IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI I BENCH, NEW DELHI

[Coram: Pramod Kumar AM and C M Garg JM]

I.T.A. No.: 1356/Del/12
Assessment year 2007-08

Capsugel Healthcare Limited ***……Appellant***
(formerly Bharti Healthcare Limited)
21, Joniawas, Dharuhera 122 100
(District: Rewari) Haryana
[PAN AAACB6447R]

Vs.

Assistant Commissioner of Income Tax
Rewari Circle, Rewari ***……Respondent***

I.T.A. No.: 1371/Del/12
Assessment year 2007-08

Assistant Commissioner of Income Tax
Rewari Circle, Rewari ***……Appellant***

Vs.

Capsugel Healthcare Limited ***……Respondent***
(formerly Bharti Healthcare Limited)
21, Joniawas, Dharuhera 122 100
(District: Rewari) Haryana
[PAN AAACB6447R]

Appearances by:
Nitin Narang, alongwith Deepak Chopra, Harpreet Ajmani and Tarun Agarwal, *for the appellant*
Yogesh Kumar Verma, *for the respondent*

Date of concluding the hearing : September 4, 2014
Date of pronouncing the order : September 30, 2014

O R D E R

Per Pramod Kumar:

1. These cross appeals, filed by the assessee as also the Assessing Officer, call into question correctness, though for different reasons, of the order dated 31st January 2011 passed by the learned CIT(A) in the matter of assessment

under section 143(3) of the Income Tax Act 1961 (hereinafter referred to as 'the Act'), for the assessment year 2007-08.

2. When these appeals were called out for hearing, Shri Narang, learned counsel for the assessee, urged us to first take up assessee's grievance against validity of impugned assessment order having been passed without issuance of a draft assessment order under section 144 C, as set out in the first ground of appeal of the assessee, since in the event of this grievance being upheld, all other issues raised in the cross appeals will be rendered infructuous. Shri Verma, learned Commissioner – Departmental Representative, does not oppose this prayer even as he vehemently supports the stand of the authorities below on this issue.

3. In the first ground of appeal, which calls into question the very validity of impugned assessment order, the assessee has raised the following grievance:

> **The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in upholding the action of the learned Assessing Officer in passing an invalid assessment order u/s 143(3) of the Act in as much as the learned Assessing Officer has failed to forward a draft of the proposed order of assessment to the appellant company and thereby not following the procedure laid down in Section 144C of the Income Tax At, 1961.**

4. So far as this grievance of the assessee is concerned, it is sufficient to take note of the fact that even though a transfer pricing adjustment under section 92CA(1) was made to the income of the assesse, and accordingly the assessee is covered by the provisions of Section 144C(15), the Assessing Officer did not furnish to the assessee a draft assessment order, before passing a final assessment order. The assessee was thus deprived of an opportunity of approaching the Dispute Resolution Panel. Aggrieved by the order so passed by the Assessing Officer, assessee carried the matter in appeal before the CIT(A)

and raised, inter alia, his grievance against the assessee not being furnished a draft assessment order. Learned CIT(A) rejected this grievance and, while doing so, observed as follows:

3.2 I have considered the issue and the submissions made by the AR. For the sake of ready reference, the relevant portions of section 144C are reproduced hereunder :-

"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 propose to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

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

(a) file his acceptance of the variations to the Assessing Officer, or
(b) file his objections, if any, to such variation with,-
(i) the Dispute Resolution Panel; and
(ii) the Assessing Officer,
(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-
(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or
(b) no objections are received within the period specified in sub-section

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

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

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

3.3 In the present case, after receipt of the order passed by TPO dated .10.2010, the AO issued a show cause notice dated 2.11.2010

proposing to make additions as per the adjustments made by the TPO. In response to this, the assessee instead of filing objections, if any, with the DRP and AO, has simply filed a brief note dated 16.11.2010 before the AO giving a gist of the basis of adjustments made by the TPO with the remark that the explanation may be put on record for further reference. The show cause notice issued by the AO is nothing but a draft assessment order as no other additions have been made by the AO apart from the adjustments made by the TPO. If the assessee had any objections on the proposed additions by the AO, it should have filed such objections within 30 days before the DRP and the AO. However, the assessee has not filed any objections before the DRP and the AO. Instead the note dated 16.11.2010 was filed which is in form of synopsis of the adjustments made by the TPO rather than objections. The contention of the appellant in this regard is therefore not tenable and the ground of appeal is dismissed."

5. The assessee is not satisfied with the stand so taken by the learned CIT(A) and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

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 Pvt Ltd Vs DRP [(2014) 46 taxmann.100 (Mad)], 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 Allahabd 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 äs 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, subsections (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 subsection (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 byt he 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.

10. As the assessment order itself is quashed, all other grievances, which deal with the issues dealt with therein on merits, are rendered infructuous and are dismissed as such.

11. In the result, while the appeal of the assessee is allowed in the limited terms indicated above, the appeal filed by the Assessing Officer is dismissed as infructuous. Pronounced in the open court today on 30th day of September, 2014.

Sd/-	Sd/-
C M Garg	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

New Delhi, the30th day of September 2014

Copies to :	*(1)*	*The assessee*	*(2)*	*The Assessing Officer*
	(3)	*CIT, Rohtak*	*(4)*	*CIT(A), Rohtak*
	(5)	*Departmental Representative*		
	(6)	*Guard File*		

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi