**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**RAJKOT BENCH, RAJKOT**
**[conducted through E court at Ahmedabad]**

**[Coram: Pramod Kumar AM and S S Godara JM]**

I.T.A. Nos.: 89 and 3208/Ahd/11, 2637/Ahd/12, 474/Ahd/14, 63 and 593/RJT/2015
Assessment years: 2006-07, 07-08, 08-09, 09-10,10-11 and 11-12

***Woco Motherson Advanced Rubber Technologies Limited*** ***……Appellant***
*Plot No. 341-344, Sector IV*
*Kandala Special Economic Zone*
*Gandhidham 370 230[ PAN: AAACW 5389 B]*

***Vs.***

***Dy Commissioner of Income Tax***
***Gandhidham Circle, Gandhidham*** ***……Respondent***

**Appearances by:**
**K M Gupta,** *for the appellant*
**Yogesh Pandey,** *for the respondent*

Date of concluding the hearing : 30/06/2016
Date of filing written submissions : 14/07/2016
Date of pronouncing the order : 29/09/2016

**O R D E R**

**Per Pramod Kumar, AM:**

[1] These six appeals pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, all the six appeals are being disposed of by this consolidated order.

[2] We will first take up the appeal for the assessment year 2006-07.

[3] This appeal is directed against the order dated 26th October 2010 passed by the Assistant Commissioner of Income Tax, Gandhidham, under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2006-07.

[4] Grievance of the appellant, in substance, is against the Assessing Officer making the armôs length price adjustment of Rs 1,34,85,624 to the payment of technical services paid by the assessee to its associated enterprise, and thus proceeding on the basis that the armôs length consideration for these services was zero.

[5] Briefly stated, the relevant material facts are as follows. The assessee before us, i.e. Woco Motherson Advanced Rubber Technologies Limited (**Woco India**, in short), is a joint venture between Woco Franz Joseph Wolf Holding GmbH (**Woco Germany**, in short) holding 66.67% shares, and Mothersons Sumi Systems Limited (Motherson India, in short) holding 33.33% shares. The assessee is engaged in manufacturing of high quality rubber parts, rubber plastic parts, rubber metal parts and liquid silicon rubber parts. During the relevant financial period, the assessee had entered into several international transactions with its associated enterprises, and, one such international transactions pertained to payment of technical services fees, amounting to Rs 1,34,85,624, to Woco Mothersons FZC, Sharjah (**Woco Sharjah**, in short). When these international transactions came up for examination before the Transfer Pricing Officer, upon a reference being made to him under section 92CA(1), the TPO noted that ñ**the assessee company has paid TSF** *(i.e. technical service fees)* **to Woco Motherson Sharjah while Woco Germany owns the manufacturing technology**ò and that ñ**Woco Motherson Sharjah is in the tax haven country where the tax rate is very low**ò It was in this backdrop, and having noted the facts that Woco Germany owns all the intangibles associated with the manufacturing process adopted by the assessee and that Woco Sharjah does not provide such services to any other AE, the Transfer Pricing Officer required the assessee to show cause as to why the armôs length price of technical services fees not be adopted as NIL. It was explained by the assessee that the manufacturing technology has been licensed by the Woco Germany, and that it is on the basis of the manufacturing technology so licensed that the assessee is able to produce the Woco Germany patented products for sale in the specified sales territory. However, as explained by the assessee, the technical services agreement between the assessee and Woco Sharjah is for achieving operational and technical competencies, relating to the know how and technology transferred licensed to the

assessee by Woco Germany, and, for that reason, materially distinct and from the know how provided by Woco Germany. It was also explained by the assessee that "rendering of technical assistance does not require the service provider to be owner of the manufacturing technology". It was also explained by the assessee that the agreement with Woco Germany shows that a role was envisaged for Woco Sharjah, for providing technical services, inasmuch clause 8 and 9 of the agreement provided that **"WML** *(Sharjah),* **which is a part of Woco Group of Companies and which is active in similar field of business as Woco** *(Germany)* **currently has, and expects continuously to have, Woco' operational technical competencies**" and "**Woco** *(Germany)* **desires SML to render all or any of the operational and technical competencies to JVC and WML is desirous to render the same**". However, the TPO, after taking into account these submissions and after going through the agreements entered into by the assessee with Woco Germany and Woco Sharjah, was of the view that services provided by Woco Germany and Woco Sharjah are not distinct, that Woco Sharjah does not possess requisite experience and expertise to provided for in the technical services agreement, and that, therefore, the arm's length price of the services said to have been rendered by Woco Sharjah, being "a ploy adopted by the assessee so as to transfer the profits of the assessee to a tax haven", is NIL. Accordingly, an ALP adjustment of Rs 1,34,85,624 was proposed by the Assessing Officer. Aggrieved by the draft assessment order so proposing the ALP adjustment, the assessee raised the grievance before the Dispute Resolution Panel but without any success. The DRP, *inter alia,* held that the stand of the assessee was not justified inasmuch as when the same services were received by the assessee from Woco Germany, without any consideration, the said transaction should have been adopted an Internal CUP (Comparable Uncontrolled Price) and the services received from Woco Sharjah should have been benchmarked on that basis. On these facts, TNMM was rejected as the most appropriate method, and it was held that CUP method was to be applied. The assessee's benchmarking of technical services fees paid on the basis of similar fees paid to independent enterprises was rejected with the observation that "**from the copies of agreements filed before us, it is clear that those third party agreements between unrelated parties were for different services, in different geographical locations and are widely off the mark as the services rendered to the assessee are concerned**".

and that ñ**in view of strict comparability criterion followed in CUP method, submission of the assessee is not accepted as transaction can at best be benchmarked by applying internal CUP wherein the assessee has not provided any technical services fees to Woco Germany vis-à-vis payment to WML** *(i.e. Woco Sharjah)"*. The DRP then concluded that ñ**In view of the above discussions, we hold that the TPO has rightly computed arm's length price at NIL in respect of technical service fees paid by the assessee to its AE. The assessee has paid the fees to WML** *(i.e. Woco Sharjah),* **a company based in Sharjah (UAE) which is a tax haven. Had the fees been paid to Woco Germany, it might have been taxed there. However, the assessee has used this route simply evade taxes for the Woco Group on the income due to it. Thus, as a group, the company has adopted a strategy to make less payments by transferring money to tax haven**ò The action of the TPO and the AO was confirmed.

[6] It was in this backdrop that the Assessing Officer made an ALP adjustment of Rs 1,34,85,624 by treating ALP of technical services fees paid to Woco Germany at NIL. The assessee is aggrieved and is in appeal before us.

[7] We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

[8] We find that so far as the approach adopted by the DRP is concerned, it is wholly unsustainable in law inasmuch as even if the services rendered, or believed to have been rendered, by Woco Germany are the same as rendered by Woco Sharjah, the same cannot be treated, being an intra AE transaction, as a valid Internal CUP. It is only an uncontrolled transaction, i.e. between the independent enterprises, which can be used as a benchmark to ascertain armôs length price of As noted by a coordinate bench in the case of **Skoda Auto India Ltd Vs ACIT [(2009) 30 SOT 319 (Pune)]**, ñ**To be considered as internal CUP also, the transaction has to be an independent transaction i.e., between two entities, which are independent of each other".** A transaction between the AEs cannot be considered as a valid input for application of CUP method. This principle is reiterated by majority view in third member decision in the case of **ACIT Vs Technimont ICB India Pvt**

**Ltd [(2012) 138 ITD TM 23 (Mum)]**. The adoption of assessee's transactions with Woco Germany, as a valid comparable for application of internal CUP method, is thus inherently vitiated in law. The stand of the DRP thus cannot meet the judicial approval by us. That, however, is only one of the reasons as to why the action of the authorities below must be held to be incorrect.

[9] We have noted that there is no dispute about the fact that Woco Germany had agreed to grant the assessee a non exclusive licence to manufacture, use, exercise or sell the licensed products, pursuant to the agreement dated 4th April 2005 between the assessee and Woco Germany, at NIL royalty rate. Separately, though vide second amendment of even date, the assessee as also Woco Germany agreed that Woco Sharjah will provide technical support services. Interestingly, however, while agreement with Woco Germany was for "use of know how and inventions", the agreement with Woco Sharjah was for "provision for technical assistance required for use of technology". While undoubtedly these two things are interlinked and interconnected, their scope is distinct and separate. While the purpose of agreement with Woco Germany was **for "right, authority and licence" for use of know how and trademark**, the purpose of agreement with Woco Sharjah was for "**operational and technical competencies relating to manufacturing know how provided under the licence agreement and effective commercial exploitation".** The obligation on Woco Germany, as noted in clause 3(A) of agreement, was **"to furnish and disclose to the licensee all know how relating to development and manufacturing of the licenced products",** and the obligation of Woco Sharjah was for **"directly or indirectly furnishing of guidance, advice and assistance with regard to use of"** product formulae, process technology, know how etc. The nature of services under the two agreements is distinct even though somewhat interconnected. A lot of emphasis has been placed by the authorities below on the ownership of intangibles, by way of manufacturing technology, what is essentially overlooked is that provision for technical assistance required for use of technology does not require that the technology, which is to be used in the manufacturing process, is not essentially required to be owned by the service provider for use of technology. There is no dispute that Woco Sharjah is capable of rendering these services and has actually rendered these services. It is not in dispute that Woco

Sharjah was already engaged in manufacturing similar manufacturing activities, as being carried out by the assessee now, and it had the necessary knowledge, skills and expertise in the use of the same technology. We have also noted that Chief Technical Officer of the Woco Group was based in Sharjah, and this person, being a key technical person of the Woco Group and working for Woco Sharjah, was indeed in possession of requisite technical skills for rendition of services. In any evet, once there was an agreement between Woco Sharjah and the assessee for rendition of technical services, it was immaterial as to whether the Woco Sharjah was in a position to render these services on its own or with the help of other group entities. What is, however, clear is that Woco Sharjah had the requisite expertise and skills available for rendition of the technical services. We have also noted that the complete details of Woco Sharjah personnel visiting the assesseeís facilities is placed on record and the evidences of their presence at the assesseeís facilities is also on record. Once the rendition of services is reasonably evidenced, it cannot be open to the TPO to disregard the same and come to the conclusion that these services need not have been compensated for or ought to have been rendered by Woco Germany. In the course of ascertaining the armís length price, all that the TPO has to examine is as to how much is the consideration that the assessee would have paid for these services in armís length situation, rather than sitting in judgment over whether the assessee should have incurred these expenses at att. Explaining this principle, a coordinate bench of this Tribunal, in the case of **AWB India Pvt Ltd Vs DCIT [(2015) 152 ITD 779 (Del)]**, has observed as follows:

> **15. …….His *(TPO's)* perception that these services are worthless is of no relevance. <u>It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient</u>. As held by Hon'ble jurisdictional High Court in the case of <u>CIT Vs EKL Appliances Limited (345 ITR 241), "Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same</u>".**
>
> **16. The very foundation of the action of the TPO is thus devoid of legally sustainable merits. There is no dispute that the impugned payments are made under an arrangement with the AE to provide certain services. It is**

**not even the TPO's case that the payments for these services were not made for specific services under the contract but he is of the view that either the services were useless or there was no evidence of actual services having been rendered. As for the services being useless, as we have noted above, it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions**.

[10] We have also noted that the authorities below have taken exception to the payment being made to Woco Sharjah, even while admitting that similar payment would have been at arm's length if it was to be made to Woco Germany, on the ground that the Woco Sharjah is located in a tax haven, that "Had the fees been paid to Woco Germany, it might have been taxed there" and that "the assessee has used this route simply evade taxes for the Woco Group on the income due to it. Thus, as a group, the company has adopted a strategy to make less payments by transferring money to tax haven". So far as determination of arm's length pricing is concerned, all that is to be examined is as to what is the arm's length price of the transaction in question, irrespective of the fact as to whether or not the person entering into transaction is in a high tax jurisdiction or low tax jurisdiction. If a person is a in a low tax jurisdiction but the arm's length price of the transaction is the same at which the transaction is entered into, the transaction value cannot be tinkered with. In any event, the base erosion, which is sought to be checked by the transfer pricing provisions in India, is the tax base in India, but then irrespective of whether the recipient is in UAE (Sharjah) or Germany, the tax withholding rate from fees for technical services is the same i.e. @10%. Obviously, Indian transfer pricing cannot be, and is not, concerned with whether the Woco Group, as a whole, has been able to reduce their tax burden by locating their units rendering technical services outside Germany. The authorities below were thus clearly swayed by the considerations which were not at all germane to the context.

[11] Learned Departmental Representative's defence primarily consists of his reliance on the decisions of the coordinate benches in the case of **Gemplus India**

**Pvt Ltd vs ACIT [(2010) 3 taxmann.com 755 (Bang)]** and **Deloitte Consulting India Pvt Ltd Vs DCIT [(2012) 19 ITR(Tribunal) 378 (Del)]**. He contends that to satisfy the arm's length standard, a charge for services or intangibles must at least meet the following conditions i.e. the need for services or intangibles is established, that the services or intangibles have actually been received and that the benefit from services or intangibles is commensurate with the charge. He also contended that if it is established that under similar circumstances, an uncontrolled entity would not incur such an expenditure, the arm's length price in respect of the same will be NIL. In the present case, the technical services are rendered. We are satisfied that these services, being in the nature of being in the nature of technical assistance for use of technology received from Woco Germany, are distinct from the technology itself. These are separate services which are required for the efficient use of technology. The rendition of these services is not in doubt, as there is contemporaneous evidence for travel and work of the personnel of Woco Sharjah. There is nothing to show that an independent entity would not have paid anything for these services as these were important services for proper use of technology. In the light of our these findings, the reliance placed by the learned DR on Gemplus *(supra)* and Delloite *(supra)* decisions is of no assistance to the revenue's case at present. It is also important to bear in mind the fact that, even going by revenue's case, agreements that the assessee entered into with Woco Germany and Woco Sharjah were essentially interlinked and are required to be viewed as such. As long as the technical services are received by the assessee, the payment for these services cannot be declined on the ground that ideally this payment should have been made to the German entity. As for the contention that all these services, for which Woco Sharjah is paid, are already covered by the agreement with Woco Germany, this is factually incorrect. Clearly, therefore, services are rendered, Woco Sharjah is paid for the same, and at best, the contention of the revenue is that these services are de facto rendered by Woco Germany as even the personnel of Woco Sharjah who have rendered the services are primarily Woco Germany employees on secondment to Woco Sharjah. Nothing on turns on this argument either because as long as services are rendered under the arrangement with Woco Sharjah- as is our categorical finding, and irrespective of who renders these services, no arm's length price adjustment can be made to the consideration paid for these services unless it is

established that the armôs length price for the services received is less than the transaction value. Thatôs not the case here. It is also contended by the learned DR to the effect that visit of Woco personnel will be in the nature of óshareholder servicesô rather than ótechnical servicesô, but then the technical services, by no stretch of logic or by any convention, are treated as óshareholder servicesô.

[12] It is also contended that for a product or service, only CUP can be most appropriate method, but then what this argument overlooks is that the availability of relevant date are a sine qua non for application of any method. On one hand, the comparables given by the assessee have been rejected, on the basis of sweeping generalizations, and no other comparables are given by the TPO, and yet CUP method is being sought to be applied. The assessee has given a CUP analysis, on the basis of per mandays of technical services, which shows that in an uncontrolled situation, the technical service fees, including travel costs, would have been Euros 2,84,115 as against Euros 2,50,000 paid by the assessee. No specific infirmities are pointed out in this CUP analysis, save and except for the observation that the nature of services is substantially different. It has been contended by the learned DR that only the visits of Lutz Becker, Chief Technical Officer of Woco Group- who is based in Sharjah, should be taken into account as he alone was in a position to render any useful services to Woco India, but then the ascertainment of ALP is not for the consideration paid for visits of this official, as it is not a separate transaction, and as long as the persons have attended to the technical services in question, the CUP analysis for the fees for technical services has to essentially take into account the visits of all these persons since the consideration, for CUP analysis, is based on mandays of persons attending to the technical services. This plea is also devoid of legally sustainable merits. As noted earlier, no other comparables are brought on record by the TPO are either. This is wholly unworkable. Even if CUP is sought to be applied, as canvassed by the learned DR, appropriate comparables are to be brought on record, in case the comparables adopted by the assessee are to be rejected. One cannot proceed on the basis that under CUP method these services are worthless and, therefore, NIL value should be adopted. For the detailed reasons set out above, such an approach is unsustainable in law. The assessee has adopted TNMM, as the transactions of manufacturing and fees for technical services are

interlinked, and the authorities below have not taken any specific objection to the same.

[13] In view of these discussions, in our considered view, the stand of the authorities below cannot be accepted. The impugned ALP adjustment of Rs 1,34,85,624 is indeed devoid of any legally sustainable merits and it must stand deleted. We direct that.

[14] In the result, the appeal for the assessment year 2006-07 is allowed.

[15] As regards appeals for the assessment years 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12, there is one common issue in all these years, and that is with regards to arm's length price adjustment in respect of technical services fees paid for assistance in the use of knowhow and technology received from Woco Germany. The quantum of these ALP adjustments are as follows:

| | |
|---|---|
| 2007-08 | Rs 1,47,77,405 |
| 2008-09 | Rs 1,61,95,898 |
| 2009-10 | Rs 2,35,87,058 |
| 2010-11 | Rs 2,64,40,263 |
| 2011-12 | Rs 1,48,43,000 |

[16] Learned representatives fairly agree that whatever we decide, on this issue, for the assessment year 2006-07 will apply mutatis mutandis for these years as well. In the assessment year 2011-12, however, there is a small variation. This is the year in which instead of agreement with Woco Sharjah, a separate agreement with Woco Germany was entered into for the technical services fees. Under this agreement, the assessee has paid a fixed fees of Euros 2,40,000. Once again the stand of the revenue is that since all these services are already available to the assessee under the original agreement for transfer of technology, no other services were required and the arm's length price for services under this agreement is NIL. This argument must fail for the reason, and in view of our categorical finding, that scope of technology transfer agreement and the technical services, even though interlinked, is quite distinct and separate.

[17] In any event, in addition to establishing armôs length price under the TNMM, the assessee has performed a supplementary CUP analysis which shows that the fees for technical services was at an armôs length, as shown below:

| ***Assessment year*** | ***Average rate per day which would have been charged by the independent enterprises (In Euros)*** | ***Amount independent enterprise would have paid- based on the number of mandays visited by AEs personnel*** | ***Amount charged by the AEs*** |
|---|---|---|---|
| 2007-08 | 718.31 | 4,62,767 | 2,50,000 |
| 2008-09 | 759.62 | 6,87,427 | 2,81,350 |
| 2009-10 | 856,74 | 5,32,183 | 3,55,354 |
| 2010-11 | 907.61 | 4,23,316 | 3,89,068 |
| 2010-11 | 907.61 | 3,00,373 | 2,40,000 |

[18] No specific infirmities are pointed out in the above, save and except for the ones discussed above, in the course of our order for the assessment year 2006-07, which we have rejected on merits. Obviously, we have no reasons to take any other view of the matter for these assessment years as well.

[19] In the light of our discussions above, as also respectfully following our own order for the assessment year 2006-07, these ALP adjustments must also stand deleted. The action of the authorities below is treating armôs length price for technical services fees at NIL thus stands vacated. The assessee gets the relief accordingly.

[20] So far as the appeals for the assessment years 2007-08, 2008-09, 2009-10 and 2010-11 are concerned, no other additions, disallowances or ALP adjustments are called into question.

[21] In the result, therefore, these four appeals (for the assessment years 2007-08, 2008-09, 2009-10 and 2010-11) must also, therefore, be held to be allowed in the terms indicated above.

[22] In the assessment year 2011-12, however, there is one more issue involved, and that involves the question whether an issue, not raised in the draft assessment order, can at all be raised in the assessment order in the case of assessees eligible for approaching the Dispute Resolution Panel. We will take up this appeal now.

[23] This appeal is directed against the order dated 20th October 2015 passed by Dy Commissioner of Income Tax, Gandhidham Circile, Gandhidham, under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2011-12.

[24] In the first ground of appeal, in substance, grievance of the assessee is that the Assessing Officer erred in making a disallowance of Rs 7,64,15,421 under section 10AA off the Act in the final assessment order dated 20th October 2015 even though no such disallowance was proposed in the draft assessment order dated 30th December 2014 passed under section 143(3) read with section 144C of the Act.

[25] The issue in appeal lies in a very narrow compass of undisputed material facts. In the draft assessment order issued by the Assessing Officer on 30th December 2014, the Assessing Officer proposed only APL adjustment of Rs 1,48,43,000. No other addition, disallowance or adjustment was proposed in the draft assessment order. This draft order was carried before the DRP and the proposed adjustment was contested. The assessee did not succeed before the DRP, and the matter was thus again before the Assessing Officer for framing of final assessment order. At this stage, in addition to the ALP adjustment of Rs 1,48,43,000, the Assessing Officer also made a disallowance of claim under section 10AA amounting to Rs 7,64,15,421. The assessee is aggrieved and in appeal before us.

[26] On the ground of Assessing Officer's jurisdiction to make this disallowance under section 10AA, the short point being made by the learned counsel for the assessee is that under section 144C(13) the Assessing Officer, upon receipt of directions of the DRP, shall complete the assessment in conformity with the directions and without providing any further opportunity of being heard to the assessee. Clearly, therefore, an adjustment being made at this stage, without having

been raised in the draft assessment order, is contrary to the scheme of Section 144C and a nullity in law. He contends that once a draft assessment order is framed by the Assessing Officer, he is *functus officio* except for implementing directions of the DRP. Learned counsel has made elaborate submissions on this and certain other connected legal issues as also on merits of the disallowance, but, for the reasons we will set out in a short while, it is not really necessary to go into these aspects in detail at this stage.

[27] Learned Departmental Representative, however, submits that it is an inadvertent mistake committed by the Assessing Officer and at best the matter can be restored to the file of the Assessing Officer for assessee being given an opportunity to approach the DRP on this issue. He submits that a procedural flaw cannot be allowed to prejudice legitimate interests, of such a magnitude, of the revenue. In case of a procedural irregularity, as in this case, the matter should be restored to the stage at which illegality has supervened. Learned Departmental representative then invites our attention to the cases in which it is held that in case the Assessing Officer did not serve draft assessment orders, as required under section 144B- as it then existed, the Courts have consistently held that the matter is required to be remitted to the assessment stage with the direction to follow the right procedure.

[28] We find that so far as section 144C is concerned, there are binding judicial precedents to the effect that when the procedure contemplated under section 144C is not followed in the case of eligible assessees, the assessment order is to be treated as a nullity. In the case of **Capsugel Healthcare Limited Vs ACIT [(2015) 152 ITD 142 (Del)]**, a coordinate bench summed up the legal position as follows:

> *7. We find that the issue is covered is now covered in favour in of the assessee by judgment of Hon'ble Madras High Court, in the case of Vijay Television (P.) Ltd v. Dispute Resolution Panel [2014] 46 taxmann.com 100/225 Taxman 35, wherein Hon'ble High Court has, inter alia, observed as follows:*
>
> > *'20. Under Section 144 (C) of the Act, it is evident that the assessing officer is required to pass only a draft assessment order on the basis of the recommendations made by the TPO after giving an opportunity to the*

*assessee to file their objections and then the assessing officer shall pass a final order. According to the learned senior counsel for the petitioners, this procedure has not been followed by the second respondent inasmuch as a final order has been straightaway passed without passing a draft assessment order.*

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

*22. As mentioned supra, as per Section 144C (1) of the Act, the second respondent-assessing officer has no right to pass a final order pursuant to the recommendations made by the TPO. In fact, the second respondent-assessing officer himself has admitted by virtue of the corrigendum dated 15.04.2013, that the order dated 26.03.2013 is only a final order and it was directed to be treated as a draft assessment order. In this context, it is worthwhile to refer to the decision of the Honourable Supreme Court in the decision Deepak Agro Foods (supra) wherein in Para No.10, the Honourable*

*Supreme Court discussed as to when an order could be construed as a final order:—*

*"10. Shri Rajiv Dutta, learned senior counsel appearing on behalf of the appellant, submitted that in the light of its afore-extracted observations and a clear finding that the assessment order for the assessment year 1995-96 had been anti-dated, the order was null and void. It was urged that assessment proceedings after the expiry of the period of limitation being a nullity in law, the High Court should have annulled the assessment and there was no question of a fresh assessment. Thus, the nub of the grievance of the appellant is that in remanding the matter back to the Assessing Officer, the High Court has not only extended the statutory period prescribed for completion of assessment, it has also conferred jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period."*

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

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

*25. In the decision rendered by the Honourable Supreme Court of India in the case of (L. Hazari Mal Kuthiala (supra), which was relied on by the learned standing counsel for the respondents, it was held that the mistake or defect on the part of the Commissioner to consult the Central Board of Revenue did not render his order invalid since the provision about consultation in terms of Section 5 (3) of Patiala Act was merely directory and not mandatory. In the present case, the procedure that was required to be followed by the second respondent to pass a draft assessment order is mandatory and it is*

*prescribed by the statute. Therefore, this decision relied on by the learned standing counsel for the respondents cannot be made applicable to this case.*

*26. The learned senior counsel for the petitioners relied on the decision of the Allahabad High Court in the case of Shital Prasad Kharag Prasad (supra) wherein the Division Bench of the Allahabad High Court held that a notice contemplated under Section 148 of the Income Tax Act is a jurisdictional notice and it is not curable by issuing a notice under Section 292 B of the Act, if it was not served in accordance with the provisions of the Act.*

*27. Similarly, the Division Bench of this Court in the decision in the case of V. Ramaiah (supra) Madras held that when an order is passed under Section 158BC of the Act instead of Section 158BD, it is not valid since it is not a defect curable under Section 292B of the Act. It was also held that an order passed after the period of limitation laid down in Section 158BC is not a valid order. It was further held that when there is a prescribed procedure contemplated under the Act or in a particular section and it is violated, then it cannot be cured. In the present case, certain procedure has been contemplated under Section 144C of the Act and they have been violated by the second respondent by passing final order of assessment and therefore such order passed by the second rspondent has got no jurisdiction or it can be cured by virtue of issuing a corrigendum.*

*28. By referring to the decision of the Division Bench of this Court dated 10.02.2014 passed in Tax Case (Appeal) No. 2412 of 2006, the learned standing counsel for the respondents sought to make a distinction with the decision of the Division Bench of this Court mentioned in the preceding paragraph. That is a case where the facts relating to the order covered in the decision of the Honourable Supreme Court, which the Division Bench relied on, could not be made applicable to the facts of that case and therefore it was not discussed by the Division Bench in the order dated 10.02.2014. For more clarity, the relevant portion of the decision of the Division Bench of this Court in the case of V. Ramaiah (supra) is extracted hereunder:—*

*"Certainly passing an order of assessment under Section 158BC instead of Section 158BD (inspite of clear terminology used in both the sections) would not amount to a mistake, a defect or an omission, much less a curable one. When different contingencies are dealt with under different sections of the Act, allowing an illegality to be perpetrated and then taking a plea by the Revenue that such an action adopted on their part would not nullify the proceedings, cannot be appreciated since by virtue of such actions, the Revenue has attempted to nullify the scheme of things of limitations legally propounded under the Act...."*

*29. In yet another decision of the Division Bench of this Court in the case of Smt. R.V. Sarojini Devi (supra), which was relied on by the learned senior counsel for the petitioners, it was held as follows:—*

*"Under Section 158BC of the Act empowers the assessing officer to determine the undisclosed income of the block period in the manner laid down in Section 158BB and 'the provisions of Section 142, sub-sections (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be apply. This indicates that this clause enables the Assessing Officer, after the return is filed, to complete the assessment under Section 143 (2) by following the procedure like issue of notice under Section 143 (2)/142. This does not provide accepting the return as provided under Section 143 (1) (a). The Officer has to complete the assessment order under Section 143 (3) only. If an assessment is to be completed under Section 143 (3) read with Section 158BC, notice under Section 143 (2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing officer to issue notice under Section 143(2) cannot be a procedural irregularity and is not curable."*

*30. It is evident from the above decision of the Division Bench of this Court that where there is an omission on the part of the assessing officer to follow the mandatory procedures prescribed in the Act, such an omission cannot be termed as a mere procedural irregularity and it cannot be cured.*

*31. In identical case as that of the case on hand, the Division Bench of the Andhra Pradesh High Court, in an unreported decision, had an occasion to consider the scope of the validity of the demand notice issued by the assessing officer in the case of Zuari Cement Ltd. (supra), wherein it was held as under:—*

*"A reading of the above section shows that if the assessing officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forward it to the assessee and after the assessee files his objections, if any, the assessing officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.*

*In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs.52.14 crores u/s.92CA of the Act on 20.09.2011 and forwarded it to the Assessing Officer and to the assessee under sub-section (3) thereof. The assessing officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 01.10.2009, the cut off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly, this has not been done and the respondent has passed a final assessment order dated*

*22.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void.*

*The contention of the Revenue that the circular No.5/2010 of the CBDT has clarified that the provisions of S.144C shall not apply for the assessment year 2008-09 and would apply only from the assessment year 2010-2011 and later years is not tenable in as much as the language of Sub-section (1) of Section 144C referring to the cut off date of 01.10.2009 indicates an intention of the legislature to make it applicable, if there is a proposal by the Assessing Officer to make a variation in the income or loss returned by the assessee which is prejudicial to the assessee, after 01.10.2009. Therefore, this particular provision introduced by Finance (No.2) Act, 2009, would apply if the above condition is satisfied and other provisions, in which similar contrary intention is not indicated, which were introduced by the said enactment, would apply from 01.04.2009 i.e., from the assessment year 2010-2011.*

*It is not disputed that the memorandum explaining the Finance Bill and the Notes and clauses accompanying the Finance Bill which preceded the Finance (No.2) Act, 2009 clearly indicated that the amendments relating to S.144C would take effect from 01.10.2009. In our view, the circular No.5/2010 issued by the CBDT stating that S.144C(1) would apply only from the assessment year 2010-2011 and subsequent years and not for the assessment year 2008-09 is contrary to the express language in S.144C(1) and the said view of the Revenue is unacceptable. The circular may represent only the understanding of the Board/Central Government of the statutory provisions, but it will not bind this Court or the Supreme Court. It cannot interfere with the jurisdiction and power of this Court to declare what the legislature says and take a view contrary to that declared in the circular of the CBDT (Ratan Melting and Wire Industries Case (1 Supra), Indra Industries (2 supra). The Revenue has not been able to pursuade us to take a contra view by citing any authority.*

*In this view of the matter, we are of the view that the impugned order of assessment dated 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside."*

*32. As against this order of the Division Bench of the Andhra Pradesh High Court, the Revenue went on appeal before the Honourable Supreme Court. The record of proceedings of the Supreme Court indicate that the Special Leave Petition was dismissed on 27.09.2013.*

*33. The decision of the Division Bench of the Andhra Pradesh High Court deals with an identical issue as that of the present case. In this case, against the order passed by the second respondent on 26.03.2013, the petitioner filed*

*objections before the DRP, the first respondent herein and the first respondent refused to entertain it by stating that the order passed by the second respondent is a final order and it had jurisdiction to entertain objections only if it is a draft assessment order. While so, the order dated 26.03.2013 of the second respondent can only be termed as a final order and in such event it is contrary to Section 144C of the Act. As mentioned supra, in and by the order dated 26.03.2013, the second respondent determined the taxable amount and also imposed penalty payable by the petitioner. According to the learned senior counsel for the petitioners, even as on this date, the website of the department indicate the amount determined by the second respondent payable by the company inspite of issuance of the corrigendum on 15.04.2013 as a tax due amount. Thus, while issuing the corrigendum, the second respondent did not even withdraw the taxable amount determined by him or updated the status in the website. In any event, such an order dated 26.03.2013 passed by the second respondent can only be construed as a final order passed in violation of the statutory provisions of the Act. The corrigendum dated 15.04.2013 is also beyond the period prescribed for limitation. Such a defect or failure on the part of the second respondent to adhere to the statutory provisions is not a curable defect by virtue of the corrigendum dated 15.04.2013. By issuing the corrigendum, the respondents cannot be allowed to develop their own case. Therefore, following the order passed by the Division Bench of the Andhra Pradesh High Court, which was also affirmed by the Honourable Supreme Court by dismissing the Special Leave Petition filed thereof, on 27.09.2013, the orders, which are impugned in these writ petitions are liable to be set aside.'*

*8. Learned Departmental Representative, on the other hand, submits that this lapse on the part of the Assessing Officer is at best a procedural lapse and the matter should, therefore, be restored to the file of the Assessing Officer for adjudication de novo.*

*9. We are, however, unable to see any legally sustainable merits in the stand so taken by the learned Departmental Representative. Hon'ble High Court's esteemed views, as extracted above, bind us and we have to respectfully follow the same. Accordingly, in due deference to this binding judicial precedent, and other binding judicial precedents referred to therein, we quash the impugned assessment order. It is a legal nullity. As for the show cause notice issued by the Assessing Officer, before making the ALP adjustment, this cannot be treated as a draft assessment order nor the assessee could have approached the DRP against the same. Learned CIT(A) was thus clearly in error in equating the show cause notice with a draft assessment order against, and thus rationalizing the impugned assessment order. The stand of the CIT(A) cannot be upheld. In a case in which no draft assessment order is furnished to the assessee, to which assessee is entitled under section 144C (15), the assessment order passed by the AO is to be held is illegal and liable to be quashed on this ground alone. We do so*.

[29] In this view of the matter, it cannot be open to us to proceed on the basis of the judicial precedents in cases dealing with Section 144B as it then existed. Undoubtedly, in the context of Section 144B, which then required the Assessing Officer to issue the draft assessment orders in certain situations to enable the assessee to approach the DCIT before issuance of final assessment orders, it was held that even when the Assessing Officer directly passed the final assessment orders, without issuance of any draft assessment orders first, such a lapse on the part of the Assessing Officer was nothing more than a procedural lapse, which at best required the matter being restored to the assessment stage for. However, as noted above, the coordinate benches, as also Hon'ble Madras and AP High Courts, have held that when a draft assessment order is not issued by the Assessing Officer, the final assessment order is a nullity. That's an altogether different approach and it binds us being directly in the context of section 144C. Now that Hon'ble Courts above, even if non jurisdictional High Court, have followed a different path, we must respectfully follow the same. Of course, as on now, this issue is an open issue before Hon'ble Gujarat High Court, and whatever we hold now is, and shall always remain, subject to the esteemed views of Their Lordships. The right forum for the grievance of the revenue, which can take an independent call, is, therefore, before Hon'ble Courts above. Be that as it may, in the light of the legal position as it stands now in the light of binding judicial precedents before us, any non-compliance with the scheme of Section 144C is fatal to the assessment itself. As a corollary thereto, when an issue is not raised in the draft assessment order, it cannot be raised in the final assessment order either. As learned counsel rightly points out, once a draft assessment order is passed by the AO and the matter is even carried before the DRP by the assessee, all that the Assessing Officer can do, while framing the final assessment order, is to frame the final assessment order in the light of the draft assessment order and the directions of the DRP. We are in considered agreement with the learned counsel's contention that no other issue, other than the issues taken up in the draft assessment order and the directions of the DRP, can be taken up by the Assessing Officer at the stage of passing final assessment order. Any other view of the matter will be contrary to the scheme of Section 144C. In this view of the matter, and without dealing with other contentions which are academic at this stage, we hold that the impugned disallowance of Rs 7,64,15,421, in respect of claim under

section 10AA, is wholly unsustainable in law. We, accordingly, delete the same as well.

[30] The assessee has also raised some other legal issues including core legal issues on merits of admissibility of deduction under section 10AA and on impermissibility of reference to the TPO- without affording the assessee an opportunity of hearing before doing so, but, having decided the matter on merits, we see no need to deal with these issues. All those issues and the related grounds of appeal have, in the light of the assessee having succeeded on merits as above, been rendered academic and infructuous.

[31] In the result, the appeal for the assessment year 2011-12 is also allowed. To sum up, all the six appeals are allowed in the terms indicated above. Pronounced in the open court today on 29th day of September 2016.

***Sd/xx*** ***Sd/xx***
**S S Godara** **Pramod Kumar**
(Judicial Member) (Accountant Member)

***Ahmedabad, dated 29th day of September, 2016***

*Copies to:* *(1)* *The appellant* *(2)* *The respondent*
*(3)* *CIT* *(4)* *CIT(A)*
*(5)* *The Departmental Representative* *(6)* *Guard File*

*By order*

*Assistant Registrar*
*Income Tax Appellate Tribunal*
*Rajkot bench, Rajkot*