

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A No. 961/Bang/2017
Assessment Year : 2012-13

M/s. Cisco Systems Services B.V. – India Branch, Brigade South Parade, No. 10, Mahatma Gandhi Road, Bangalore – 560 001. PAN: AACCC4836D	Vs.	The Deputy Commissioner of Income Tax, International Taxation, Circle – 1(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Rajan Vora, CA
Revenue by	:	Dr. Manjunath Karkaihalli, CIT DR

Date of Hearing	:	19-01-2022
Date of Pronouncement	:	19-01-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

This appeal by assessee is directed against the order of the Ld.AO dated 27.02.2017 passed u/s. 143(3) r.w.s. 144C(14) of the Income-tax Act, 1961 [the Act] on the following grounds:

“Based on the facts and circumstances of the case and in law, Cisco Systems Services B.V. - India Branch (hereinafter referred to as the 'Appellant.') respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax (International Taxation) - Circle 1(1) ('Assessing Officer' or 'AO') dated February 27, 2017 in pursuance of the directions & the revised directions issued by the Dispute Resolution Panel ('DRP'), Bangalore dated December 29, 2016 & January 16, 2017 respectively, under section 253 of the Income-tax Act, 1961 ('Act) on the following grounds:

That on the facts and in the circumstances of the case and in law and based on the directions of the DRP:

A. Grounds of appeal relating to corporate tax matters

1. The learned AO has erred in law and in fact. by not considering the plea of the Appellant that foreign currency expenditure incurred in relation to recharge of international assignee costs constitute 'reimbursements' and are not in the nature of income chargeable to tax under the Act.

B. Grounds of appeal relating to transfer pricing matters

3. The learned DRP/ learned TPO/ learned AO have erred in law and in fact by concluding that the technical services provided by the Appellant are a mix of high end & low end services.

4. The learned AO/TPO have erred, in law and in facts. by making negative working capital adjustment in relation to the services provided by the Appellant without appreciating the fact that the Appellant is a captive service provider and does not bear any working capital risk.

5. The learned TPO/ learned AO have erred, in law and in facts, by accepting/rejecting certain companies based on unreasonable comparability criteria:

6. The learned TPO/ learned AO have erred, in law and in facts, by wrongly computing the operating margins of some of the comparable companies identified in the transfer pricing order

7. The learned TPO/ learned AO have erred, in law and in facts, by not applying a higher threshold while applying the turnover filter;

8. The learned TPO/ learned AO have erred, in law and in facts. in computing the arm's length price without giving the benefit of 5 percent under the proviso to section 92C of the Act;

9. The learned TPO/ learned AO have erred, in law and in facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparables.

10. The learned TPO/ learned AO have erred, in law and in fact, by rejecting certain comparable companies

identified by the Appellant using the export sales less than 75% of the sales as a comparability criterion.

11. The learned TPO/ learned AO have erred, in law and in fact, by rejecting certain comparable companies identified by the Appellant using the employee cost less than 25% of the total revenues as a comparability criterion.

12. The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant using the related party transactions more than 25% of the sales as a comparability criterion:

13. The learned TPO/ learned AO have erred, in law and in facts, by not appreciating the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules, conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length.

14. The learned TPO/ learned AO have erred, in law and in facts, by applying the filter of companies having different accounting year for rejecting the comparable companies (i.e., companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months):

15. The learned TPO/ learned AO have erred, in law and in facts, by determining the arm's length margin/price using only FY 2011-12 data, which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

16. The learned TPO/ learned AO have erred, in law and in facts, by rejecting the filter of ratio of research and development expenses to sales less than 3% considered by the Appellant for the purpose of selecting the companies which do not own intangibles and are pure service providers:

17. The learned TPO/ learned AO have erred in law and in facts. by rejecting the filter adopted by the Appellant for selecting companies having a ratio of sum of advertising, marketing and distribution expenses to sales less than 3%;

18. *The learned AO has erred in making a reference to the TPO without recording a finding that he considers it 'necessary or expedient' to do so as required under section 92CA(1) of the Act. hence the reference made by the learned AO to TPO suffers from jurisdictional error.*

19. *The learned TPO/ AO have erred, in law and in fact, by using the information by exercising powers under section 133(6) of the Act.*

C. Grounds of appeal relating to other matters

20. *The learned AO has erred in law and in fact, by not providing credit of Minimum Alternate Tax while computing the total tax payable by the Appellant.*

21. *The learned AO has erred. in law and in fact. by restricting the credit for taxes deducted at source ('TDS') to INR 18,74,81,464 vis-a-vis INR 19,36.50,171 claimed by the Appellant in its return of income.*

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.”

2. The assessee has raised modified grounds of appeal vide application dated 30.03.2021.

“Based on the facts and circumstances of the case. the Appellant craves leave to prefer an appeal against the order passed by impugned order of the learned AO. passed under section 143(3) read with section 144C of the Income Tax Act. 1961 (hereinafter referred to as the `Act), each of which are without prejudice to one another.

5.1. The learned TPO/ learned AO have erred in law and in facts by accepting following companies based on unreasonable comparability criteria:

- a) Infosys BPO Limited;*
- b) TCS E-serve Limited; and*
- c) B.N.R Udyog Limited*

The Assessee craves. to consider the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal.”

3. The assessee has also raised additional ground dated 08.04.2021 as follows:

“Based on the facts and circumstances of the case and in law, Cisco Systems Services B V - India Branch (hereinafter referred to as the ‘CSS BV - India BO’ or ‘Appellant’), respectfully craves leave to file additional ground of appeal, in addition to the grounds of appeal filed previously by the Appellant on April 28, 2017 which is detailed herein below:

Validity of draft assessment order

22. The learned AO has erred in issuing the notice of demand under section 156 of the Act and notice initiating penalty proceeding under section 271(1)(c) along with draft assessment order and thereby making the same as final order and thus, not following the provisions of section 144C of the Act and hence, the order passed by the learned AO is bad in law and merits to be quashed.

The Appellant craves leave to add, alter, amend, vary, omit or substitute the aforesaid ground of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.

Further, it is respectfully submitted that no prejudice would be caused to the Respondent by reason of the above additional ground being admitted and adjudicated and accordingly the balance of convenience is in favour of such an order being passed by this Hon'ble Tribunal.”

4. We have heard the rival submissions and perused the material on record. In our opinion, the issue raised by the assessee being a legal issue and does not require any investigation of facts which are already on record. Accordingly, these grounds are admitted for adjudication following the decision of *Hon'ble Supreme Court judgment in the case of M/s National Thermal Power Co. Ltd. (supra)* .

5. The Id. AR submitted that the draft assessment order was passed on 23.03.2016 with a mention that such order was passed u/s. 143(3) r.w.s. 144C(13) of the Act. Further, the draft assessment order was also accompanied with a demand notice

u/s. 156 of the Act. We also note that in the draft assessment order the Ld.AO initiated penalty proceedings u/s. 271(1)(c) of the Act. According to the Id. AR, passing of the draft assessment order along with demand notice and also initiating penalty proceedings along with draft assessment proceedings are bad in law, being contrary to the procedure prescribed under law, thus subsequent final assessment order along with demand notice loses its sanctity. Being so, it deserves to be treated as null and void in the eyes of law. He relied on the following judgments:-

1.	<i>Bangalore Tribunal in case of M/s Suretex Prophylactics (India) Pvt Ltd (ITA (TP) 430/Bang/2016) dated April 01,2021</i>
2.	<i>Madras High Court in case of Vijay Television Private Limited (407 ITR 642) dated April 23, 2018</i>
3.	<i>Mumbai Tribunal in case of Lionbridge Technologies Pvt Ltd (ITA 1041/M/2015) dated May 29, 2015</i>
4.	<i>Bombay High Court in case of Lionbridge Technologies Pvt Ltd (ITA 622/2016) dated December 03, 2018</i>
5.	<i>Delhi Tribunal in the case of Olympus Medical Systems India Pvt. Ltd. (ITA No 8892/Del/2019) dated August</i>
6.	<i>Pune Tribunal in the case of Kohler Power India Private Limited (ITA No, 2467/PUN/2016) dated August 26, 2019</i>
7.	<i>Delhi Tribunal in the case of Perfetti Van Melle (India) Pvt. Ltd. (ITA No 9116/De1/2019) dated August 11, 2020</i>
8.	<i>Pune Tribunal in the case of M/s. Sandvik Asia Pvt. Ltd. (ITA No. 607/PUN/2014 & ITA No. 465/PUN/2014) dated March 26, 2018</i>
9.	<i>Pune Tribunal in the case of Skoda Auto India Pvt. Ltd. (ITA No. 2344/PUN/2012) dated June 03, 2019</i>
10.	<i>Pune Tribunal in the case of Soktas India Pvt. Ltd. (ITA No. 206/PUN/2015) dated December 09, 2016</i>
11.	<i>Supreme Court in the case of Kalyan Kumar Ray v. CIT [191 ITR 634] dated August 06, 1991</i>

12.	<i>Madras High Court in case of GE Oil & Gas India Pvt Ltd (WP 1575/2020) dated 5 January 2021</i>
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6. On the contrary, the Id. DR submitted that the order passed by the AO is valid in law as the assessee very well knew the intent of the AO while passing the draft assessment order on which he filed objections before the DRP and now he cannot raise any objection against that order. He further submitted that the various case laws relied on by the assessee are delivered on different set of facts and being so, it cannot be applied.

7. We have heard both the parties and perused the material on record. As per section 144C of the Act, it is mandatory for the Ld.AO to pass Draft Assessment Order in accordance with the procedure laid down therein. We have noticed that the coordinate Bench in the case of *Suretex Prohphylactics (India) Ltd., 62 CCH 0002 Bang Trib.*, considered similar issue and given finding after following the decision of Hon'ble Madras High Court in case of *Vijay Television (2014) 369 ITR 113 (Mad)* observed as follows:-

"11. Various decisions relied by the Ld.AR reproduced hereinabove highlight that, it is mandatory for Ld.AO to follow the procedures laid down under section 144C of the Act in an assessment that involves assessment of international transaction. Hon'ble Madras High Court in case of Vijay Television (supra) observed as under:

"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,

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(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.

144C. Reference to dispute resolution panel.-- (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

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 rules⁵² 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 Board⁵⁴ 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 *Deepak Agro Foods (supra)* wherein in Para No.10, the Honourable Supreme Court discussed as to when an order could be construed as a final order:-- "10. Shri Rajiv Dutta, learned senior counsel appearing on behalf of the appellant, submitted that in the light of its afore-extracted observations and a clear finding that the assessment order for the assessment year 1995-96 had been anti-dated, the order was null and void. It was urged that assessment proceedings after the expiry of the period of limitation being a nullity in law, the High Court should have annulled the assessment and there was no question of a fresh assessment. Thus, the nub of the grievance of the appellant is that in remanding the matter back to the Assessing Officer, the High Court has not only extended the statutory period prescribed for completion of assessment, it has also conferred jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period."

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

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

25. In the decision rendered by the Honourable Supreme Court of India in the case of *(L. Hazari Mal Kuthiala (supra))*, which was relied on by the learned standing counsel for the

respondents, it was held that the mistake or defect on the part of the Commissioner to consult the Central Board of Revenue did not render his order invalid since the provision about consultation in terms of [Section 5 \(3\)](#) of Patiala Act was merely directory and not mandatory. In the present case, the procedure that was required to be followed by the second respondent to pass a draft assessment order is mandatory and it is prescribed by the statute. Therefore, this decision relied on by the learned standing counsel for the respondents cannot be made applicable to this case.

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

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

28. By referring to the decision of the Division Bench of this Court dated 10.02.2014 passed in Tax Case (Appeal) No. 2412 of 2006, the learned standing counsel for the respondents sought to make a distinction with the decision of the Division Bench of this Court mentioned in the preceding paragraph. That is a case where the facts relating to the order covered in the decision of the Honourable Supreme Court, which the Division Bench relied on, could not be made applicable to the facts of that case and therefore it was not discussed by the Division Bench in the order dated 10.02.2014. For more clarity, the relevant portion of the decision of the Division Bench of this Court in the case of V. Ramaiah (*supra*) is extracted hereunder:--
"Certainly passing an order of assessment under [Section 158BC](#) instead of [Section 158BD](#) (inspite of clear terminology used in both the sections) would not amount to a mistake, a defect or an omission, much less a curable one. When different contingencies are dealt with under different sections of the Act, allowing an illegality to be perpetrated and then taking a plea by the Revenue that such an action adopted on their part would not nullify the proceedings, cannot be appreciated since by

virtue of such actions, the Revenue has attempted to nullify the scheme of things of limitations legally propounded under the Act...."

29. *In yet another decision of the Division Bench of this Court in the case of Smt. R.V. Sarojini Devi (supra), which was relied on by the learned senior counsel for the petitioners, it was held 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, subsections (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be apply. This indicates that this clause enables the Assessing Officer, after the return is filed, to complete the assessment under Section 143 (2) by following the procedure like issue of notice under Section 143 (2)/142. This does not provide accepting the return as provided under Section 143 (1) (a). The Officer has to complete the assessment order under Section 143 (3) only. If an assessment is to be completed under Section 143 (3) read with Section 158BC, notice under Section 143 (2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing officer to issue notice under Section 143(2) cannot be a procedural irregularity and is not curable."*

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

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

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

In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs.52.14 crores u/s.92CA of the Act on 20.09.2011 and forwarded it to the Assessing Officer and to the assessee under subsection (3) thereof. The assessing officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 01.10.2009, the cut off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft

assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly, this has not been done and the respondent has passed a final assessment order dated 22.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void. The contention of the Revenue that the circular No.5/2010 of the CBDT has clarified that the provisions of S.144C shall not apply for the assessment year 2008-09 and would apply only from the assessment year 2010-2011 and later years is not tenable in as much as the language of Sub-section (1) of [Section 144C](#) referring to the cut off date of 01.10.2009 indicates an intention of the legislature to make it applicable, if there is a proposal by the Assessing Officer to make a variation in the income or loss returned by the assessee which is prejudicial to the assessee, after 01.10.2009. Therefore, this particular provision introduced by [Finance \(No.2\) Act, 2009](#), would apply if the above condition is satisfied and other provisions, in which similar contrary intention is not indicated, which were introduced by the said enactment, would apply from 01.04.2009 i.e., from the assessment year 2010-2011. It is not disputed that the memorandum explaining the Finance Bill and the Notes and clauses accompanying the Finance Bill which preceded the [Finance \(No.2\) Act, 2009](#) clearly indicated that the amendments relating to S.144C would take effect from 01.10.2009. In our view, the circular No.5/2010 issued 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 Revenue* has not been able to persuade 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."

12. In the present facts of the case we note that the Ld.AO passed order under [section 143\(3\)](#) read with [section 144C\(1\)](#) of the Act dated 25/02/2015 and along with demand notice issued under [section 156](#) and penalty notice under [section 274](#) read with [section 271](#) of the Act. Ratio of Hon'ble Madras High Court has expressed the view that such orders passed by the Ld.AO without following due process of law are liable to be set aside. Thus, this ratio will prevail over the view taken by Hon'ble Kolkotta & Hyderabad Tribunal (Supra). We place reliance on the decision of Kaneel Oils & Export Inds. Ltd. Vs. JCIT reported in (2009) 121 ITD 596, which is a Third Member decision.

As the assessment order passed dated 25/2/2015 has been quashed and set aside, all other issues raised on merits become academic."

8. In the present case, the Ld.AO passed the draft assessment order u/s. 143(3) r.w.s. 144C (13) of the Act on 23.03.2016 which is accompanied with demand notice issued u/s. 156 of the Act dated

23.03.2016. It is also **noticed that** in the draft assessment order, the Ld.AO recorded the **statement** as follows:-

'Demand notice issued accordingly. Penalty proceedings u/s. 271(1)(c) are initiated separately for the additions made.'

9. Being so, it is observed that the draft assessment order passed by the Ld.AO is without following the due process of law as enumerated in the judgment in the case of *Vijay Television (supra)*.

10. Since the order passed by the Ld.AO is without following the due process of law and it cannot survive in the eyes of law, accordingly we quash the impugned assessment order before us. Since we have quashed the assessment order itself, we refrain from going into other grounds of appeal raised by the assessee at this stage which are kept open.

In the result, the appeal by the assessee is allowed.

Order pronounced in the open court on 19th January, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 19th January, 2022.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore