IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 1136/Mum/2019

(A.Y.2012-13)

Global Hospitality Licensing SARL C/o Marriot Hotels India Private Limited 303A, 304, Fulcrum, B-Wing, Hiranandani Business Park, Sahar Road, Andheri (East), Mumbai – 400099	Vs.	Deputy Commissioner of Income Tax (I.T.) Range-2(3)(2) Room No. 1702, 17th Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCG5657K		
Appellant	..	Respondent

Appellant by :	Paras Savla Pratik Poddar
Respondent by :	Soumendu Kumar Das

Date of Hearing	19.01.2023
Date of Pronouncement	28.03.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assesse is directed against the order passed by the CIT(A)-56, Mumbai dated 31.12.2018 for A.Y. 2012-13. The assesse has raised the following grounds before us:

1. *On the facts and circumstances of the case and in law, the CIT(A) erred in determining the total income of the Appellant at Rs.21,43,35,129 by upholding the addition of Rs.20,20,35,913 made by the assessing officer (learned AO').*

2. *On the facts and circumstances of the case and in law, the CIT(A) erred in holding that the marketing contribution and reimbursement of expenses (IMPPA receipts) received by the Appellant from the Indian hotel owners*

pursuant to the International Marketing Program Participation Agreement (IMPPA') are taxable as 'royalty' by placing reliance on the appellate order in case of the Appellant for AY 2009 10.

3. *On the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the IMPPA receipts are taxable as fees for technical services' merely by placing reliance on his predecessor's order in the case of Appellant for AY 2011-12 which relied on the Authority for Advance Rulings ('AAR') in the case of International Hotel Licensing Company SARL*

4. *On the facts and circumstances of the case and in law, the CIT(A) has erred in not considering that all of the services under the IMPPA are rendered by the Appellant outside India and that no part of the activities were undertaken in India.*

5. *On the facts and circumstances of the case and in law, the CIT(A) erred in placing reliance on the applicability of the following the decisions of the Hon'ble Income-tax Appellate Tribunal (TTAT), Mumbai*

    - *Marriott International Inc vs DDIT (IT)-4(1) [ITA No 1996 & 1997/Mum/2011] ('MII Ruling 1'); and*
    - *Marriott International Inc vs ADIT (IT)-4(1) [2217/Mum/2016] (Mil Ruling 2').*

6. *On the facts and circumstances of the case and in law, the CIT(A) has erred in not considering that the marketing contribution and reimbursement of expenses pursuant to the IMPPA does not constitute income of the Appellant as per the provisions of the Act since these receipts are not unfettered receipts but received with the corresponding obligation to be spent in a prescribed manner for a specific purpose namely for carrying out marketing activities and that any surplus or deficit is to the account of the member hotel owner*

7. *On the facts and circumstances of the case and in law, the CIT(A) has erred in not considering that the marketing contribution and reimbursement of expenses pursuant to the IMPPA are in the nature of pure cost reimbursements without any profit element embedded therein and therefore, not liable to tax in India.*

8. *On the facts and circumstances of the case and in law, the CIT(A) erred in holding that the Appellant's case is not covered by the principle of mutuality merely by relying on his predecessor's order in the Appellant's case for AY 2011-12.*

9. *On the facts and circumstances of the case and in law, the CIT(A) has erred in holding that that the royalty agreement and IMPPA are interlinked and inseparable merely because the consideration under both these arrangements is determined as a fixed percentage of gross revenue.*

10. *On the facts and circumstances of the case and in law, the CIT(A) has erred in not considering that the IMPPA receipts can at best be considered as business income of the Appellant and in the absence of business connection*

or permanent establishment in India, such business income cannot be chargeable to tax in India as business profits.

11. On the facts and circumstances of the case and in law, the CIT(A) has erred in placing reliance on incorrect facts, surmises and conjectures.

The Appellant craves leave for a hearing in this matter before disposing of the said appeal and leave to add, alter, amend or delete any or all of the above grounds of appeal, at or prior to hearing of the appeal, so as to enable the Hon'ble ITAT to decide this appeal according to law."

2. Fact in brief is that assessee is a tax resident of Luxembourg and filed return of income on 28.09.2012 declaring total taxable income of Rs.1,22,99,216/-. During the year the assessee has received contribution from various Indian hotels for sale and marketing activities and reimbursement of expenses under the International Marketing Program Participation Agreement (IMPPA). The detail of amount received from various Indian hotels under IMPPA during the year under consideration is as under:

Name of hotel	*Contribution towards sales and marketing activities (in Rs.)*	*Amount of reimbursement (in Rs.)*	*Contribution towards sale and marketing activities and reimbursement of expenses*
Palm Grove Beach Hotel	*1,35,76,883*	*53,26,247*	*1,89,03,130*
Viceroy hotel	*1,14,42,644*	*90,47,295*	*2,04,89,939*
EON Hinjewadi Infrastructure Pvt. Ltd	*50,12,900*	*60,50,969*	*1,10,63,869*
Chalet Hotels	*3,06,47,528*	*3,86,70,048*	*6,93,17,576*
ICC Reality (India) Pvt. Ltd.	*1,61,70,952*	*1,43,61,972*	*3,05,32,924*
Pacifica Hotels	*81,36,300*	*55,54,833*	*1,36,91,133*
Sanya Hospitality Pvt.ltd.	*1,73,77,213*	*90,16,593*	*2,63,93,806*
Capricorn Plaza	*13,76,142*	*9,94,640*	*23,70,782*
Serveall Land Developers Pvt. Ltd.	*68,49,284*	*24,23,470*	*92,72,754*
	11,05,89,846	*9,14,46,067*	*20,20,35,913*

During the assessment the assessee explained that the assessee Marriott is a leading worldwide hospitality group and under the IMPPA the assessee is to provide for advertisement space in magazines, newspapers and other printing media, advertising slots on radio

television, and other electronic media. The assessee claimed that payment received by it were in the nature of reimbursement of expenses. However, the A.O has not agreed with the submission of the assesee and stated that payment made by the various hotels to the assessee has no nexus with the amount of expenditure incurred by the assessee and therefore, the same cannot be considered as restoration or repayment. The payment made by the various hotels were on the basis of gross turnover which had no link with the amount of expenses incurred or to be incurred by the assessee. The AO further stated that in its substance the agreement is a business contract between the hotel owners and the assessee wherein the assesse is described as carrying on the business of promoting enterprises and conducting international advertisement, marketing and sales programmes for the Marriott chain of hotels. Therefore, the assessing officer is of the view that payment made by the hotel owners to the assessee cannot be considered as reimbursement of expenses. The A.O further stated that payment made by the hotel owner were towards royalty for use of the international brand "Marriott". Therefore, the assessing officer stated that services provided by the assessee by way of advertising and worldwide business promotion of the brand clearly file within the wide scope of "fees for technical services" and are taxable u/s 9(1)(vii) of the Act. Accordingly, the amount of Rs.20,20,35,913/- received by the assessee from various Indian hotels under IMPPA during the financial year was taxed as fees for technical services under Article 12 of India Luxembourg DTAA @ 10% on gross basis.

3. Thereafter, the A.O has passed final assessment order on 22.05.2015 assessed the total income as per the draft assessment order as referred above stating that assessee has neither filed any objection from the ld. DRP nor has intimated the A.O about the acceptance of the variation in the draft assessment order.

4. Against the final assessment order the assessee filed appeal before the ld. CIT(A). The ld. CIT(A) had dismissed the appeal of the assessee.

5. During the course of appellate proceedings before us the assesse has filed additional ground of appeal before us as under:

> *"12. On the facts and circumstances of the case and in law, the draft assessment order dated March 23, 2015 passed by the Assessing Officer along with the notice of demand under section 156 and penalty notice under section 274 read with section 271(1)(c) of the Income-Tax Act, 1961 (the Act) is bad in law, as the same has been passed in violation of section 144C of the Act.*
>
> *The Appellant craves leave to add, alter, vary, omit, substitute or amend the above ground of appeal, at any time before or at, the time of appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide the appeal accordingly."*

6. In respect of additional ground filed by the assessee the ld. Counsel submitted that A.O has passed the draft assessment order on 23.03.2015 along with issued notice of demand u/s 156 and penalty notice u/s 274 r.w.s 271(1)(c) of the Act and the same was passed in violation of Sec. 144C of the Act. The ld. Counsel also placed reliance on the decision of Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. (1998) 229 ITR 383 (SC) wherein held that assessee should not be prevented from raising a question of law before the ITAT for the first time. The ld. Counsel further submitted that the adjudication of additional ground of appeal would be essential for due dispensation of substantial justice and submitted that the additional ground was a purely legal ground arised from the draft assessment order dated 23.03.2015.

7. We have heard the rival contention with respect to the additional ground raised by the assessee. The assessee has raised purely a legal ground and in view of the decision of the Hon'ble Supreme Court as referred supra we admit the additional ground and adjudicated the same.

In the additional ground the assessee stated that A.O has passed the draft assessment order on 23.03.2015 which was accompanied with a notice of demand u/s 156 of the Act dated 23.03.2015 and also a show cause notice of penalty u/s 274 r.w.s 271(1)(c) of the Act, therefore, the order was bad in law as the same has been passed in violation of Sec. 144C of the Act. In support of its contention the assessee has filed paper book wherein it has placed copy of draft assessment order dated 23.03.2015 passed by the A.O along with notice of demand, computation of tax and penalty notice. In support of his contention the ld. Counsel has referred the various judicial pronouncements:

"1. Vijay Television (P) Ltd. Vs. DRP (2014) 46 taxmann.com 100 (Madras)
2. Aker Powergas P. Ltd v. DCIT (ITA No.7211/Mum/2017
3. Perfetti Van Melle (India) Pvt. Ltd. Vs. ACIT (ITA No. 9116/Del/2019)
4. Eaton Industrial Systems Pvt. Ltd. vs DCIT (ITA No. 536/Pun/2014
5. DCIT Vs. Rehau Polymers Pvt. Ld. & Vice versa (2017) 85 taxmann.com 23 (Pune – Trib.)
6. Soktas India Pvt. Ltd. Vs. ACIT (2017) 77 taxmann.com 19 (Pune Trib)
7. Yazaki India (P) Ltd. Vs. ACIT (2019) 108 taxmann.com 297 (Pune – Trib)
8. Inatech India (P) Ltd. Vs. ITO (2019) 106 taxmann.com 318 (Bangalore – Trib)
9. DCIT Vs. Atlas Copco (India) Limited (ITA No. 469/Mum/2013 & 1726/Pun/2014)
10. Suretex Prophylactics (India) Ltd. Vs. ACIT (IT (TP)A No. 430/Bang/2016)
11. Skoda Auto India Pvt. Ltd. Vs. ACIT (ITA No. 2344/Pun/2012)
12. Mavenir India Pvt. Ltd vs. DCIT (ITA No. 203/Del/2020)
13. Jazzy Creation (P) Ltd. Vs. DCIT (2017) 83 taxmann.com 244 (Mumbai Trib)
14. Keller Ground Engineering India Pvt. Ltd. Vs. ACIT (ITA No. 144/CHNY/2018)
15. M/s Cisco Systems Services B.V. Vs. DCIT (IT (IT)A 2574/Bang/2019)
16. Nikon India Pvt. Ltd. Vs. DCIT (ITA No. 8752/Del/2019 & 8753/Del/2019)"

By referring the aforesaid judicial pronouncements the ld. Counsel contended that A.O has failed to follow the procedure prescribed for passing a draft assessment order. In respect of passing draft order along with the notice of demand and show cause notice for penalty, he, submitted that the order passed by the A.O is void-ab-initio and

deserves to be quash. In this regard, the ld. Counsel has taken us to the order passed by the ITAT, Mumbai in the case i.e Aker Powergas P. Ltd v. DCIT (ITA No.7211/Mum/2017, dated 23.06.2022 based on identical issue on similar facts.

8. With the assistance the ld. Representative we have gone through the above referred decision. The relevant part of the decision is reproduced as under:

> *"06. We have carefully considered the rival contentions with respect to the additional ground raised by the assessee. We find that the assessee can raised legal ground at any time during the pendency of appeal. In the grounds raised by the assessee no fresh facts are required to be investigated and further it goes to the root of the matter as it is jurisdictional ground. In view of this, we admit the additional ground and proceed to adjudicate the same first.*
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> *07. The facts of the case shows that assessee company is engaged in the business of engineering consultancy services. It is part of a leading global oil service company specialising in oil and gains. The assessee provides engineering design services to the entities of the whole group.*
>
> *08. Assessee filed its return of income on 29/11/2013 declaring a total income of ₹ 72,005,269. The case of the assessee was picked up for scrutiny. The learned assessing officer found that assessee has entered into an international transactions with its associated enterprises and therefore these international transactions are required to be tested on arm's-length principle, therefore the matter was referred to the learned transfer pricing officer.*
>
> *09. The learned TPO found that assessee has entered into six different kind of international transactions. All these transactions are related to*
>
> *a. provision of engineering and design services amounting to ₹ 147,444,3403/- ,*
> *b. payment for implementation of SNAP software of Rs 4, 81,44,289/–,*
> *c. management services availed of Rs 4,90,39,998/–,*
> *d. payment towards use of software and link rental amounting to ₹ 210,315,510,*
> *e. reimbursement of expenses of Rs 2,64,59,887/– and*
> *f. recovery of expenditure of Rs 2, 63,52,035/–*
>
> *010. In its transfer pricing study report assessee used Internal Transactional Net Margin Method (TNMM) as the most appropriate method. Assessee selected return on total cost i.e. OP/OC as the profit level indicator, it computed its PLI on transactions with associated parties at 22.41%. It also bifurcated transactions with unrelated parties and stated that its gross profit margin with third party transaction is 24.53% and therefore as the operating margin earned by the assessee on transactions with its associated enterprises is more than the margin earned from third parties the international transactions are at arm's-length.*

011. The learned transfer pricing officer examined the transfer pricing study report of the assessee and found that assessee has adopted internal transactional net margin method as the most appropriate method. He found that revenue from engineering design services from associated enterprise segment is 57% whereas from non- AE segment is 43%. He accepted the internal transactional net margin method, however, he examined the profitability segment and found that assessee has applied internal transactional net margin method using the domestic segment also in comparison. According to him the domestic segment cannot be compared with export segment. Therefore he held that it is appropriate to compare the related party export as well as third-party exports Under the internal transactional net margin method analysis. According to that, he found that related party export transactions resulted into profit level of 21.88% compared to transactions with other parties of 27.62%. Therefore adjustment of ₹ 69,416,669/– was made towards Arms' length price of international transactions. The learned transfer pricing officer passed an order u/s 92CA (3) of the act on 31/10/2016.

012. Based on this, the learned assessing officer passed a draft assessment order on 21/12/2016 wherein the total income returned of the assessee of ₹ 72,005,269/– was assessed at ₹ 141,821,938/– and transfer pricing adjustment of ₹ 69,416,669/- was made.

013. Assessee preferred an objection before the Dispute Resolution Panel – I, Mumbai [the Ld DRP] who passed direction on 05/9/2017 and rejected the objections of the assessee. Consequently, on 27/10/2017, the learned assessing officer passed a final assessment order u/s 143 (3) read with Section 144C (13) of the Act wherein the total income of the assessee was assessed at ₹ 141,421,940.

014. The learned authorised representative , in the additional ground stated that the assessment order passed on 21 December 2016 is accompanied with a notice of demand u/s 156 of the act and also a show cause notice of penalty u/s 274 read with Section 271 (1) (C) of the act along with the draft assessment order and therefore the procedure of passing the draft assessment order has not been followed and instead of that the assessing officer has passed the final assessment order. Therefore, it was stated that the draft assessment order passed by the learned assessing officer is void ab initio and deserves to be quashed.

015. For this proposition he referred to the paper book and took us to page number 203 – 216 of the paper book wherein the draft assessment order is placed. He also submitted that notice of demand u/s 156 of The Income Tax Act along with the income tax computation form and showcause notice u/s 274 read with Section 271 (1) © of the income tax act of the same date.

016. To support his contention that the assessment order passed by the learned assessing officer is void ab initio and deserves to be quashed, he referred to the several judicial precedents as Under:-

- *i. Atlas Copco India Ltd versus DCIT (ITA number 649/PU 1/2013 and 1726/UN/2014*
- *ii. Preffetti van Millee India private limited versus ACIT ITA number 9116/del/2019*
- *iii. Suretex profilatyics India private limited versus ACIT ITA number 430/bang /2016*

iv. DCIT versus Rehau polymers private limited (2017) 85 taxmann.com 23
v. Skottas India private limited versus ACIT (2017) 77 taxman.com 19
vi. Mavenir India private limited versus DCIT ITA number 203/del/2010
vii. Skoda auto India private limited versus ACIT 2344/PU and/2012
viii. Jazzy creations private limited versus ITO 83 taxmann.com 24
ix. PCIT versus Lion bridge technologies private limited 100 taxmann.com 413

017. He referred to all those decision to show that on identical facts and circumstances the assessment orders have been quashed where the learned assessing officer has failed to follow the procedures prescribed for passing a draft assessment order but instead of that passed draft assessment order along with the notice of demand and show cause notice for penalty.

018. The learned departmental representative vehemently stated that it is merely an irregularity and not an invalidity of the assessment order. He further stated that assessee has already taken the objection route before the learned dispute resolution panel and therefore assessee is not aggrieved with that and therefore the above additional ground raised by the assessee deserves to be dismissed on the merits. He further stated that the notice of demand issued by the learned assessing officer did not have any demand as demand was Rs Nil. Even the show cause notice has not been replied by the assessee with respect to penalty and therefore no prejudices caused to the assessee.

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.

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.

022. In the result we allow the additional ground raised by the assessee and quash the assessment order.

023. In view of our above decision, all other grounds of appeal becomes infructuous and do not deserve any merit. Therefore, they are left unadjudicate.

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

In view of the above referred decision of the ITAT, Mumbai, we find that issue raised before the Tribunal are similar to the issue as adjudicated in the above referred decisions. There is nothing before us on hand to differ from the issue raised in the cases cited supra so as to take a

different view of this issue. Since the issue on hand being squarely covered it would not be appropriate for us to deviate from the view taken by the coordinate bench as discussed supra. Accordingly, we allow the additional ground raised by the assessee and quash the assessment order. In view of the above decision, all other ground of appeal left open.

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

Order pronounced in the open court on 28.03.2023

Sd/-	Sd/-
(Vikas Awasthy) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 28.03.2023
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.