

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad**

Before Shri Rama Kanta Panda, Accountant Member

AND

Shri Laliet Kumar, Judicial Member

ITA-TP.No.385/Hyd/2021		
Assessment Year: 2017-18		
Apache Footwear India Private Limited Apache SEZ, Mambattu Village TADA, Nellore Andhra Pradesh-524 401 PAN : AAFCA6140B	V s.	ACIT, Circle-1(1) Tirupati
(Appellant)		(Respondent)
Assessee by:		Shri Kuriachan, CA
Revenue by:		Shri Rajendra Kumar, CIT-DR
Date of hearing:		09.01.2023
Date of pronouncement:		11.01.2023

ORDER

Per Shri Laliet Kumar, J.M.

This is appeal filed by the Assessee, feeling aggrieved by the order passed by the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, dated 26.02.2021 for the AY 2017-18, on the following grounds

1. The order of the learned Dispute Resolution Panel -1, Bengaluru (DRP), dismissing the objection filed by the petitioner against the draft assessment order without considering the jurisdictional tribunal decision and other judicial precedence pleaded by the petitioner is bad in law.

2. The learned DRP erred in not considering the fact that the petitioner has not allowed any excess credit period to the Associate Enterprise (AE), rather the delay in the cases referred by the learned Transfer Pricing Officer (TPO) was only due to technical reason or seeking clarifications by the AE.

3. The learned DRP failed to appreciate the fact that during the year out of total 3,910 invoices raised on AE, only 335 invoices delayed for realisation which is less than 10% of the total number of invoices raised

during the assessment year and by no stretch of imagination it can be said that by doing this the assessee had extended benefit to the AE by way of advancement of interest free loan.

4. The learned DRP erred in upholding ad-hoc credit period of 60 days for export realisation when the foreign exchange regulator, Reserve Bank of India allows a period of 1 year for realisation of export consideration.

5. The learned DRP failed to appreciate the fact that the assessee is a debt free company and has not incurred interest expenses and entire working capital requirements were made by internal accruals and capital contributions and hence there is no justification for charging notional interest on delayed realisation of receivables and erred in not following the decision of the jurisdictional Tribunal 'A' Bench in the case of Mis Value Labs Technologies, Hyderabad Vs. Asst. Commissioner of Income Tax, Circle 8(1), Hyderabad (ITA No.1921/Hyd/2018) and Hon'ble ITAT Delhi decision in the case of Optum Global Solutions (India) Private Ltd, Hyderabad Vs. ACIT Special Range-9, New Delhi (ITANo.6665/DeI./2017).

6. The DRP failed to appreciate the fact that when TNMM method has been applied as the most appropriate method, it could take care of all notional interest costs wherever it could be applied and there could be no separate upwards adjustment for export receivables for delayed realisation of bills as decided by the Hon'ble Income Tax Appellate Tribunal. Chennai in the case of Mis Gimpex Pvt Ltd Vs. Assistant Commissioner of Income Tax, Central Circle 1(2), Chennai[IT(TP)A.No.57/Chny/2019]

7. Leamed Dispute Resolution Pa nol-1 erred in net considering the plea of the Appellant that no separate bench marking is required for export dues realised beyond 60 days period as receivables ingrained in the sale.

8. The learned DRP failed to appreciate the fact that sales result in profit and that of lending money gives interest income and thus it is evident that interest income is associated only with lending or borrowing of money and not with sale as concluded by the Hon'ble Delhi Tribunal in the case of M/s corbus India pvt Ltd Vs. DCIT, Circle 3(1), New Delhi ((3) (2020(3) TM 11192 -ITAT Delhi) and as held by the Hon'ble Mumbai Tribunal in Mis Indo American Jewellery Limited (ITA No.5872/Mum/2009) that early or late realisation of sales proceeds is only incidental to sale transaction and not a separate transaction itself.

9. The petitioner most respectfully prays that in the light of the submission made above and based on the judicial pronouncements made, the Hon'ble Tribunal may be pleased to quash the order of the Hon'ble Dispute Resolution Panel-1, Bengaluru and delete the addition of interest on delayed realisation of export bills made by the learned TPO.

2. The Assessee has also raised following additional grounds:-

1. *The learended Assessing Officer erred in not passing a final order, upon receipt of the directions issued by the Hon'ble Dispute Resolution Panel under subsection 5 of Section 144C of the Income Tax Act, 1961, as required under Sub section 13 of Section 144C of the Income Tax Act, 1961.*

2. *As per subsection 13 of Section 144C of the Act, the learned Assessing Officer was required to pass final order within one month from the end of the month in which a direction under subsection 5 of Section 144C of the Act was received by the Assessing Officer, ie., on or before 31/07/2021 and not having passed such an order, the entire assessment proceedings became vitiated and the draft assessment order passed by the learned Assessing Officer on 26/02/2021 becomes void ab intio and liable to be quashed.*

3. *Learned Assessing Officer erred in making an addition of Rs.11,72,618/- and initiating penalty proceedings under section 274 red with section 270A, 271BA, 271AA and 271G of the Act based on Draft Assessment Order without passing a final order as required under section 144C(13) of the Income Tax Act, 1961.*

3. The brief facts of the case are that assessee is a company and filed the return declaring total income at Rs. Nil. Subsequently, the case was selected for limited scrutiny under CASS. A notice u/s. 143(2) issued to the assessee on 27.08.2018, which was duly served upon the assessee. Notices u/s. 142(1) along with questionnaire were issued on 12.02.2021 and duly served upon the assessee. In response thereto, the assessee filed e-submissions on 17.02.2021. The information furnished by the assessee in response to statutory notices from time to time has been verified with the return of income and audit report filed by the assessee. During the course of assessment proceedings, it was found from the 3CEB report that the assessee company had entered into international transactions with its associated enterprises aggregating to Rs.9,50,25,02,242/-. The case was selected for scrutiny and the reason for selection of scrutiny is T.P. risk parameter, i.e. "Large International transactions", .

3.1 . Hence a reference as per Para 3.2 of the Board's instruction No.3/2016 dated 10/03/2016 was made to the TPO (Transfer

Pricing Officer), on 17.06.2019 after obtaining the approval of the Pr.Commissioner of Income-tax. Tirupati.

3.2 Accordingly, the Transfer Pricing matters were examined by the Dy. Commissioner of Income-tax(Transfer Pricing Officer)-1, Hyderabad and an order u/s. 92CA(3) of the Income-tax Act, 1961 was passed by him on 22.01.2021 determining the upward adjustment of Rs.15,45,798/- u/s. 92CA of the Act, mentioning as “**assessment order**”.

3.3 Subsequently, the TPO passed rectification order u/s. 92CA(3) r.w.s. 154 dated 18.02.2021 reducing the enhancement from Rs.15,45,28,798 to Rs.11,72,618/-.

3.4 Accordingly, the income returned was enhanced as per the provisions of section 92CA(3) of the Act by a sum of Rs.11,72,618/- towards arm's length price determined by the TPO u/s. 92CA(3) r.w.s. 154 of the Act dated 18.02.2021. Penalty proceeding u/s. 271A, 271BA and 271G were also initiated under law.

4. However, the assessee had challenged the draft assessment order while filing the proceeding u/s.144C of the Act before the ld.DRP, the ld.DRP had passed direction vide order dated 25.06.2021. It was the contention of the ld.AR and the grounds raised before us that after passing the order, the AO had not passed any assessment order pursuant to the order of the DRP. It was submitted that it is mandatory for the AO to pass the assessment order after passing the direction by the DRP.

5. The ld.AR had submitted that the AO has passed the assessment order in the present case on 26.02.2021, though it should be titled as draft assessment order. Along with this order AO has also sent the computation of income and has also issued the penalty notices to the assessee.

6. The Id.AR had filed the following written submissions in support of his contention before us.

1. The learned Assessing Officer failed to follow the procedures prescribed under section 144C for passing draft assessment order and passed a draft assessment order along with demand notice and initiated penalty proceedings and issued penalty notice.

2. The learned Assessing Officer passed the draft assessment order by designating it as the 'Assessment Order' under section 143(3) of the Act and also issued demand notice under section 156 and initiated penalty proceedings.

3. The learned Assessing Officer ought to have passed a final assessment order and issued demand notice and penalty notice only upon receiving direction from the Hon'ble Dispute Resolution Panel.

4. The Hon'ble Apex Court in the case of Kalyan Kumar Ray Vs. CIT191 ITR 634 (SC) held that the assessment proceedings come to an end on the issue of notice of demand U/s 156 of the Act. The Hon'ble Court held that "once a notice of demand is issued, the AO becomes functus officio in so far as the completion of the assessment is concerned. It consequently follows that issue of notice of demand marks the completion of the assessment" .

5. It is most respectfully submitted that by issuing demand notice u/s 156 along with the draft assessment order on 26102/2021, the learned Assessing Officer has finalized the assessment at the stage of draft assessment order and thereby failed to follow the statutorily mandatory procedure under the Act and hence the order passed by the learned Assessing Officer is not a valid order and liable to be set aside.

6. In an identical case, Hon'ble ITAT Delhi in the case of Perfetti Van Melle India Pvt Ltd. Vs. ACIT Circle 3(1), Gurgaon 2020(8) TMI 273 - ITAT Delhi held that by issuing demand notice along with draft assessment order. the Assessing Officer by passed the mandatory sub sections of section 144C of the Act and set aside the order.

7. The Appellant rely upon the following Hon'ble Tribunal and High Court decisions rendered in similar to the case of the Appellant.

i) Hon'ble Jurisdictional High Court in Zuari Cements Ltd Vs. ACIT [WP. No.5557/2012] - AP High Court

- ii) Hon'ble Delhi High Court in the case of Turner International India Pvt Ltd. V. The Deputy Commissioner of Income Tax, Circle 25(2), New Delhi [398 ITR 177]
- iii) Hon'ble ITAT Mumbai in Aker Powergas P.Ltd Vs. The Deputy Commissioner of Income Tax, Circle 15(1)(1), Mumbai [2022(6) TMI 1118]
- iv) Hon'ble ITAT Bangalore in Cisco Systems Services B.V. Vs. Deputy Commissioner of Income Tax (IT) [2022 136 taxmann.com 118]
- v) Hon'ble ITAT Bangalore in Mis Suretex Prophylactics (India) Pvt Ltd Vs. The Assistant Commissioner of Income Tax, Circle -6(1) (2), Bengaluru [2021 (4) TMI 120]
- vi) Hon'ble ITAT Pune in Walter Tools India Pvt Ltd Vs. The Assistant Commissioner of Income Tax, Circle 10, [Pune -ITA No.419/PUN/2014]
- vii) Hon'ble ITAT Pune in DCIT Vs. Rehau Polymers Private Ltd Vs. ACIT [2017 85 taxmann.com 23]
- viii) Hon'ble ITAT Pune in Skoda Auto India Ltd. Vs. ACIT 2344/PU and 2012
- ix) Hon'ble Madras High Court in Vijay television Pvt Ltd Vs. DRP [(2014) 369 ITR 113]

8. The Appellant most respectfully prays that as per the submission made above and the judicial precedents cited, the draft order of the learned Assessing Officer is not as per the mandate of the provisions of section 144C and hence the draft assessment order and demand notice may be quashed and set aside.

7. Per contra the ld. DR, had filed the e-mail received from the ld.ACIT,Circle-1(1), Tirupati, wherein it was mentioned as under :-

Date:25/10/22 3:21 PM

From:"Tirupati.dcit1.1" [Tirupati.dcit1.1@income tax.gov.in](mailto:Tirupati.dcit1.1@income.tax.gov.in)

Sir/Madam

"In the case of Apache footwear India Private Limited the order passed by NFAC, Delhi is a procedural mistake passing draft assessment order as final assessment order. Since the draft assessment order was passed as final assessment order, the assessment window was closed for the case and it could not be passed again despite of best efforts because of the technical difficulties on ITBA. Since the tax effect of both the orders remains the same, the same may be considered as final assessment order."

8. It was submitted that the error in passing the order was a curable defect being procedural in nature and further no fresh assessment order was required to be passed by the Assessing

Officer. Further there is no provision in ITBA portal to correct the assessment order already passed even if the earlier order was defective in so much so it was required to be passed as draft assessment order instead of assessment order. It was submitted that the assessee should not be benefitted on account of the glitches in software. It was further the contention of the Id.DRP that the assessee had treated the assessment order as draft assessment order and has filed the appeal against the said order before the DRP.

9. We have heard the rival contention of the parties and perused the material available on record.

10. In the present case, there are two discrepancies which are in the nature of jurisdiction error namely, the AO has directly passed the assessment order along with the penalty notice and computation of income to the assessee instead of passing the draft assessment order. Secondly, the AO vide his communication dated 25.10.2022 had admitted that no final assessment order pursuant to the direction of the Id.DRP had been passed as the Assessing Officer had already passed the assessment order on 26.02.2021 though the Assessing Officer was required to pass the draft assessment order under section 144C(1) of the Act. After receipt of the draft assessment order, the assessee within 30 days of the receipt of order may file objections, if any, before the DRP. In case, the assessee files objections before DRP, the DRP shall issue the directions after considering draft order / objections, evidences etc. At the time of issuance of direction, the DRP may confirm or reduce, or enhance the variations proposed in the draft assessment order or may issue any direction for further enquiry and passing of the assessment order. The direction

issued by the DRP shall be binding on the assessing officer as per the Clause (10) of Section 144C of the Act. In the present case, instead of passing the draft assessment order under section 144C(1) of the Act, the Assessing Officer had passed the assessment order, in derogation of the mandatory provisions of the Act. Thereafter, the Assessing Officer in his communication dt.25.10.2022 had acknowledged that the Assessing Officer was to pass the draft assessment order instead of the assessment order passed by him. In our view the law with respect to the passing of the assessment order pursuant to the direction of the ld.DRP is fairly settled and is no more res integra. Section 144C(10) r.w.s. 144(13) mandates the AO to pass the assessment order after receiving a direction.

11. Further, in our opinion, the law mandates that if an Act is required to be done in the particular manner, it should be done in that manner or not. Further, during the course of argument, it was submitted that the draft assessment order/assessment order dated 26.02.2021 was passed by NFAC and window was not opening for passing the final assessment order and thereby giving effect to the directions of the DRP. In our view, it is for the revenue to devise its own means and ways to correct the software and pass the final assessment order in accordance with the law. In the present case, the Assessing Officer had straight way passed the assessment order instead of passing the draft assessment order as per section 144C(1) of the Act and further, the Assessing Officer has not passed the final order as per section 144C(10) of the Act. In view of the above, we find that the assessee has made out a case on quashing the entire assessment order being passed in violation of the mandatory provisions of the law. Even otherwise, the issue is fairly covered in favour of the assessee by the decision of the Mumbai Tribunal

in case of Aker Powergas Pvt.Ltd. vs CIT 2022(6) TMI 1118-ITAT, Mumbai, wherein the Mumbai Tribunal after considering the various decisions had decided the issue in paragraph 19-21 to the following effect.

019. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly the draft assessment order passed by the learned assessing officer on 21/12/2016 is accompanied with the notice of demand as well as show cause notice u/s 274 read with Section 271 (1) (c) of the act of the even date. Issue that arises is Whether draft assessment order accompanied with [1] Notice of Demand, [2] tax Computation sheet and [3] Show Cause Notice for penalty u/s 271 (1) (C) of the act, can it be considered as draft assessment order or a final assessment order. If it is a final assessment order then naturally the procedure laid down under the act has not been followed by the ld AO. In such circumstances, the assessment order passed by the ld AO becomes void ab intio and to be quashed.

020. We find that identical issue has been considered by the coordinate bench in 649/ Pun / 2013 in case of Atlas corpo India Ltd vide order dated 29/8/2019 wherein it has been held as Under:-

“7. Briefly stated, the facts of the case are that the assessee filed its return declaring income of ₹ 1,44,59,01,250/-. Certain international transactions were reported by the assessee. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the arm’s length price (ALP) of the international transactions. The TPO passed the order u/s. 92CA(3) of the Act proposing transfer pricing adjustments. Then, the AO passed the order u/s.143(3) of the Act on 29-12-2011 marking it as “Assessment order”. At the end of this order, the AO remarked that: ‘This is the proposed order of assessment passed u/s.143(3) r.w.s.144C(1) of the Income Tax Act, 1961’ determining the total income at ₹ 1,56,72,76,785/-. The assessee was also made aware that: ‘within 30 days of the receipt of this draft order’, it should either file acceptance to the variations or file objections to such variations before the Dispute Resolution Panel. Thereafter, the AO proceeded to calculate tax in the same order directing to “Issue demand notice and challan accordingly after giving credit to prepaid taxes, if any’ and further directing to ‘Issue notice u/s.274 r.w.s. 271(1)(c) of the I.T. Act, 1961”. A demand notice dated 29-12- 2011 was also simultaneously issued, a copy of which has been placed on record by the ld. AR. Then, the AO issued penalty notice u/s.274 r.w.s. 271(1)(c) of the Act, again, on 29-12-2012, whose copy has also been placed on

record. Thereafter, the AO passed the final assessment order dated 27-02-2012 u/s.143(3) r.w.s. 144C of the Act determining total income at ₹ 156.73 crore.

8. From the above factual matrix, it is seen that the AO passed the draft order by designating it as the "Assessment order" u/s 143(3) of the Act on 29-12- 2011 and also issued notice of demand u/s.156 along with initiation of the penalty proceedings. Thereafter, he passed the final assessment order again characterizing it as 'Assessment order' on 27- 2- 2012. Under such circumstances, the assessee has raised the issue that the final assessment order lacked validity and hence should be quashed as the AO/TPO failed to follow the statutorily prescribed procedure u/s.144C of the Act.

9. Section 144C of the Act with the marginal note "Reference to Dispute Resolution Panel" provides through sub-section (1) of section 144C 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.' Subsection (2) of section 144C states that the assessee shall either file his acceptance to the AO on the variations proposed in the draft order or file his objections, if any, with the DRP. In case, the assessee accepts the variation in the draft order or no objections are received within 30 days, then subsection (3) states that: 'The Assessing Officer shall complete the assessment on the basis of the draft order'. In case, the assessee does not agree with the draft order, it can, inter alia, raise objections before the DRP, which shall issue directions under subsection (5) of section 144C. Upon receipt of the directions from the DRP, the AO completes the assessment under sub-section (13) in conformity with the directions given by the DRP.

10. An overview of section 144C of the Act deciphers that a draft order passed under sub-section (1) is only a tentative order which does not fasten any tax liability on the assessee. In case variations to the income in the draft order are accepted by the assessee or no objections are received within 30 days, the AO completes the assessment under section 144C(3) on the basis of draft order and the matter ends. In case the assessee objects to the variations in the income as proposed in the draft order and approaches the DRP, the final assessment order is passed by the AO u/s.144C (13) giving effect to the directions given by the DRP under sub-section (5). In case the assessee seeks to take the route of seeking redressal of its grievances through the channel of the CIT(A), in that case, again the AO has to pass a separate assessment order, which is obviously distinct

from the draft order. So, it is only on the finalization of the variation in the income as per the draft order, to the extent specified in the provision, that the AO is obliged to pass an assessment order, either under sub-section (3) or (13) of section 144C of the Act, determining the tax liability, pursuant to which a notice of demand is issued. Thus it follows that, irrespective of the course of action followed by the assessee, whether or not accepting the variation in the draft order or choosing the route of the DRP or the CIT(A), a draft order has to be necessarily followed by an assessment order on the basis of which a notice of demand is issued and it is then that the assessment is said to have come to an end.

11. The Hon'ble Apex Court in Kalyan Kumar Ray (1991) 191 ITR 634 (SC) has held that assessment order involves determination of income and tax. It laid down that: 'Assessment' is one integrated process involving not only the assessment of the total income but also the determination of the tax. The latter is as crucial for the assessee as the former.' Again the Hon'ble Summit Court in Auto and Metal Engineers vs. UOI (1998) 229 ITR 399 (SC) has held that the process of assessment involves (i) filing of the return of income under s. 139 or under s. 142 in response to a notice issued under s. 142(1) ; (ii) inquiry by the AO in accordance with the provisions of ss. 142 and 143 ; (iii) making of the order of assessment by the AO under s. 143(3) or s. 144; and (iv) issuing of the notice of demand under s. 156 on the basis of the order of assessment. The process of assessment thus commences with the filing of the return or where the return is not filed, by the issuance by the AO of notice to file the return under s. 142(1) and it culminates with the issuance of the notice of demand under s. 156.

12. On going through the above precedents, it is manifested that the assessment proceedings come to an end on the issue of notice of demand u/s 156 of the Act. Once a notice of demand is issued, the AO becomes functus officio in so far as the completion of assessment is concerned. It consequently follows that issue of notice of demand marks the completion of the assessment. 12. Turning to the facts of the instant case, it turns out that the AO issued notice of demand on 29.12.2011 tantamounting to legally finalizing the assessment, which was just the stage of draft order. As against that, it was incumbent upon him to statutorily pass the final assessment order after the draft order and then issue notice of demand. Issue of notice of demand brings down the curtain on the process of assessment. Until notice of demand is issued, the assessment cannot be said to have concluded.

13. *The Hon'ble Madras High Court in Vijay Television (P) Ltd. Vs. DRP (2014) 369 ITR 113 (Mad.)* was confronted with a situation in which the AO, pursuant to the order of the TPO, passed a final assessment order instead of a draft order. A question arose as to whether the order so passed could be treated as a valid order.

Accepting the contention of the assessee, the Hon'ble High Court set aside the order passed by the AO by observing that: "where there was omission on the part of the AO to follow the mandatory procedures prescribed in the Act, such omission cannot be termed as a mere procedural irregularity and it cannot be cured".

Resultantly, the assessment order was quashed. Almost similar issue came up for consideration before the Hon'ble jurisdictional High Court in *Pr. CIT Vs. Lionbridge Technologies Pvt. Lt. (2019) 260 Taxman 273 (Bom.)* in which the Tribunal in the first round restored the matter to the AO on the ground that the DRP failed to deal with the assessee's objections. During the remand proceedings, a reference was made to the TPO. On receipt of the TPO's order, the AO straightaway passed an order u/s.143(3) r.w.s. 144C(13), which action came to be disapproved by the Hon'ble High Court. It, ergo, follows that the statutorily mandated procedure must be adhered to by the authorities, non-observance of which renders the assessment order null and void.

14. Similar issue came up for consideration before the Pune Benches of the Tribunal in *Skoda Auto India Ltd. Vs. ACIT*. In that case also the AO passed the draft order and simultaneously issued notice of demand and initiated penalty proceedings by issuing notice u/s 274 of the Act. It was thereafter that the final assessment order was passed. The assessee challenged the legality of the final assessment order. Vide its order dated 02-07-2019, the Tribunal in *ITA No.714/PUN/2011* has held that the demand got crystallised on passing of the draft order pursuant to issue of demand notice which is contrary to the relevant provision of the Act. Ex Consequenti, the draft order was held to be invalid in law and the consequential assessment order void ab-initio.

15. The ld. DR buttressed his point of view by relying on an order passed by the Hyderabad Benches in *BS Ltd. Vs. ACIT (2018) 94 taxmann.com 346 (Hyderabad-Trib.)* in which it has been held that the issuance of demand notice along with the draft order is only a procedural mistake. In our considered opinion, this case does not advance the Departmental stand. Unlike the assessee in the instant case not raising objections before the DRP and pursuing the appeal straight away before the ld. CIT(A), the assessee in that case adopted the route of the DRP. Be that as it may, it is found that similar issue came up for consideration before the Pune Benches of the Tribunal in series of cases including *Eaton Fluid Power Ltd. Vs. DCIT (2018) 96 taxmann.com 512*

(Pune Trib.). In that case also, the AO passed the draft order u/s.143(3) r.w.s. 144C(1) of the Act. Thereafter, he issued notice of demand u/s.156 and initiated penalty proceedings u/s.271(1)(c) of the Act. When this infirmity in not following the statutorily mandated procedure was pointed out, the Tribunal declared the assessment order to be without jurisdiction and hence, null and void.

16. It is observed that the facts and circumstances of the instant case are similar to those considered by the Pune Benches of the Tribunal in the case of Skoda Auto India Ltd. Vs. ACIT (supra) and Eaton Fluid Power Ltd. Vs. DCIT (supra). As the AO in the extant case issued notice of demand at the stage of the draft order, which, actually ought to have been done at the stage of passing the final order, thereby assigning the finality to the assessment at the stage of draft order itself, we hold that the resultant final assessment order got vitiated in the eyes of law and hence cannot stand.

17. Before parting, we would like to clarify that for the assessment year 2006-07 also, the assessee took similar argument urging that the assessment order be declared null and void. We have noted above that the assessment proceedings get completed on the issue of notice of demand only. On examination of facts, the Tribunal for such earlier year found that even though penalty notice was issued u/s 274 but no notice of demand was issued u/s 156 of the Act pursuant to the draft order. It was under such circumstances that the Tribunal in ITA No. 1470/Pun/2010 vide its order dated 21.08.2019 did not accept the contention of the assessee to the effect that the assessment got concluded on the passing of the draft order and hence the final assessment order was a nullity. It is an altogether different matter that the initiation of penalty through the draft order carried some infirmity, but that would not impinge upon the validity of the assessment order.

18. To sum up, we set-aside the assessment order by declaring it to be null and void. Thus, the income offered in the return becomes total income of the assessee.”

021. We do not find any reason to multiply the several judicial precedents on the facts of the present case. Therefore, respectfully following the decision of the coordinate bench, we also hold that the present assessment order passed is null and void. Thus, the income offered in the return becomes total income of the assessee.

12. Respectfully following the decision of the co-ordinate Bench in the case of Aker Powergas Pvt.Ltd (supra), we find the appeal of the assessee is required to be allowed and accordingly, we allow the appeal of the assessee.

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

Order pronounced in the Open Court on 11th January, 2023

Sd/- (RAMA KANTA PANDA) ACCOUNTANT MEMBER	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 11th January, 2023

Thirumalesh/sps

Copy to:

S.No	Addresses
1	Apache Footwear India Private Limited Apache SEZ, Mambattu Village TADA Andhra Pradesh-524 401
2	ACIT, Circle-1(1) Tirupati
3	CIT(A), National Faceless Appeal Centre (NFAC), Delhi.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order