

**PASSING OF FINAL ASSESSMENT ORDER WITHOUT PASSING A DRAFT
ASSESSMENT ORDER - AN ANALYSIS**

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APPELLATE PROCEDURE UNDER THE INCOME TAX ACT:

It has always been the case that an assessee has a right of appeal under the Income Tax Act (“Act”). Typically, an assessee aggrieved by an order passed by the AO’s final Assessment Order **can appeal against the Order to the Commissioner of Income Tax (CIT) - Appeals under Section 246A** of the Act.

The Finance Act 2009 introduced **another appellate body called the Dispute Resolution Panel (DRP)** which certain assessee’s (with TP/international taxation issues or who are non-residents/foreign companies) can avail of. The Finance (No. 2) Act 2009 w.e.f 1-4-2009 inserted Sec 144C to the Act to create the DRP and the Explanatory Notes to the Provision explain the rationale as follows:

*“The dispute resolution mechanism presently in place is time consuming and finality in high demand cases is attained after long drawn litigation till Supreme Court. **In order to address the concern of the multi-national companies and to provide mechanism for speedy disposal of their cases so as to attain finality, a new section 144C is inserted in the Income-tax Act to facilitate expeditious resolution of disputes.**”¹.*

THE DISPUTE RESOLUTION PANEL (DRP)

The DRP under Sec144C (15)(a) comprises of three Principal Commissioner (PCIT) or Commissioner of Income Tax (CIT). When the AO makes any variance to the income or loss stated in the return filed by the assessee, he first proposes a **Draft Assessment Order** to the assessee to invite his objection or acceptance of the same.

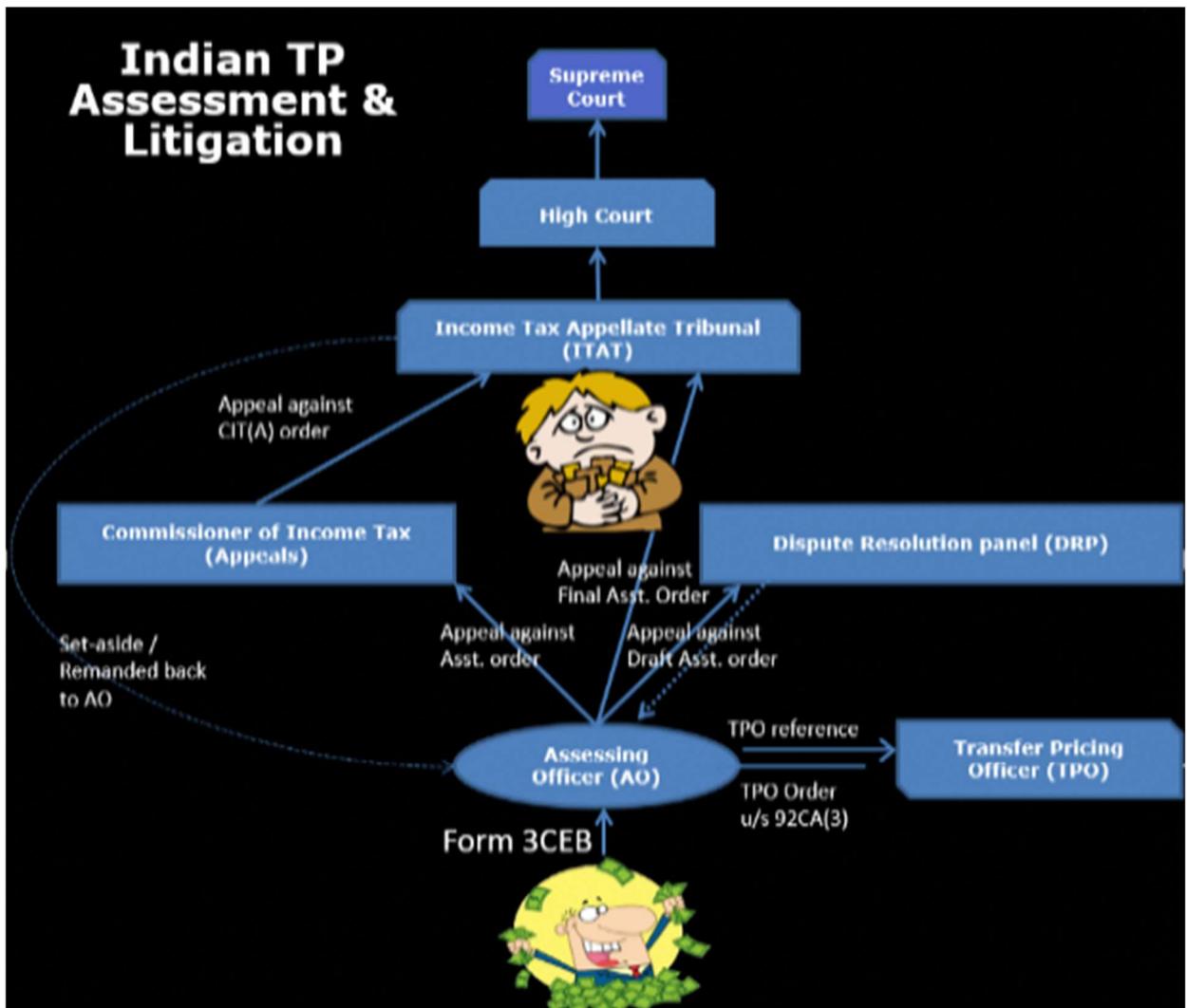
Under Sec 144C (2)(b) the assessee on receipt of such Draft Assessment Order shall within thirty days file an **Objection before the DRP**. The Explanatory Notes to the Provision of the Finance (No.2) Act, 2009 makes the procedure clear:

¹ Circular No. 05/2010, F.No.142/13/2010-SO (TPL) Government of India Ministry of Finance Department of Revenue (Central Board of Direct Taxes)
<https://www.incometaxindia.gov.in/Communications/Circular/91011000000001058.pdf>

*“It would be the choice of the assessee whether to file an objection against the draft assessment order before the Dispute Resolution Panel (DRP) or to pursue the normal channel of filing an appeal against the assessment order before the Commissioner of Income Tax (Appeals). **In order to approach the DRP, the assessee must file an objection against the draft assessment order within the prescribed time limit. In case the assessee does not file an objection, the assessing officer shall pass the assessment order. The assessee can file an appeal against such assessment order before the CIT (Appeals).** Once the option of filing an objection against the draft assessment order before the DRP has been exercised, the assessee cannot withdraw the objection and opt for the normal channel of filing appeal before CIT(Appeals).”*

If the assessee chooses to file objections before the DRP, the DRP shall hear the assessee and pass Directions under Section 144C(5) which shall be incorporated as-is by the AO in his final assessment Order as per S.144C(13). The assessee can appeal to the ITAT against this final Assessment Order of the AO passed pursuant to the directions of the DRP.

To summarize, the Appellate procedure under the Act with the introduction of the DRP can be viewed as follows:



PASSING FINAL ORDER WITHOUT THE DRAFT ORDER

Thus, with the introduction of the DRP, it is clear that the Assessing Officer (AO) has to ALWAYS pass a Draft Assessment order first and send it to the Assessee who shall make his/her objections available within 30 days of the receipt of such order if they choose to go to DRP or indicate that the assessee will take the CIT(A) route.

This is codified in Sec 144C (1) the Sec states as follows;

*“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 95[***] which is prejudicial to the interest of such assessee.”*

However, there have been many instances where the AO has instead of passing the Draft order has directly passed the Final order; such an Order is in violation of the mandatory requirement given under Sec 144C (1) which makes it very clear that the AO has to “in the first instance” pass a draft. The term “in the first instance” under the section must be understood as the first step the AO has to do in the series of acts that has to be performed under the section to the eligible assessee². The Hon’ble Madras High Court in the case of **GE Oil and Gas India Private Ltd vs ACIT**³ in para 4 the court has made it clear that,

“The scheme of assessment in terms of Section 144C statutorily requires the officer to pass a draft assessment order at the first instance and put the same to the assessee for its acceptance or for filing of objections before the Dispute Resolution Panel. The language of Section 144 C makes this position more than abundantly clear.”

Failure to follow the steps as prescribed by the Act invalidates the entire assessment order and is not a curable defect. Thus, an AO lacks the jurisdiction and cannot do anything which is contrary to the Act and failure to pass a draft order is a gross violation of the assessee’s statutory right.

In **Principal Commissioner of Income Tax-4 vs Headstrong Services India Pvt Ltd**⁴ the Hon’ble Delhi High Court stated that

“The failure by the AO to adhere to the mandatory requirement of Section 144C (1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings”

It must also be understood that there is a plethora of cases where High Courts of various Jurisdictions have held the same view such as,

1. Zuari Cement Ltd v. Asstt. CIT⁵,
2. CV. Ramaiah v. CIT⁶,
3. CIT v. Turner International India (P.) Ltd⁷,
4. CIT v. Citi Financial Consumer Finance India (P.) Ltd⁸

² In the context of Sec 144C(15) an ‘Eligible Assessee’ is seen as a separate class of assessee i.e. any person in whose case the variation arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of Sec 92CA

³ 436 ITR 168 (Madras)

⁴ 197 DTR 329 /318 CTR 369 (Delhi)

⁵ WP No. 5557 of 2012 (Andhra Pradesh)

⁶ 365 ITR 646/37 (Madras)

⁷ 82 taxmann.com 125 (Delhi)

⁸ IT Appeal No.275 (Delhi)

5. ESPN Star Sports Mauritius S.N.C. ET Companies vs. Union of India⁹,
6. PCIT v. Andrew Telecommunication Private Ltd¹⁰,
7. CIT v. C-Sam (India) Pvt Ltd¹¹ and etc.

Thus, the position of AO must pass the draft order first has no legal ambiguity.

It must also be understood that failure of passing of a Draft Order under Sec 144C (1) is not a curable defect since this a violation of a statutory right of the assessee thus the department cannot pass a corrigendum making the Final order into a draft order. In the case of **Vijay Television Private Limited vs The Dispute Resolution Panel**¹² the Hon'ble Madras High Court has made it clear that

“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 respondent has got no jurisdiction or it can be cured by virtue of issuing a corrigendum”.

DRAFT ORDER AND REMAND

According to Black Law Dictionary the term 'Remand' means to send back, this is usually refereed as sending back the matter to the lower or subordinate authority. Understanding how Sec 144C of the Act works it is a logical conclusion that even in remand the same process i.e the AO passing draft order first applies.

This was espoused in the decision of H'onble Delhi High Court in **Principal Commissioner of Income Tax-4 vs Headstrong Services India Pvt Ltd**¹³ which states in para 19 that

“This Court is further of the view that if the Assessing Officer under Section 144C can prepare a draft assessment order only, then by virtue of a remand order which directs the Assessing Officer to decide the matter de novo, the Assessing Officer cannot get the power to pass an assessment order, when there is an objection by the Assessee like in the present case, without reference of the Dispute Resolution Panel which comprises of three Principal Commissioners or Commissioners of Income Tax constituted by the Board.”

⁹ 388 ITR 383 (Delhi)

¹⁰ 423 ITR 503 (Bombay)

¹¹ Tax Appeal No 542 of 2017 (Gujarat)

¹² 46 taxmann.com 100 (Madras)

¹³ Supra at 5

This is because under the expression “*in the first instance*” which is used in Sec 144C (1) it signifies the first step to be taken by the Assessing Officer in a series of acts contemplated by the said Section while dealing with the case of an eligible assessee. The Hon’ble High Court also went on to further state in para 21 that

”It is further settled law that when a power is given to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden.”

