आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पॉल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 1084/JP/2016
निर्धारण वर्ष/Assessment Years : 2011-12

DY. Commissioner of Income-tax, Circle-2, Jaipur	बनाम Vs.	M/s Jaipur Rugs Company (P) Ltd., 250, Mansarovar Industrial Area, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ6934C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA. No. 46/JP/2017
निर्धारण वर्ष/Assessment Years : 2011-12

M/s Jaipur Rugs Company (P) Ltd., 250, Mansarovar Industrial Area, Jaipur	बनाम Vs.	DY. Commissioner of Income-tax, Circle-2, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ6934C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Smt. Seema Meena (JCIT)
निर्धारिती की ओर से/ Assessee by : Shri Rajeev Sogani (CA)

सुनवाई की तारीख/ Date of Hearing : 12/04/2018
उदघोषणा की तारीख/Date of Pronouncement : 24/04/2018

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are cross appeals filed by the Revenue and the assessee against the order of ld. CIT(A)-2 Jaipur dated 26.10.2016 for Assessment Year 2011-12. The respective grounds of appeal taken by the Revenue and the assessee are as under:-

ITA. No. 1084/JP/2016:

"1. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) has erred in deleting the addition of Rs. 46,53,648/- made by the AO u/s 92C of the IT Act, 1961.

2. Whether on the facts and circumstances of the case and in law, the ld. CIT(A) was justified in not appreciating the fact that assessee's claim is self contradictory. On one hand assessee is claiming that the average sale price of AE is better than the unrelated parties whereas on the other hand it has been claimed that the AE is given bulk discount for which no evidence was produced whatsoever.

3. Whether on the facts and circumstances of the case & in law, ld. CIT(A) was justified in not appreciating the fact that the second proviso to section 92C(2) is not applicable in the instance case, as the AO has applied CUP method for determining ALP."

ITA. No. 46/JP/2017:

"1. In the facts and circumstances of the case and in law the ld. CIT has erred in not appreciating the fact that ld. AO/TPO has not provided

the draft of the proposed order of assessment in terms of the provisions of section 144C of the Income tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the entire assessment order.

2. In the facts and circumstances of the case in law the ld. CIT(A) has erred in confirming the action of ld. AO/ ld. TPO in making an addition of Rs. 31,84,607/- on account of alleged notional interest on outstanding receivables in respect of transactions with AE. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 31,84,6-7/-."

2. We shall first take up the ground of appeal taken by the assessee where the assessee has challenged the legality of the assessment order passed by the AO without providing the draft of the proposed order of assessment in terms of the provisions of section 144C of the Income tax Act, 1961.

3. The facts of case are that the assessee filed its return of income on 27.09.2011 declaring total income of Rs. 1,83,51,750/- which was processed u/s 143(1) of the Act. Subsequently, the matter was manually selected for scrutiny by issuing notice u/s 143(2) of the Act and a reference was made to Transfer Pricing officer u/s 92CA(3) for determination of arms length price of international tax transactions entered into by the assessee during the FY 2010-11 relevant to AY 2011-12. The TPO passed the order u/s 92CA(3) on 08.01.2015 wherein

he has proposed an adjustment to the tune of Rs. 78,38,255/-. On receipt of the TPO order, the AO vide his letter dated 03.02.2015 issued a show cause notice to the assessee as to why the adjustment so determined by the TPO should not be made while completing the assessment. The assessee vide its letter dated 06.02.2015 made its submissions/objections which were found by the AO as identical submissions/objections made before the TPO and in view of the reasoning given by the TPO in his order u/s 92CA(3), the AO enhanced the income declared by the assessee by making an adjustment on account of arms length price in respect of international transactions entered into by the assessee with its associate enterprise amounting to Rs. 78,38,255/-. As against the returned income of Rs. 1,83,51,750/-, assessed income was determined at Rs. 2,61,90,005/- by passing an order u/s 143(3) of the Act. Along with assessment order, a notice of demand u/s 156 vide entry in D&CR No. 104/20 dated 18.02.2015 was raised wherein an amount of Rs. 38,98,400/- was determined as payable by the assessee. Separately, the penalty proceedings u/s 271(1)(c) were also initiated for furnishing of inaccurate particulars of income and a notice u/s 274 read with section 271 dated 18.02.2015 was issued to the assessee company.

4. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) and raised an additional ground of appeal stating that the the AO has erred in not providing a draft of the proposed order of assessment in terms of the provisions of section 144C of the Act which is prejudicial to the interest of the appellant and therefore, the order of the AO is invalid and void ab initio. The said ground, being a legal

ground was admitted for adjudication by the ld. CIT(A) and a remand report on the matter was called for from the Assessing Officer.

5. In its remand report, the Assessing Officer submitted that the TPO had issued a specific show cause notice stating the intended adjustments under the transfer pricing mechanism, and afforded ample opportunity to the assessee to put forth its objections. Further, the assessee duly availed of this opportunity, and submitted its detailed reply on 30.12.2014, which has been incorporated and discussed/ rebutted in the order dated 08.01.2015. It was further submitted by the AO that after the receipt of the TPO's order, another show cause notice was issued to the assessee and in response, the assessee filed its reply which was identical to the reply/objections filed before the TPO. It was submitted by the AO that the assessee while filing its reply against the said show cause notice did not take recourse to filing its objections with the Dispute Resolution Panel, nor did it make a mention of any such intention while filing its reply. It was submitted that the assessee would have been well within its right to invoke the provisions of section 144C (2)(b) since the order u/s 92CA(3) was the basis of the show cause notice. It was submitted by the AO that the assessee is merely raising this issue as an afterthought to hide its own shortcoming of not objecting to the proposed additions at the appropriate stage. The AO further submitted that additions have been made on identical issues in earlier assessment order for AY 2010-11 and the AO had issued a draft assessment order before passing the order u/s 143(3) of the Act and in that assessment year's proceedings, the assessee did not take recourse to filing objections against the draft order before the Dispute Resolution

Panel and the Assessing Officer as envisaged under section 144C(2)(b). Thus, it was accordingly submitted by the AO that it is apparent that the assessee had itself not contemplated resolution of dispute regarding variation in Transfer Pricing adopted by the concerned departmental authority and the averment made by the assessee on account of not providing the draft of the proposed assessment order is not tenable and needs to be rejected per se.

6. Based on the remand report of the AO, the ld. CIT(A) held that a detailed show cause notice has been issue to the assessee and the same has also not been denied by the Authorized Representative. No additions have been made which were not included in the show cause notice and the reply to the show cause notice was duly considered when passing the assessment order. It was accordingly held by the ld. CIT(A) that adequate opportunity was provided to the assessee for filing objections and the same has also been availed by assessee and in view of the above, this ground of appeal was dismissed. Against the said finding of the ld. CIT(A), the assessee is in appeal before us.

7. During the course of hearing, the ld. AR drawn our reference to the provisions of section 144C of the Act and submitted that the intention of the legislature could be gauged from the clear language employed in and various phrases/words used in sub-section (1) of section 144C of the Act whereby the draft order is required to be passed and served upon the assessee before passing the final assessment order. It was submitted that the term "shall" has been used which means that the AO/TPO are bound to follow this provision

of section 144(C). The term "Notwithstanding….. in this Act" has been used which means this is a superseding section and empowers the assessee to receive a draft order before the final order is served upon him. The phrase "In the first instance" has been used which means before making the final order, the AO first of all shall sent the draft order to the assessee so as to have his acceptance or objection if any. The terms "eligible assessee" has been used which means the assessee company. The phrase "any variation in the income or loss return which is prejudicial to the interest of the assessee" has been used which means that if an addition is made in the ALP, consequently, income of the assessee is increased against the interest of the assessee. It was accordingly submitted that the AO/TPO have not uphold the intention of law as it is clear from language of section 144C(1) whereby no draft order was served upon the assessee before passing and issuing the final order. It was further submitted that the lower authorities have not disputed the fact of non service of draft order in accordance with section 144C of the Act.

8. It was further submitted the service of show cause notice cannot be equated with serving of the draft assessment order as envisaged in section 144C(1) of the Act. It was submitted that certain rights can be exercised only when draft order is made available to it and in absence of the same, the assessee has been denied the opportunity to exercise those rights.

9. In support, the ld AR placed reliance on the decision of Hon'ble Madras High Court in case of Vijay Television (P.) Ltd. vs. Dispute

Resolution Panel, Chennai [2014] 46 taxmann.com 100 where it was held where pursuant to order of TPO, the Assessing Officer passed a final order u/s 143(3) instead of passing a draft assessment order under section 144C, there being violation of procedure prescribed under Act, impugned order was to be set aside and, in such a case, even corrigendum issued by Assessing Officer modifying final order of assessment to be read as a draft assessment order, could not cure defect existing in original order.

10. Further, the ld AR placed reliance on the decision of Co-ordinate Bench of the Tribunal in case of Capsugel Healthcare Ltd. vs. Assistant Commissioner of Income Tax, Rewari Circle, Rewari [2014] 50 taxmann.com 324 where it was held that failure to furnish to assessee a draft assessment order, to which assessee is entitled under section 144C(1), renders proceedings illegal and a show cause notice cannot be equated with draft assessment order.

11. It was accordingly submitted by the ld AR that the AO has failed to passing order in accordance with prescribed law and therefore the order passed is invalid and void ab initio which deserves to the quashed.

12. The ld. DR is heard who has relied on the findings of the lower authorities and submitted that adequate opportunity has been provided to assessee to submit objections against the ALP adjustments by the TPO as well as by the Assessing Officer. Accordingly, it is not a case where the rights of the assessee have been prejudiced in any manner.

13. We have heard the rival contentions and purused the material available on record.

14. Firstly, it would be relevant to refer to the provisions of section 144C which reads as under:-

"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 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 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 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.

(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 Principal Commissioner or Commissioner as provided in sub-section (12) of section 144BA.

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegiums comprising of three Principal Commissioners or] Commissioners of Income-tax constituted by the Board 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.

15. The scheme of section 144C is unambiguous and sub-section (1) of section 144C clearly provides for issuance of a draft order which is a *sine qua non* before the Assessing Officer can pass a regular assessment order u/s 143(3) of the Act. It is not in dispute that in the instant case, the AO has made an addition based on the ALP adjustment proposed by the TPO and has thus made a variation in the income returned which is prejudicial to the interest of such assessee.

16. During the course of hearing, in order to determine whether draft assessment order was prepared and furnished to the assessee by the AO or not, the assessment records were called for. Thereafter, at the hearing scheduled on 12.04.2018, the assessment records were produced by the ld DR and on perusal of the same, it is noted that there is nothing on record in terms of draft assessment order which was prepared and furnished to the assessee and further, there is no entry which has been recorded in the order sheet to this effect that draft assessment order was prepared and furnished to the assessee. Therefore, it is a undisputed fact that in the instant case, there was no draft assessment order which was prepared and furnished to the assessee as contemplated under section 144C(1) of the Act.

17. We have also carefully perused the assessment order passed under section 143(3) of the Act dated 18.02.2015. It is a regular assessment order in form and in substance. Along with assessment order, a notice of demand u/s 156 vide entry in D&CR No. 104/20 dated 18.02.2015 was raised wherein an amount of Rs. 38,98,400/- was determined as payable by the assessee. Separately, the penalty proceedings u/s 271(1)(c) were also initiated for furnishing of inaccurate particulars of income and a notice u/s 274 read with section 271 dated 18.02.2015 was issued to the assessee company. It is therefore a case where not only that income has been finally determined by the AO computed, the tax payable thereon has also been computed and demand entries are made on the basis of this order in the D&CR register and even penalty proceedings are initiated. Such an

exercise could not have been done if the assessment order was indeed a draft assessment order. Undoubtedly, if draft of assessment order is wrongly titled an assessment order, section 292B should have come to the rescue of the Assessing Officer. However given the fact that resultant tax demand and penalty proceedings have been initiated, it is a final assessment order which has been passed by the Assessing Officer in substance and in effect.

18. Now, coming to the contention of the ld DR that adequate opportunity has been provided to assessee to submit objections against the ALP adjustments by the TPO as well as by the Assessing Officer. Accordingly, it is not a case where the rights of the assessee have been prejudiced in any manner. In other words, the contentions of the ld DR is that where show-cause notice towards proposed ALP adjustment has been issued to the assessee, the same is a sufficient compliance and in such a scenario, there is no necessity to furnish the draft assessment order. We are however unable to accede to the said contentions raised by the ld DR as the same is not what has been contemplated by the legislature under section 144C(1) of the Act. And if we were to accept the said contentions of the ld DR, it will make the provisions of section 144C redundant and will take away the assessee's right of approaching the Dispute Resolution Panel as basis such show-cause notice, the assessee could not have approached the Dispute Resolution Panel and thus, the same cannot be accepted. As we have noted above, the scheme of section 144C is unambiguous and sub-section (1) of section 144C clearly provides for issuance of a draft order which is a *sine qua*

non before the Assessing Officer can pass a regular assessment order u/s 143(3) of the Act.

19. In this regard, we refer to the decision of the Co-ordinate Bench in the case of **Capsugel Healthcare Ltd vs. ACIT (supra)** wherein the facts of the case are identical and ratio thereof equally applies in the instant case. In that case, certain transfer pricing adjustment under section 92CA(1) was made to the income of the assessee. However, the Assessing Officer did not furnish to the assessee a draft assessment order, before passing a final assessment order. On appeal before the ld CIT(A), the assessee raised its grievance of not being furnished a draft assessment order. The ld CIT(A) rejected this grievance and observed that in the instant case, after receipt of the order passed by TPO, the Assessing Officer issued a show cause notice 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 the Assessing Officer had simply filed a brief note before the Assessing Officer 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 Assessing Officer was nothing but a draft assessment order as no other additions had been made by the Assessing Officer apart from the adjustments made by the TPO. If the assessee had any objections on the proposed additions by the Assessing Officer, it should have filed such objections within 30 days before the DRP and the Assessing Officer. However, since the assessee had not filed any objections before the DRP and the Assessing

Officer his contentions in this regard were not tenable. On appeal, the Coordinate Bench held as under:

"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,*** *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 respondent 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."*

20. In light of above discussions, respectively following the decision of the Hon'ble High Courts and the Co-ordinate Bench referred supra, since the AO has failed to follow the mandate of the provisions of section 144C of the Act whereby he was required to pass a draft assessment order which is mandatory and is prescribed by the statute,

the final assessment order passed by the Assessing Officer u/s 143(3) is without jurisdiction. Further, the issuance of a show-cause notice cannot be equated and treated as a draft assessment order as the same would make the provisions of section 144C redundant. Accordingly, we quash and set aside the impugned assessment order. The ground of assessee's appeal is thus allowed.

21. Since we have quashed the assessment order, there is no necessity to address the other grounds raised by the assessee on merits. The same are rendered infructious and are dismissed as such.

22. Similarly, the appeal filed by the Revenue is dismissed as infructious as we have quashed the assessment order itself.

In the result, the appeal filed by the assessee is partly allowed and appeal filed by the Revenue stands dismissed.

Order pronounced in the open Court on 24/04/2018.

Sd/-	Sd/-
(विजय पॉल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 24/04/2018
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:
1. अपीलार्थी/The Appellant- DCIT, Jaipur & Jaipur Rugs Company Pvt. Ltd., Jaipur

2. प्रत्यर्थी / The Respondent- Jaipur Rugs Company Pvt. Ltd., Jaipur & DCIT, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1084/JP/2016 & 46/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar