

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.6830/DEL/2015
Assessment Year 2011-12

North Shore Technologies Pvt. Ltd., H-9, Hauz Khas, New Delhi.	v.	ITO, Ward-13(3), New Delhi.
TAN/PAN: AAACN 9477H		
(Appellant)		(Respondent)

Appellant by:	Shri Piyush Kaushik, Adv.		
Respondent by:	Ms. Nidhi Sharma, Sr.D.R.		
Date of hearing:	25	11	2019
Date of pronouncement:	13	02	2020

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Assessee against the impugned order dated 15.09.2015, passed by Commissioner of Income Tax (Appeals)-XLIV, New Delhi for the quantum of assessment passed u/s.143(3) r.w.s. 144C for the Assessment Year 2011-12. In the grounds of appeal, the assessee has raised following grounds:-

“1. On the facts and circumstances of the case, the learned CIT(A) erred in upholding time barred assessment as valid assessment.

2. On the facts and circumstances of the case, the learned CIT(A) erred in holding the draft assessment order as

final assessment order.

3. *On the facts and circumstances of the case, the learned CIT(A) erred in upholding the draft assessment order dated 31.03.2014 as valid which was served on appellant without determination of tax payable by the appellant.*

4. *On the facts and circumstances of the case, the learned CIT(A) erred in holding that corrigendum order dated 05.05.2014 passed by AO has removed the deficiency in the draft assessment order without realizing that the corrigendum order was passed beyond limitation period and such order cannot validate a time barred assessment.*

5. *On the facts and circumstances of the case, the learned CIT(A) erred in holding the draft assessment order dated 31.03.2014 as valid assessment when Notice of Demand was served on appellant on 05.05.2014 along with corrigendum order dated 05.05.2014 which was passed beyond limitation period.*

6. *On the facts and circumstances of the case, the leaned CIT(A) erred in upholding the validity of corrigendum order in spite of the fact that the same did not contain mention of the provision of Income Tax Act under which it was passed.*

7. *On the facts and circumstances of the case, the learned CIT(A) erred in upholding the AO act of denying the appellant deduction of RS 46,23,444/- u/s. 10A of the Income Tax Act.”*

2. Before us, ld. counsel for the assessee has challenged the validity of entire assessment order on the ground that

same has been passed beyond the limitation period. He submitted that Assessing Officer has passed the assessment order as 'draft assessment order', whereby he has made addition of Rs.46,59,671/- on account of transfer pricing adjustments and addition of Rs.46,23,444/- on account of other corporate tax issues. He submitted that the said draft assessment order is accompanied by forwarding letter dated 31.03.2014, which goes to show that Assessing Officer has issued the order with all its intention and purpose as a 'draft assessment order'. This is evident from the following letter enclosed in paper book at page 20.

'To,
The Principal Officer
M//s North Shore Technologies Private Limited H-9, Hauz
Khas New Delhi

Sir,

*In the case of: M/s Northshore Technologies Private Limited -
PAN -AAACN9477H Sub: Forwarding of **Draft Assessment
Order**- Assessment Year 2011-12-Reg.*

I am forwarding herewith a copy of draft assessment order passed u/s 143(3) r.w.s. 144C dated 31.03.14 as per provisions of section 144C of the I.T. Act 1961. If the Transfer pricing adjustment determined is not acceptable, you may file objection before the Dispute Resolution Panel and file a copy of the same to this office within 30 days of receipt of this draft order. If you are accepting the variations acceptance may be

filed before the undersigned within 30 days of receipt of this draft order, failing which this draft order shall be given the final effect.

End: as above

***Sd/-
Arun Kumar
Income Tax Officer
Ward 13(3), New Delhi.”***

3. Thus, he submitted that the aforesaid letter clearly confirms that Assessing Officer has consciously passed draft assessment order dated 31.03.2014 and it was not a final assessment order. Apart from that, the draft assessment order was not accompanied by any notice of demand. Later on, on 05.05.2014 after the expiry of time barring date of 31.03.2014 for framing the assessment, Assessing Officer issued a corrigendum dated 05.05.2014 stating that in the order sent by him, it was wrongly mentioned as assessment order passed u/s.144C r.w.s. 143(3), that it is a draft order and it should be treated as final assessment order. Along with the said corrigendum the Assessing Officer has issued Notice of Demand and show cause notice u/s. 271(1)(c).

4. Before the Ld. CIT(A), the assessee has specifically challenged that no valid assessment order has been within the stipulated time limit of 31.03.2014, and therefore, the assessment proceedings are barred by limitation. Since, it is only a draft assessment order and no final order has been passed on or before 31.03.2014, therefore, the said assessment is barred by limitation and is bad in law.

5. Ld. CIT(A) has dealt and decided the issue in the following manner:

“4.2 The facts of the case is that the transfer pricing adjustment was done by the assessing officer without reference to the TPO. Therefore, there is no order passed by TPO u/s. 92CA(3) of I.T. Act & therefore, Section 144C is not applicable and providing draft assessment order to the assessee was not required as has been done by the assessing officer. Having held so, only issue which remains to be answered is whether the said order dated 31.03.2014 can be said as assessment order. The said order has been passed & served within lime allowed under the provision of Section 153 of I.T. Act. To determine this issue, it would be proper to go through contents of the impugned assessment order. The assessing officer in last para 5 of the assessment order has computed total income & directed to calculate tax & charge interest u/s. 234A, 234B &, 234C. The relevant paragraphs of assessment order is reproduced as under:-

5. After discussion the total income is computed as:

<i>The returned income</i>	<i>: Rs.15,09,015/-</i>
<i>Addition as discussed in para 4</i>	<i>: Rs.46,59,671/-</i>
<i>(on account of Transfer pricing adjustment</i>	
<i>Addition as discussed in para 5</i>	<i>: Rs.46,23,444/-</i>
<i>Total income</i>	<i>: Rs.1,07,92,130/-”</i>

Assessed at a total income of Rs. 1,07,92,130/- u/s. 144C read with section 143(3) of the Act Calculate the tax and charge interest u/s 234 A/B/C/D of the Act, as applicable. Penalty proceedings u/s.271(l)(c) of the Act are being initiated separately since I am satisfied that assessee has concealed taxable income and have not disclosed true particulars of the

income. Give credit for prepaid taxes if any after due verification. Issue necessary forms.

A perusal of the above workings reveals that total income is already assessed & the order is already signed by the assessing officer. Even notice of demand u/s. 156 and penalty notice u/s 274 is signed on 31.03.2014 which were of course sent to the appellant alongwith corrigendum dated 05.05.2014.

4.3 Ld. AR's allegation that demand notice and penalty notice u/s 274 were signed back dated has been examined in depth. The copy of impugned order dated 31.03.2015 which has been perused. The first page contains DCR No. 01/91/2013-14. Therefore, this order is entered in Demand & Collection register of the assessing officer. Without raising demand, an entry cannot be made in demand & collection register of the assessing officer. Therefore, allegation of Ld. AR that demand notice was issued back dated is unproved. If the copy of order dated 31.03.2014 in possession of the assessee contains DCR No, it proves that the demand was entered on 31.03.2014 alongwith the order. Therefore, by just mentioning 'draft' word in the assessment order and mentioning of Section 144C cannot make the assessment null & void. This mistake has been corrected by passing corrigendum dated 05.05.2014, subsequently.

In the view of the above though demand notice issued in time was served alongwith corrigendum dated 05-05-2014 will not make the assessment invalid as impugned assessment order determining the total income was passed and served in time. Therefore, the assessee knew the liability arising as a result of

passing the assessment order. The appellant has not been put in disadvantaged position for the late service of notice of demand u/s 156, as the appellant has been given time to file appeal after the date of service of notice demand as per provisions of section 246A of the act.

4.4 1 have examined judicial pronouncement relied by Ld. AR. The case of PK Chandra v/s state of Kerala cited Supra Hon'ble S.C has only given general guidelines on the law of limitation. In the case of CIT v/s. Balakrishnan Malhotra cited supra Hon'ble Supreme Court has held that determination of tax is essential to assess total income. Similarly in the case of Kalvan Kumar A v/s CIT Hon'ble Supreme Court has held the unless tax that the computation sheets for the tax liability are signed by the IT officer, the process of assessment is not complete. In present case the assessment order including determination of tax liability was completed before time barring date. Therefore, the above two judgments of Hon'ble Supreme Court does not help the appellant In the case of Vijay Television Pvt. Ltd. Hon'ble Madras High court has held that in case of reference made to the TPO or determination of Arm's Length Price, the assessing officer has to pass only draft assessment order u/s.144C of IT act and not the final assessment order. Therefore, this decision is not applicable on the facts of the case.

4.5 Considering entire facts and circumstances of the case, my view by mentioning the word draft assessment order and 144C by mistake does not make assessment order bad in law. Accordingly, all the jurisdictional grounds are hereby dismissed.

6. Before us, ld. counsel after narrating the fact and background of the case, submitted that corrigendum issued cannot be treated as final assessment order as a draft assessment order, when the corrigendum itself has been issued beyond the period of limitation. In support, he relied upon the following judgments:-

i. Decision of Delhi ITAT in the case of Oracle India Pvt. Ltd. Vs. ACIT in cross appeals dated 13/04/18;

ii. Decision of Madras High Court in the case of Vijay Television P. Ltd. Vs Dispute Resolution Panel & Ors. (2014) 369 ITR 113 (Mad.);

iii. Decision of Delhi High Court in the case of Turner International India Pvt. Ltd. Vs. DCIT (2017) 398 ITR 177 (Del.);

iv. Decision of Bombay High Court in the case of Principal Commissioner of Income Tax Vs. Lionbridge Technologies Pvt. Ltd. 2018-TII-268-HC-MUM-TP.

7. By way of alternative argument, he submitted that there is another illegality in the approach of the Assessing Officer, as in terms of provisions of section 92CA where the AO considers necessary or expedient to determine the ALP of international transactions then a reference is to be made to the TPO. The provisions of Income tax Act nowhere authorizes an AO to step in the shoes of TPO and assume the functions of TPO. The AO accordingly on the facts of present case has committed an illegality at the threshold in assuming the role of TPO himself without referring the matter to TPO. It equally

settled that when an authority under the provisions of law is required to act in a particular manner then that power has to be exercised and the act has to be performed in that manner alone and not in any other manner. A direct reliance is placed for this proposition on the ensuing decisions:-

i. Dr. Shashi Kant Garg v. CIT [2006] 152 Taxman 308/285 ITR 158 (All.);

ii. CIT v. Anjum M.H. Ghaswala [2001] 119 Taxman 352/252 ITR 1 (SC);

iii. Dy. CIT v. Mahi Valley Hotels & Resorts [2006] 287 ITR 360 (Guj.);

iv. ITO Vs Aditya Narain Verma (HUF) (2017) 88 taxmann.com 840.”

8. On the other hand, ld. DR strongly relied upon the order of the Ld. CIT(A) and submitted that the Assessing Officer has passed the assessment order on 31.03.2014 which was within the limitation period and the corrigendum issued thereafter clearly shows that it was a final assessment order only. He strongly referred to the observation and finding given by the Ld. CIT(A) as reproduced above.

9. After considering the rival submissions and on perusal of the impugned order as well as material placed on record, we find that the assessee company had filed its return of income on 29.09.2011 through electronic mode and the said return was processed u/s.143(1). Thereafter, assessee's case

was selected for scrutiny u/s.143(2) and thereafter assessment proceedings had commenced. In form 3CEB, the assessee had disclosed international transaction on provision of Software Development Services with AE at Rs.4,55,56,928/-. The ld. Assessing Officer has noted the business of the assessee as given in the transfer pricing report and he has made transfer pricing adjustment of Rs.46,59,671/- by computing the Arm's Length Price of international transaction, without even referring the matter to the Transfer Pricing Adjustment Officer as required under the law in terms of Section 92CA. The provisions of the Act is very clear wherein Assessing Officer cannot assume the role of TPO without referring the transfer pricing analysis on international transaction to the TPO. Such an exercise of transfer pricing adjustment itself gets vitiated.

10. From a bare perusal of the impugned assessment order, it is seen that it is captioned as 'draft assessment order' which has been passed on 31.03.2014. Along with the said draft assessment order, the Assessing Officer has written a forwarded letter which has been incorporated above, which clearly shows that he was forwarding the 'draft assessment order' and that it has been passed u/s.143(3) r.w.s. 144C. He has categorically said that if Transfer Pricing Adjustment is not acceptable, then assessee may file objection before the DRP within 30 days after the receipt of the order. Thereafter, the ld. Assessing Officer has passed corrigendum on 05.05.2014 which reads as under:

“This is in continuation to my earlier letter dated 31.03.2014 and accompanied assessment order dated 31.03.2014. It is to be brought in your knowledge that while passing the assessment order, it was erroneously mentioned that the order passed is a draft order u/s. 144C read with section 143(3) of the Income Tax Act. It is to be stated that the order was passed u/s. 143(3) and the same may be treated as final order passed u/s.143(3) of the Act. It is pertinent to mention that income was determined as per provisions of the Act and accordingly assessed at Rs. 1,07,92,130/- and demand notice was prepared vide DCR entry no.91/01 dated 31.03.2014, which is also mentioned on the first page of the above referred order, thereby raising demand of Rs.38,75,320/- on 31.03.2014. Notice of Demand of Rs.38,75,320/- dated 31.03.2014 u/s.156 of the Act, is enclosed herewith with the corrigendum alongwith ITNS-150 and show cause notice u/s.271(1)(c) of the Act read with section 274 of the Act. Time period as provided in the section 156 and 246A of the Act may be counted from the date of service of this corrigendum having enclosed notice of demand u/s. 156 of the Act and show cause notice u/s. 271(1)(c) of the Act read with section 274 of the Act.”

11. Such a corrigendum cannot validate the draft assessment order passed by the Assessing Officer, where he had clearly mentioned that, order passed u/s.143(3)/144C, is a draft assessment order and even his forwarding letter further clarifies the same and the intention of the Assessing Officer. It is an undisputed fact that limitation for passing the assessment order, if it was not draft assessment order was

31.03.2014. However, as noted above, the Assessing Officer has passed the draft assessment order and has forwarded the same to the assessee stating that if the assessee does not agree with the transfer pricing adjustment, then he can file objection before the DRP within 30 days of the said order. It is only when assessee intimates to the Assessing Officer that he has accepted the variation order he has no objection within 30 days then Assessing Officer has to complete the assessment order on the basis of draft assessment order. Here in this case, there was international transaction and deviation arises out of transfer pricing adjustments though without referring to TPO in terms of Section 92CA, the Assessing Officer was obliged to follow the procedure u/s.144C, which he has not.

13. The Tribunal in the case of Oracle India Pvt. Ltd. vs. ACIT, after taking note of the judgment of Hon'ble Madras High Court in the case of Vijay Television Pvt. Ltd. vs. DRP & Ors., (2014) 369 ITR 113 (Mad.); and judgment of Hon'ble Delhi High Court in the case of Turner International India Pvt. Ltd. vs. DCIT, (2017) 398 ITR 177 (Del.) has observed and held as under:

“15. The sequitur of the aforesaid judgments of the Hon'ble Jurisdictional High Court, which can be culled out are as under:

Firstly, Assessing Officer has to follow the mandatory procedure of Section 144C (1), i.e., to pass a draft assessment

order and if such a draft assessment order has not been passed and instead final assessment order has been passed, then such a final assessment order is null and void;

Secondly, merely by issuing a corrigendum, final assessment order passed cannot be converted into a draft assessment order especially when such corrigendum has been passed beyond the period of limitation; and

Lastly, if the draft assessment order has not been passed in accordance with the procedure laid down in Section 144C (1) and instead final assessment order has been passed though within the limitation time, then such an order cannot be cured after the limitation has expired by any subsequent rectification proceedings or corrigendum and in such a situation all the subsequent proceedings and final assessment order will get invalidated.

It is a trite proposition that errors which can be rectified either u/s.154 or some error in the printing work for which a corrigendum has been issued, cannot be resorted for curing the defect of jurisdictional nature and if there is an error of jurisdiction or limitation, then same cannot be validated by such an order. Rectification orders can only be exercised in respect of an order which is valid on the date of proposed rectification and if the order itself was void ab initio for want of following the correct procedure of law then such a rectification cannot revive its legality.

16. Accordingly, we hold that the proposed corrigendum issued by the Assessing Officer so as to cure the defect of the

original final assessment order is bad in law and same could not have been done and consequently entire subsequent proceedings and final assessment order dated 30.10.2013 is held to be invalid being barred by limitation and is hereby quashed.”

12. Thus, draft assessment order dated 31.03.2014 cannot be treated as final assessment order simply by way of issuing corrigendum on 05.05.2014 and since no final assessment order has been passed as on 31.03.2014 and only draft assessment order has been passed, therefore, the said draft order has no consequence and is null and void. Accordingly, on this ground, appeal of the assessee is allowed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 13th February, 2020.

Sd/-

**[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER**

DATED: 13th February, 2020

PKK:

Sd/-

**[AMIT SHUKLA]
JUDICIAL MEMBER**