Also, in the case of **JCB India Ltd. Vs DCIT the Hon’ble Delhi High Court**¹⁴ in para 17 states that

“The Court is unable to agree with the submissions made on behalf of the Revenue by Mr. Jain. Section 144C (1) of the Act is unambiguous. It requires the AO to pass a draft assessment order after receipt of the report from the TPO. There is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.”

Even on remand proceedings, number of HC’s have upheld this view such as:

1. Nokia India Pvt. Ltd v. ACIT¹⁵
2. Control Risks India Pvt. Ltd v. DCIT¹⁶
3. PCIT v. Andrew Telecommunication Ptv. Ltd¹⁷
4. Dimension Data Asia Pacific Pvt. Ltd v. DCIT¹⁸

It must also be noted that the SC has dismissed SLP’s in the case of **ACIT v. Nokia India Pvt. Ltd**¹⁹ as well as **DCIT v. Control Risks India Pvt. Ltd**²⁰.

Thus, in our view, there is no legal ambiguity in terms of whether it be remand proceedings or first round in terms of the AO having to pass a draft order

Contrary views taken by the Madras High Court:

¹⁴ 61 ITR 148 (Delhi)

¹⁵ WP(C) No. 3692 of 2019 (Delhi)

¹⁶ WP(C) No. 5722 of 2017 (Delhi)

¹⁷ Tax Appeal No 144 of 2017 (Bombay)

¹⁸ WP No 921 of 2018 (Bombay)

¹⁹ SLP Diary No. 7302/2018 dated 14-5-2018

²⁰ SLP Diary No. 7090/2018 dated 16-3-2018

Surprisingly, a contrary interpretation seems to have been taken by Hon'ble Madras High Court in the case of **Enfinity Solar Solutions (P) Ltd v. DCIT**²¹ where the Hon'ble Madras High Court on the issue of whether Draft Order has to be passed after a matter or a portion of the matter has been remanded back held that the AO is not required to follow the procedure laid out in Sec 144C. The Hon'ble Madras High Court in its reasoning stated that the legislative intent behind the section is to provide an opportunity to the assessee to go to the DRP before the final assessment order is passed thus once the procedure has been followed and the ITAT has remanded back matter either fully or partially to the AO once again following the procedure from the beginning is just an empty formality and not the idea behind the provision. In another case, **Durr India (P) Ltd v. ACIT**²², the Hon'ble Madras High Court seems to have agreed that final Assessment Order was passed without jurisdiction but went ahead to direct the AO to redo the same which seems to imply that the defect of passing final Assessment Order without a Draft Assessment Order is a curable defect which is not as per other jurisprudence noted above including the cases of Hon'ble Madras HC itself.

The researcher would like to point out the rationale of introducing Sec 144C by the legislature is for the benefit of the assessee. The assessee cannot be deprived of a statutory right at the whims of the AO and further once the final Assessment Order is passed and demand notice u/S 156 generated, this is not a curable defect by the Assessment Order. By reinterpreting such a clearly worded section in a narrow manner the Hon'ble Madras High Court has created uncertainty in an area of certainty. Stating that in case of remand such process need not be followed because it is unnecessary, in my view incorrectly expands the power of AO which was never contemplated and only results in a weakened form of statutory right to the assessee. Allowing the assessee to file an objection towards the Order and avail the DRP benefit, if available, is the spirit of the legislation and it is necessary to follow it.

CONCLUSION

In conclusion the AO must pass a Draft Assessment order first under Sec 144C (1) of the Income Tax Act 1961, regardless of whether this is original or remand assessment, and the assessee cannot be deprived of his statutory right to appeal to the CIT(A) or DRP as the case may be. Further, the passing of a final Assessment Order without passing a draft Assessment Order is not a curable defect and vitiates the entire assessment proceedings.

²¹ W.P. No 31165 of 2018 (Madras)

²² W. P No 32751 of 2017 (Madras)

