approval that too with a liberty to collect share capital up to Rs. 600 crores and ROC compliance etc. clearly indicate the stand of the assessee. In our considered view, the plethora of the evidence filed by the assessee amounts to discharge of primary burden cast on the assessee in terms of s. 68 of the IT Act for identity and creditworthiness of the creditors and genuineness of transaction.

……..

11.5 We find merit in the contentions of learned counsel and reliance on the decisions of the Tribunal in the cases of Finlay Corporation Ltd. (supra), Smt. Susila Ramasamy (supra) and Saraswati Holding Corpn. Inc. (supra) and the import of CBDT circular referred to above. Whenever remittances are made by the non-resident holding company for purchase of shares of its subsidiary in India, the money undoubtedly is capital in the nature and if documents like FIRC etc. are produced, it can safely be stated that the said money came in through banking channels.

11.6 In the absence of any evidence to show that the money remitted by the non-resident accrued in India, it cannot be held to be taxable in India. Hence, moneys remitted by non-residents whose identity is not in question through their bank accounts outside India have to be held as capital receipts not exigible to tax. It therefore naturally follows that if the identity of the non-resident remitter is established and the money has come in through banking channels, it would

constitute a capital receipt and ordinarily cannot be treated as deemed income under s. 68 or 69 of the Act. This is clarified by the CBDT circular itself.

11.7 *Taking into consideration of all the above, we find merit in the argument of the learned counsel for the assessee that the primary burden cast on the assessee was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the assessee is also to be decided on the basis of documents filed by the assessee and facts and circumstances of each case and on that basis a reasonable view is to be taken as to whether the assessee has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and genuineness of the transaction. From the documents filed during the course of assessment and before CIT(A), the independent existence of the share applicants in Russia is clearly established. The assessee's application to FIPB for raising the capital contains all the relevant details which is favourably accepted by the Board, particularly by allowing the assessee to raise further capital without approaching the FIPB. The transactions are through banking channels. Thus, the gamut of evidence does not leave any doubt in the discharge of primary burden of the assessee. On the issue CBDT circular and Finlay Corporation Ltd. Judgment (supra) also we are in agreement with the learned counsel for the assessee that in these circumstances of the case, moneys remitted by non-residents through banking channel outside India have to be held as capital receipts, not exigible to tax and cannot be treated as deemed income on the fictions created by ss. 68 and 69 of the Act. In consideration of all these observations, we are inclined to hold that the share application money as raised in the grounds of appeal cannot be held as non-genuine and added as income of the assessee under s. 68 of the Act.*

Consequently, additions made on this count as raised in grounds of appeal are deleted. Assessee's grounds of appeal on this issue are allowed."

22. The above decision of the coordinate bench was also affirmed by the Hon'ble High Court of Delhi.

23. Further, we observed that the similar issue was considered by the ITAT Mumbai bench in the case of Syntensia Network Security India Pvt. Ltd (supra) and held as under:

> *"9. Furthermore, the law is section 68 is not apply to remittances made in India by non- resident is strengthened by the proviso to u/s.68 inserted w.e.f. asst. yr. 2013-14. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital, then the source of funds of resident shareholder has to be established by the assessee in order to get out of the kin of the deeming provision under s. 68. Hence, the proviso talks of the source being established only when the shareholder is a resident of India. There is no such requirement if shareholder is a non-resident. Therefore, the creditworthiness of the shareholders, if he is a non-resident, does not have to be established by the assessee in respect of remittance received by him."*

24. In this case, the assessee has already proved the identity of the share holders since the same shareholders have invested in the previous assessment year and relevant documents submitted to prove the identity before the authorities. With regard to credit worthiness, the same was invested by the AE's of the same group and the same was also approved by the RBI as well as funds have come thru inward remittances. With regard to genuineness, we observed that the assessee has properly received the share capital alongwith the share premium and invested the same in the business. This is part of capital transactions, therefore, all

the ingredients of the section 68 are already satisfied and invoking the deemed provision after verification once by the TPO and again the JAO has made addition without proper verification after all the relevant documents before him. Further he has not considered the voluminous documents submitted before him shows that recklessness in which the FAO was passed by the JAO. Therefore, we are inclined to direct the AO to delete the addition made u/s 68 of the Act. In the result, the ground no 4 raised by the assessee is allowed.

25. With regard to other addition of ESI/PF, we observed that the assessee has remitted the employee shares of ESI/PF belatedly but before filing the return of income. The same was disallowed by the JAO. We observed that the assessee has raised ground against the above disallowance, however, after the decision of Hon'ble Supreme Court decision in the case of Checkmate Services Private Limited 143 taxmann.com 278(SC)) which has rested all the controversy of deduction of belated remittance of employee shares of ESI/PF and distinguished the various decisions relied by the assessee before us. Therefore, the relevant ground no 5 raised by the assessee is accordingly dismissed.

26. The ground no 6 in consequential in nature and ground not 7 is premature at this stage, accordingly, both these grounds are also dismissed at this stage.

27. In the result appeal filed by the assessee is partly allowed as indicated above.

Order pronounced in the open court on this 9th day of September, 2024.

Sd/-	sd/-
(YOGESH KUMAR U.S.)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:09.09.2024
TS
Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI