IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-04-2014

Coram

**THE HONOURABLE MR. JUSTICE B. RAJENDRAN**

Writ Petition Nos. 1526 and 1527 of 2014
and
M.P. Nos. 1 and 1 of 2014

Vijay Television Private Limited
No.15, Jagannathan Road
Nungambakkam
Chennai – 600 034
represented by its Chief Financial Officer
Shri S. Rajaram .. Petitioner in both the writ Petitions

Versus

1. The Dispute Resolution Panel, Chennai
   Room No.711, Annexe Building, 7th Floor
   Aayakar Bhawan
   121, M.G. Road, Nungambakkam
   Chennai – 600 034

2. Assistant Commissioner of Income Tax
   Media Circle-II
   Room No.312, New Block
   121, M.G. Road, Nungambakkam
   Chennai – 600 034

3. Commissioner of Income-tax, Circle-II
   121, M.G. Road, Nungambakkam
   Chennai – 600 034 .. Respondents in both the Writ Petitions

WP No. 1526 of 2014:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorari to calling for the records of the respondent No.2 for the assessment year 2009-2010 in respect of assessment order in the case of the petitioner (PAN No.AAACV4918P) dated 26.03.2013 and quash the same.

WP No. 1527 of 2014:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorari to calling for the records of the respondent No.2 for the assessment year 2009-2010 in respect of the Corrigendum issued on 15.04.2013 to assessment order dated 26.03.2013 in respect of the petitioner (PAN No.AAACV4918P) dated 26.03.2013 and quash the same.

For Petitioners : Mr. Porus Kaka Divesh Chawla, Senior Counsel
for Mr. M.V. Swaroop
in both the writ petitions

For Respondents : Mr. T. Pramod Kumar Chopda

in both the writ petitions

**COMMON ORDER**

As the issues involved in both the writ petitions are inter-related and common arguments have been advanced by counsel for both sides, these writ petitions are taken up together and are disposed of by this common order.

2. These two writ petitions have been filed by the assessee, challenging the orders passed by the second respondent. While the first writ petition being WP No. 1526 of 2014 has been filed challenging the assessment order dated 26.03.2013, the second writ petition in WP No. 1527 of 2014 has been filed challenging the Corrigendum issued by the second respondent on 15.04.2013.

3. According to the learned senior counsel appearing for the petitioners, the case of the petitioner company was taken up for scrutiny in respect of the assessment year 2009-2010 and as the petitioner company had entered into international transactions during such assessment year, the case was referred to the Transfer Pricing Officer (in short 'TPO') for determination of the arm's length price (hereinafter termed as ('ALP') of all such international transactions reported in Form 3CEB filed by the petitioner company. The TPO passed an order on 30.01.2013 and pursuant to the said order, the assessment officer viz., the second respondent, instead of passing a provisional order, has passed a final assessment order dated 26.03.2013 as contemplated under Section 143 (3) of the Income Tax Act, 1961 (hereinafter called as “The Act''). This order, according to the learned senior counsel for the petitioners, is *per se* unsustainable under law as there is a mandatory direction enumerated under the Act that after an order was passed by the TPO, the Assessment Officer has to

only pass a draft assessment order as required under Section 144C of the Act. The learned senior counsel for the petitioners would further pointed out that the Assessment Officer, after realising the folly that a final order ought not to have been passed pursuant to the order passed by the TPO, issued a Corrigendum on 15.04.2013 modifying the final order of assessment passed on 26.03.2013 to be read as a draft assessment order purported to have been passed under Section 144C of the Act. On receipt of the corrigendum, the petitioner company filed their objections before the Dispute Resolution Panel, Chennai, the first respondent herein on 26.04.2013 specifically questioning the validity of the corrigendum issued by the second respondent. It was specifically contended that the corrigendum issued by the second respondent is without jurisdiction and such an order was passed beyond the period of limitation.

4. It is the contention of the learned senior counsel for petitioners that the Corrigendum was issued to modify a final order passed by second respondent which is legally not sustainable. A corrigendum cannot be issued to rectify a mistake particularly when the limitation for passing the final assessment order expired even as on 31st March 2013. Therefore, the corrigendum issued on 15.04.2014 after expiry of the period of limitation, is legally not sustainable. It is further stated that the first respondent, unfortunately, after hearing the arguments of both sides, declined to issue any order or direction to second respondent taking note of the objections raised by petitioner company on the ground that the very jurisdiction of the first respondent to pass an order has been challenged by them. In those circumstances, left with no other alternative relief, the petitioner has filed these writ petitions.

5. The learned senior counsel for the petitioners would contend that under Section 144C1 of the Act, with effect from 1st October 2009, the Assessing Officer has

to mandatorily issue a draft assessment order if there is a proposed variation to the return which are prejudicial to the eligible assessee. According to the learned senior counsel for the petitioner, the fact that the petitioner is an eligible assessee is not in dispute. While so, under Section 144C2 of the Act, the eligible assessee has the option, either to accept the variation or to file their objections before the first respondent and such option has to be exercised within 30 days. On such objections filed by the assessee, the first respondent shall issue appropriate direction for the guidance of the assessing officer under Section 144C5 of the Act. It is only thereafter, the second respondent-assessing officer is bound to pass a final order of assessment in compliance with the directions issued by the first respondent under Section 144C3 of the Act. In the present case, without following the above mandatory procedures, the second respondent has passed the order of assessment on 26.03.2013 and subsequently issued a corrigendum on 15.04.2014 to rectify the mistake committed in passing the final order of assessment *inter alia* to treat it as a draft assessment order. This course of action adopted by the second respondent is contrary to the mandatory provisions contained in the Act and the corrigendum issued by the second respondent could not cure the defect. The very fact that the assessing officer has signed the order of assessment and also assessed the amount payable by the assessee has become complete and it cannot be simply treated as a draft assessment order or it can be rectified by issuing the corrigendum. In fact, pursuant to the order of assessment under Section 143C, demand was also made for payment of the amount and such demand has not been withdrawn by the second respondent even after issuing the corrigendum. Even as per the website of the department, the demand made to the petitioner company continues till date and therefore, the final order as well as the corrigendum issued by the second respondent are vitiated by errors apparent on the face of the record and they are legally not sustainable.

6. It is further argued by the learned senior counsel for the petitioner that under Section 154 of the Act, no doubt, an order can be amended, varied or modified but that by itself will not cure the defect committed by the second respondent. This is more so that Section 154 of the Act can be made applicable only in respect of draft assessment order and not a final order. Even the corigendum issued by the second respondent does not indicate that it was passed purportedly under Section 154 of the Act. In fact, as against the final order, the department has got a right of appeal but such right have not been utilised by them. Therefore, Section 154 of the Act does not apply to this case or it can save the period of limitation to re-open the assessment or it can be treated as a substitute for the draft assessment order. Even the corrigendum issued by the second respondent is beyond the period of limitation. When once the assessing officer lost his right to re-open the assessment, it cannot be rectified or cured by issuing a corrigendum. It is well settled that the issue of limitaiton cannot be extended by the conduct of the parties. Even as early as on 29.11.2011, a reference was made to the TPO to evaluate the transaction between the petitioner and it's allied enterprises operating out of India. After several hearings, ultimately, on 30.01.2013, the TPO passed a detailed order and on 27.02.2013, a show cause notice was issued on the basis of the order passed by the TPO. On 11.03.2013, a reply was given by the petitioner company and on 26.03.2013, just 4 days prior to the expiry of limitation period, the final order was passed by the second respondent under Section 143 (2) of the Act in which demand was made and penalty was also slapped on the petitioner. After reference of the order passed by the TPO there can only be an order under Section 144 (C) of the Act which can only be a preliminary order and not an order under Section 143 of the Act. As the period of re-opening the assessment expired on 31.03.2013, the second respondent is not empowered to issue the corrigendum

beyond the period of limitation.

7. In this context, the learned senior counsel for the petitioners relied on the decision of the Honourable Supreme Court in the case of (**Deepak Agro Foods vs. State of Rajasthan and others)** reported in (**2008) 16 VST 454 (SC)** to contend that the assessment proceedings after the expiry of the period of limitation being a nullity in law, this Court has to annul such assessment and the question of fresh assessment does not arise.

8. The learned senior counsel for the petitioners further relied on the decision of the Honourable Supreme Court in the case of (**Kalyankumar Ray vs. Commissioner of Income Tax)** reported in **Volume 191, ITR SC 634** to contend that once when an order was passed by assessing the total income and also determining the tax payable thereof, such an order can only be called as a final order of assessment and it could not be termed as a draft assessment order.

9. The learned senior counsel also relied on yet another decision of the Honourable Supreme Court in the case of (**Patel Narshi Thakershi and others vs. Shri. Pradyumansinghji Arjunsinghji) 1971 (3) Supreme Court Cases 844** to submit that the order passed under Section 154 of the Act could not make the already invalid order passed by the second respondent to be a valid by reason of the corrigendum issued on 15.04.2013. For the same proposition, reliance was also placed on the decision of the Madhya Pradesh High Court in the case of (**Commissioner of Income tax vs. Fatelal**) reported in **225 ITR 1061.**

10. Apart from the above decisions, the learned senior counsel for the

petitioners also cited the decisions reported in the following cases

i) Peeru Lal, Mohan Lal vs. Commissioner of Income Tax-257 ITR 198 Rajasthan
ii) Commissioner of Income Tax vs. Avi Oil India P Ltd., 323 ITR 242 Punjab and Haryana High Court
iii) Commissioner of Income Tax vs. Shital Prasad Kharag Prasad (280 ITR 595) Punjab and Haryana High Court
iv) Commissioner of Income Tax vs. Norton Motors (275 ITR 595) Punjab and Haryana High Court
v) V. Ramaiah vs. Commissioner of Income Tax, Chennai (356 ITR 646) Madras
vi) Smt. R.V. Sarojini Devi vs. Inspecting Assistant, Commissioner of Income Tax and another (242 ITR 329) Madras
vii) Assistant Commissioner of Income Tax and another vs. Hotel Blue Moon (321 ITR 362) Supreme Court
viii) Zuari Cement Limited vs. Assistant Commissioner of Income Tax, Circle 2 (1) passed in WP No. 5557 of 2012 dated 21.02.2013 on the file of Andhra Pradesh High Court
ix) Assistant Commissioner of Income Tax, Circle 2-(1) vs. Zuarti Cement (SLP CC No. 16694 of 2013 dated 27.09.2013
x) Vodafone India Service (P) Ltd., vs. Union of India, Ministry of Finance, New Delhi (359 ITR 133) Bombay High Court

11. These decisions have been relied on by the learned senior counsel for the petitioners to contend that a time barred order cannot be cured by passing a rectification order in the nature of corrigendum and that the orders which are passed contrary to Section 144C of the Act are invalid.

12. On the contrary, the learned Standing Counsel appearing for the respondents would vehemently oppose these writ petitions by contending that the petitioner has filed another writ petition in WP No. 1528 of 2014 before this Court challenging the order passed by the first respondent on 20.12.2013 and after quashing the order, sought for issuance of a consequential order to direct the first respondent to rehear their case afresh after giving them an opportunity of hearing and pass fresh orders thereon on all the issues raised before it, including the issue as to whether the assessment officer can pass a corrigendum in his order. The petitioner company withdrew the said writ petition on 16.04.2014. By filing such writ petition, the

petitioner has admitted that the order passed by the second respondent is not a final order. In the said writ petition, it was only contended that the order was passed beyond the period of limitation. In any event, the order passed by the second respondent cannot be construed to be a final order especially when the petitioner company questioned it before the first respondent and when the appeal was not heard, WP No. 1528 of 2014 was filed seeking for a direction to the first respondent to give them opportunity of hearing. In fact, to this course of action, the respondents are also amenable.

13. According to the learned standing counsel for the respondents, the order passed by the second respondent is not an illegal order, as alleged by the petitioner company. No doubt, the assessment officer has passed an order on the basis of the order passed by the TPO, of course, in the nature of a final order on 26.03.2013. Immediately, to rectify such mistake, the second respondent has issued the corrigendum on 15.04.2013. According to the learned standing counsel for the respondents, there cannot be any period of limitation prescribed for issuing a corrigendum and therefore, the corrigendum, as such, is legally sustainable. The corrigendum was issued only to rectify the mistakes or deficiencies committed by the second respondent and such a course of action cannot be termed as illegal. In this context, the learned standing counsel for the respondents, relying on Section 154 of the Act, contends that as per Section 154 of the Act, the Assessing Officer is empowered to alter, amend, vary or modify an order at any point of time. In the present case, the corrigendum was issued within a period of 20 days on 15.04.2013 to rectify the defects in the order dated 26.03.2013. Merely because the corrigendum has been issued on 15.04.2013, it cannot be said that the defects could not be cured. In fact, as against an order passed under Section 154 of the Act, an appeal remedy is

provided before the Commissioner of appeals. The petitioner company, instead of filing an appeal, filed the present writ petitions by contending that the order passed by the second respondent is a final order of assessment, which is incorrect. The fact that the order passed by the second respondent is not a final order could be inferred from the fact that the petitioner has filed a petition before the first respondent questioning such order passed by the second respondent. It is well settled that whenever a final order is rectified, varied, altered or amended, it will relate back to the original order and in such event, the corrigendum is in order having been passed to cure the defects emanated in the order passed by the second respondent. By virtue of the corrigendum, the defects in the order passed by the second respondent has been set at naught. The errors crept in the order passed by the assessment officer is a curable defect and it cannot be said to be incurable.

14. In order to strengthen his contentions, the learned standing counsel for the respondents relied on the decisioin of the Honourable Supreme Court in the case of (**R.N. Gosain vs. Yashpal Dhir)** reported in **AIR 1993 Supreme Court 1952** to contend that a party cannot be allowed to approbate and reprobate. By relying on this decision, the learned standing counsel for the respondents would contend that when once the petitioner company has approached the DRP, the first respondent herein, treating the order passed by the second respondent as a draft assessment order, the petitioner company is estopped from questioining the very same order as though it is a final order.

15. Reliance was also placed on the decision of the Supreme Court in the case of (**L. Hazari Mal Kuthiala vs. Income Tax Office, Special Circle, Ambala Cantt. And another)** reported in **Volume XLI ITR SC Page No.12** wherein it was held

that the failure 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. By placing reliance on this decision, the learned standing counsel for the respondents would contend that merely because the assessment officer has committed certain mistakes or quoted a wrong provision of law, it cannot be taken to the advantage of the petitioner company or that by itself will not render the order vitiated especially when it was sought to be corrected by issuing the corrigendum at the earliest point of time.

16. The learned standing counsel for the respondents also relied on the Division Bench decision of this Court passed on 10.02.2014 in Tax Case (Appeal) No. 2412 of 2006 for the proposition that whether the assessment order was passed under Section 158BC or 158BD or whether the procedures contemplated under Section 158BC of the Act have not been followed, will not make the assessment order itself vitiated. Similarly, in this case, merely because the order of the assessment officer has been passed purportedly to be in the nature of a final order, it will not render the corrigendum subsequently issued thereof vitiated. Therefore, he would contend that the orders, which are impugned in these writ petitions, are valid.

17. Lastly, the learned standing counsel for the respondents relied on the latest decision of the Honourable Supreme Court rendered in the case of (**Deepak Agro Foods vs. State of Rajasthan and others)** reported in (**2008) 16 VST 454 (SC),** which was also relied on by the learned senior counsel for the petitioners, to distinguish between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is

merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed as inexecutable.

18. I heard the learned senior counsel for the petitioner company as well as the learned standing counsel appearing for the respondents department. The point for determination in these two writ petitions is whether the corrigendum issued by the second respondent on 15.04.2013 is legally sustainable and whether it will cure the defects or deficiencies crept in the order dated 26.03.2013,

19. Admittedly, the case of the petitioner company was taken up for scrutiny by the second respondent relating to the assessment years 2009-2010 inasmuch as the petitioner company had entered into international transactions during such assessment year. Ultimately, the case was referred to the TPO for determination of the ALP of all such international transactions reported in Form 3CEB filed by the petitioner company. The TPO, after conducting enquiry, has ultimately passed an order on 30.01.2013. Thereafter, according to the petitioner company, the second respondent, instead of passing a provisional order or a draft assessment order, has passed a final assessment order dated 26.03.2013 as contemplated under Section 143 (3) of the Act. Section 143 (3) and 144 (C) of the Act reads as follows:-

> "143 (3) On the day specified in the notice,—
>
> (*i*) issued under clause (*i*) of sub-section (2), or as soon afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and determine the sum payable by the assessee on the basis of such assessment;
>
> (*ii*)issued under clause (*ii*) of sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require

on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:]

[**Provided** that in the case of a—

(*a*) [research association] referred to in clause (*21*) of section 10;

(*b*) news agency referred to in clause (*22B*) of section 10;

(*c*) association or institution referred to in clause (*23A*) of section 10;

(*d*) institution referred to in clause (*23B*) of section 10;

(*e*) fund or institution referred to in sub-clause (*iv*) or trust or institution referred to in sub-clause (*v*) or any university or other educational institution referred to in sub-clause (*vi*) or any hospital or other medical institution referred to in sub-clause (*via*) of clause (*23C*) of section 10, which is required to furnish the return of income under sub-section (4C) of section 139, no order making an assessment of the total income or loss of such [research association], news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, shall be made by the Assessing Officer, without giving effect to the provisions of section 10, unless—

(*i*) the Assessing Officer has intimated the Central Government or the prescribed authority the contravention of the provisions of clause (*21*) or clause (*22B*) or clause (*23A*) or clause (*23B*) or sub-clause (*iv*) or sub-clause (*v*) or sub-clause (*vi*) or sub-clause (*via*) of clause (*23C*) of section 10, as the case may be, by such [research association], news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, where in his view such contravention has taken place; and

(*ii*) the approval granted to such [research association] or other association [or fund or trust] or institution or university or other educational institution or hospital or other medical institution has been withdrawn or notification issued in respect of such news agency or fund or trust or institution has been rescinded :]

[**Provided further** that where the Assessing Officer is satisfied that the activities of the university, college or other institution referred to in clause (*ii*) and clause (*iii*) of sub-section (1) of section 35 are not being carried out in accordance with all or any of the conditions subject to which such university, college or other institution was approved, he may, after giving a reasonable opportunity of showing cause against the proposed withdrawal to the concerned university, college or other institution, recommend to the Central Government to withdraw the approval and that Government may by order, withdraw the approval and forward a copy of the order to the concerned university, college or other institution and the Assessing Officer:]

[**Provided also** that notwithstanding anything contained in the first and the second provisos, no effect shall be given by the Assessing Officer to

the provisions of clause (*23C*) of section 10 in the case of a trust or institution for a previous year, if the provisions of the first proviso to clause (*15*) of section 2 become applicable in the case of such person in such previous year, whether or not the approval granted to such trust or institution or notification issued in respect of such trust or institution has been withdrawn or rescinded.]

[**Reference to dispute resolution panel.**

**144C.** (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(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 (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 [50][or section 153B], 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 thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(*a*) draft order;

(*b*) objections filed by the assessee;

(*c*) evidence furnished by the assessee;

(*d*) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(*e*) records relating to the draft order;

(*f*) evidence collected by, or caused to be collected by, it; and

(*g*) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(*a*) make such further enquiry, as it thinks fit; or

(*b*) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[*Explanation.*—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [51a][or section 153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules[52] for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

**The following sub-section (14A) shall be inserted after sub-section (14) of section 144C by the Finance Act, 2013, w.e.f. 1-4-2016 :**

*(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in sub-section (12) of section*

*144BA*.

(15) For the purposes of this section,—

(*a*) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board[54] for this purpose;

(*b*) "eligible assessee" means,—

(*i*) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company.]

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 reported in (**Deepak Agro Foods vs. State of Rajasthan and others)** reported in (**2008) 16 VST 454 (SC)** wherein in Para No.10, the Honourable Supreme Court discussed as to when an order could be

construed as a final order:-

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

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

24. This decision squarely applies to the facts of this case. In this case, the order passed by the second respondent lacks jurisdiction especially when it is beyond the period of limitation prescribed by the statute. When there is a statutory violation in

not following the procedures prescribed, such an order cannot be cured by merely issuing a corrigendum.

25. In the decision rendered by the Honourable Supreme Court of India in the case of (**L. Hazari Mal Kuthiala vs. Income Tax Office, Special Circle, Ambala Cantt. And another)** reported in **Volume XLI ITR SC Page No.12**, 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 (**Commissioner of Income Tax vs. Shital Prasad Kharag Prasad)** reported in **280 ITR 541** 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 vs. Commissioner of Income Tax, Chennai** reported in (356 ITR 646) 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 vs. Commissioner of Income Tax, Chennai** reported in (356 ITR 646) 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 vs. Inspecting Assistant Commissioner of Income Tax**

**and another)** reported in **(242 ITR 329) Madras**, 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, 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 Limited vs. Assistant Commissioner of Income Tax, Circle 2 (1)** passed in WP No. 5557 of 2012 dated 21.02.2013, 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 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.

34. Accordingly, the orders, which are impugned in these writ petitions are set aside and both the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

29-04-2014

rsh

Index : Yes

Internet : Yes

To

1. The Dispute Resolution Panel, Chennai
   Room No.711, Annexe Building, 7th Floor
   Aayakar Bhawan
   121, M.G. Road, Nungambakkam
   Chennai – 600 034

2. Assistant Commissioner of Income Tax
   Media Circle-II
   Room No.312, New Block
   121, M.G. Road, Nungambakkam
   Chennai – 600 034

3. Commissioner of Income-tax, Circle-II
   121, M.G. Road, Nungambakkam
   Chennai – 600 034

**B. RAJENDRAN, J**

rsh

WP Nos. 1526 and 1527/2014

29-04-2014