आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष

Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.2308/Kol/2019

Assessment Year: 2004-05

M/s Philips India Limited.…..……..…..…… Appellant
3rd Floor, Tower A, DLF Park,
08 Block AF, Major Arterial Road,
New Town (Rajarhat), Kolkata-700156.
[PAN: AABCP9487A]

vs.

ACIT, Circle-12(2), Kolkata.....…...…….....…..…..…..…..... Respondent

Appearances by:
Shri Ketan K Ved, CA, appeared on behalf of the appellant.
Shri Amal Kamat, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : November 17, 2022
Date of pronouncing the order : February 06, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 31.07.2019 of the Assessing Officer (in short the 'A.O') passed u/s 92CA(3) & 144C read with section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') in pursuance of the directions of the Dispute Resolution Panel (DRP) dated 14.05.2019.

2. At the outset, the ld. counsel for the assessee has submitted that the impugned assessment order framed by the Assessing Officer is null and void being framed without passing of draft assessment order. That the Assessing Officer without passing of draft assessment order and without giving opportunity to the assessee to file objections against the said draft assessment order as per provisions to section 144C of the

Act, straightway framed the final assessment order, which was not sustainable in the eyes of law. The ld. counsel has further submitted that the Assessing Officer, however, vide letter dated 21.12.2018 withdrew the said final assessment order dated 29.11.2018 along with calculation sheet, demand notice and penalty notice u/s 274 of the Act. Further, that the Assessing Officer vide the said letter dated 21.12.2018 enclosed a subsequent draft assessment order dated 21.12.2018. The ld. counsel, in this respect, has submitted that once the Assessing Officer had passed the final assessment order, the Assessing Officer had become functus officio and thereafter the Assessing Officer did not have jurisdiction to withdraw the final assessment order dated 29.11.2018 and that the draft assessment order, if any, passed subsequently was invalid, null and void. The ld. counsel has further submitted that even the assessee filed objections before the DRP against the said invalid draft assessment order, however, the ld. DRP declined to entertain and adjudicate upon the said objections holding the said draft assessment order as invalid and void. The relevant part of the DRP directions, for the sake of ready reference, is reproduced as under:

> *"3.3 In this case, consequent to reference from the AO, the TPO passed order u/s 92CA(3) of the Act on 30.10.2018 determining an upward adjustment of Rs. 6,47,36,896/. The AO included this adjustment in the assessment order but no draft assessment order was passed by the AO and he instead passed the final assessment order u/s 143(3) r.w.s 254 && 92 CA(3) of the Act on 29.11.2018 annexing tax calculation sheet, demand notice and penalty notice u/s 274 of the Act dated 29.11.2018 along with the assessment order u/s 143(3) r.w.s 254 & 92 CA(3) of the Act.*
>
> *3.4 Vide his letter dated 21.12.2018, the AO informed the assessee that the order passed u/s 143(3) r.w.s 254 & 92 CA(3) of the Act on 29.11.2018, tax calculation sheet, demand notice and penalty notice u/s 274 of the Act dated 29.11.2018 are withdrawn. Vide same letter,*

the AO enclosed the impugned draft assessment order passed on 21.12.2018.

3.5 In terms of the provisions of section 144C(1) of the Act, after reference to the TPO on the transfer pricing issue related to international transaction in terms of s.92C(3) of the Act, and after receipt of the TPO's order u/s 92CA(3) of the Act, the Assessing Officer is required to pass draft assessment order incorporating the order of the TPO in terms of s.92CA(4) of the Act.

3.6 In view of the provisions under the Dispute Resolution Panel Rules 2009 and Chapter XIV and the relevant s. 144C (1) of the Act, it is observed that the Panel has the power to issue Directions u/s 144C(5) of the Act to the Assessing Officer to enable him to complete the assessment only in regard to the cases of 'eligible assessees' in whose case the variation referred to in s.144C(1) of the Act arises as a consequence of the order passed u/s 92CA(3) of the Act, and consequently draft assessment order has been passed by the AO.

3.7 In view of the above provisions it is clear that the Panel has no jurisdiction over such draft assessment order passed subsequent to withdrawal of final assessment order. Therefore, the DRP is of the view that the assessee's case is beyond the jurisdiction of the DRP. Hence, we held that the impugned draft assessment order is not a valid order u/s 92CA(4) of the Act and, therefore, we find ourselves unable to deal with the invalid draft assessment order.

3.8 In view of our decision at Para 3.7 above, there is no need of DRP directions on Ground of objections between No. 2 to 5."

3. A perusal of the above DRP order would reveal that DRP has categorically held that it had no jurisdiction over such a draft assessment order passed subsequent to withdrawal of the final assessment order. The ld. counsel has also relied upon the following case laws to stress the point that passing of the draft assessment order is sine qua non before passing of the final assessment order and further that once the final assessment order has been passed, the subsequent order/draft order etc. will not have any validity:

"1. Decision of the Mumbai Bench of the Tribunal in the case of Jazzy Creations Pvt. Ltd. v/s. ITO reported in [2017] 83 taxmann.com 244

2. Decision of the Delhi Bench of the Tribunal in the case of Olympus Medical Systems India Pvt. Ltd. v/s. DCIT [ITA No. 8892/ Del/2019]

3. Decision of the Delhi Bench of the Tribunal in the case of Perfetti Van Melle India Pvt. Ltd. v/s. ACIT [ITA No. 9116/Del/ 2019]

4. Decision of the Delhi Bench of the Tribunal in the case of Suretex Prophylactics (India) Ltd. v/s. ACIT [IT(TP) A No. 430/ Bang/2016]

5. Decision of the Pune Bench of the Tribunal in the case of Atlas Copco India Ltd. v/s. DCIT [ITA No. 649/Pun/2013 and 1726/Pun/ 2014 alongwith CO Nos. 34 & 35/Pun/2019]

6. Decision of the Pune Bench of the Tribunal in the case of DCIT v/s. Rehau Polymers Pvt. Ltd. reported in [2017] 85 taxmann.com 23

7. Decision of the Pune Bench of the Tribunal in the case of Soktas India Pvt. Ltd. v/s. ACIT reported in [2017] 77 taxmann.com 19

8. Decision of the Delhi Bench of the Tribunal in the case of Mavenir India Pvt. Ltd. v/s. DCIT [ITA no. 203/ Del/2010]

9. Decision of the Pune Bench of the Tribunal in the case of Skoda Auto India Pvt. Ltd. v/s. ACIT [ITA No. 2344/ Pun/2012]"

4. The ld. DR could not rebut the fact that even the DRP has held that any draft assessment order passed by the Assessing Officer after final assessment order was not a valid draft assessment order, therefore, the ld. DRP has also declined to interfere or propose any adjustment to such an invalid draft assessment order.

5. At this stage, we deem it appropriate to discuss the relevant provisions of section 144C also. The relevant part of the provisions of section 144C, for the sake of ready reference, is reproduced as under:

"11. Provisions of section 144C read 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."*

12. Most relevant clauses pertinent for adjudication of the quarrel reads as under:

> *"(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).*
>
> *(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."*

6. A perusal of the aforesaid provision would show that the Assessing Officer before passing of the final assessment order is mandatorily required to forward a draft of the proposed order of assessment (draft order) to the eligible assessee if he proposes to make any adjustment, and to give opportunity to the assessee to file objections against such draft order either to the Assessing Officer himself or to the DRP. In this case, the Assessing Officer straightway passed the final assessment order, without passing any draft assessment order. As held by the various Benches of the Tribunal as noted above, a final assessment order without passing of the draft assessment order, being not in accordance with law, is liable to be quashed and further that the subsequent proceedings after passing of the final assessment order would also be vitiated and would not have any sanctity of the law. Reliance, in this respect, can be placed on the

decision of the Coordinate Bench of the Tribunal in the case of "Jazzy Creations Pvt. Ltd."(supra), wherein, the Tribunal while relying upon the decision of the Hon'ble Madras High Court, in the case of "Vijay Television Pvt. Ltd Vs DRP" [(2014) 369 ITR 113 (Mad)] has quashed such an invalid assessment order which was framed without passing of draft assessment order and held that the subsequent corrigendum issued by the Assessing Officer did not have any legal sanctity. The relevant part of the order of the Tribunal, for the sake of completeness, is reproduced as under:

> *"9. The scheme of Section 144C is unambiguous. Section 144C(1) states that "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". Clearly, therefore, the issuance of a draft assessment order is a sine qua non before the Assessing Officer can pass a regular assessment order under section 143(3). We have carefully perused the assessment order dated 24 November 2010. It is a regular assessment order in form and in substance. Not only that the income is computed, tax payable thereon is computed and demanded, entries are made on the basis of this order in the demand and collection 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 a draft assessment order is wrongly titled as an assessment order, Section 292B comes to the rescue of the Assessing Officer as it specifically provides that "(n)o return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act". The key really is that even if the draft assessment order has a wrong description as an "assessment order", as long as it is "in substance and effect, in conformity with, or according to the intent and purpose of this Act", no objection can be taken to the same. However, given the fact that*

that the resultant tax demand is raised, penalty proceeding initiated and entries made, the order passed by the Assessing Officer was a final assessment order in substance and in effect. The subsequent letter dated 30th December 2010, issued by the Assessing Officer, was only a cover up exercise to convert a regular assessment order into a draft assessment order. However, once a regular assessment order is framed and issued- as, in our considered view, was issued on 24th November 2010, there cannot be any occasion to turn the clock back and issue a draft assessment order. As to what is the impact of an assessment order being directly issued, in a situation in which the assessee is an eligible assessee who ought to have been issued a draft assessment order, we find the following guidance from the decision of a coordinate bench in the case of Capsugel Healthcare Limited Vs ACIT and vice versa [(2015) 152 ITD 142 (Del)] :-

> *7. We find that the issue is covered is now covered in favour in of the assessee by judgment of Hon'ble Madras High Court, in the case of Vijay Television Pvt. Ltd Vs DRP [(2014) 369 ITR 113 (Mad)] wherein Hon'ble High Court has, inter alia, observed as follows:*
>
> *20. Under Section 144(C) of the Act, it is evident that the assessing officer is required to pass only a draft assessment order on the basis of the recommendations made by the TPO after giving an opportunity to the assessee to file their objections and then the assessing officer shall pass a final order. According to the learned senior counsel for the petitioners, this procedure has not been followed by the second respondent inasmuch as a final order has been straightaway passed without passing a draft assessment order.*
>
> *21. As rightly pointed out by the learned senior counsel for the petitioners, in the order passed on 26.03.2013, the second respondent even raised a demand as also imposed penalty. Such demand has to be raised only after a final order has been passed determining the tax liability. The very fact that the taxable amount has been determined itself would show that it was passed as a final order. In fact, a notice for demand under Section 156 of the Act was issued pursuant to such order dated 26.03.2013 of the second respondent.*
>
> *Both the order dated 26.03.2013 and the notice for demand thereof have been served simultaneously on the petitioner. Therefore, not only the assessment is complete, but also a notice dated 28.03.2013 was issued thereon calling upon the petitioner to pay the tax amount as also penalty under Section 271 of the Act. Thereafter, the petitioner was given an opportunity of hearing*

on 12.04.2013. Subsequently, the second respondent realised the mistake in passing a final order instead of a draft assessment order which resulted in issuing a corrigendum on 15.04.2013. In the corrigendum it was only stated that the order passed on 26.03.2013 under Section 143C of the Act has to be read and treated as a draft assessment order as per Section 143C read with Section 93CA (4) read with Section 143 (3) of the Act. In and by the order dated 15.04.2013, the second respondent granted thirty days time to enable the assessee to file their objections. On receipt of the corrigendum dated 15.04.2013, the petitioner company approached the first respondent, but the first respondent declined to issue any direction to the assessment officer on the ground that the first respondent has got jurisdiction only to entertain such an appeal if the order passed by the second respondent is a pre-assessment order. Therefore, it is evident that the first respondent declined to entertain the objections raised by the petitioner company on the ground that the order passed by the second respondent is not a draft assessment order, rather it is a final order. Thus, the first respondent had treated the order dated 26.03.2013 of the second respondent as a final order and therefore it refused to entertain the objections filed on behalf of the petitioner company.

22. As mentioned supra, as per Section 144C (1) of the Act, the second respondent-assessing officer has no right to pass a final order pursuant to the recommendations made by the TPO. In fact, the second respondent assessing officer himself has admitted by virtue of the corrigendum dated 15.04.2013, that the order dated 26.03.2013 is only a final order and it was directed to be treated as a draft assessment order. In this context, it is worthwhile to refer to the decision of the Honourable Supreme Court in the decision Deepak Agro Foods (supra) wherein in Para No.10, the Honourable Supreme Court discussed as to when an order could be construed as a final order:-

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

has also conferred jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period."

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

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

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

26. The learned senior counsel for the petitioners relied on the decision of the Allahabad High Court in the case of Shital Prasad Kharag Prasad (supra) wherein the Division Bench of the 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 (in spite 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 (2 supra). The 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.

8. Learned Departmental Representative, on the other hand, submits that this lapse on the part of the Assessing Officer is at best a procedural lapse and the matter should, therefore, be restored to the file of the Assessing Officer for adjudication de novo.

9. We are, however, unable to see any legally sustainable merits in the stand so taken by the learned Departmental Representative. Hon'ble High Court's esteemed views, as extracted above, bind us and we have to respectfully follow the same. Accordingly, in due deference to this binding judicial precedent, and other binding judicial precedents referred to therein, we quash the impugned assessment order. It is a legal nullity. As for the show cause notice issued by the Assessing Officer, before making the ALP adjustment, this cannot be treated as a draft assessment order nor the assessee could have approached the DRP against the same. Learned CIT(A) was thus clearly in error in equating the show cause notice with a draft assessment order against, and thus rationalizing the impugned assessment order. The stand of the CIT(A) cannot be upheld. In a case in which no draft assessment order is furnished to the assessee, to which assessee is entitled under section 144C (15), the assessment order passed by the AO is to be held is illegal and liable to be quashed on this ground alone. We do so.

10. As we have seen in the reproductions above, the issuance of corrigendum by the Assessing Officer was not allowed to be given effect by the Hon'ble Court as well. What is material is that the original assessment order was in form and in substance a regular assessment order, and not a draft assessment order. Learned Departmental Representative has also submitted that since the assessee has participated in the proceedings before the DRP, it cannot be open to the assessee to raise this question now. It is only elementary that acquiescence does not confer the jurisdiction, and the only issue which cannot be raised subsequently, in the light of the specific provisions of Section 292BB, is objections with regard to service, time or manner of service of a notice. That is not the case before us. In any event, in the case of Inventors Industrial Corp (supra) as well, the assessee had duly participated in the reassessment proceedings and yet, in the second

round of proceedings, the objections were taken to the validity of reassessment itself. In this view of the matter, and in the light of the above discussions, we uphold the grievance of the assessee and quash the impugned assessment order itself. The issuance of a regular assessment order, without issuance of draft assessment order, was an illegality, but once a regular assessment order was so framed, it was also no longer open to the Assessing Officer to issue a corrigendum or the draft assessment order after issuance of the regular assessment order. As the assessment order itself is quashed, all other issues raised in this appeal have been academic and infructuous. These issues do not call for any adjudication as on now.

7. In view of the above discussion, the impugned assessment order is hereby quashed and the consequential additions/adjustments stand deleted.

8. In the result, the appeal of the assessee stands allowed.

Kolkata, the 6th February, 2023.

Sd/-	Sd/-
[गिरीश अग्रवाल /Girish Agrawal]	**[संजय गर्ग /Sanjay Garg]**
लेखा सदस्य/**Accountant Member**	न्यायिक सदस्य/**Judicial Member**

Dated: 06.02.2023.
RS

Copy of the order forwarded to:
1. M/s Philips India Limited
2 ACIT, Circle-12(2), Kolkata
3. CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches