

**IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE**

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT  
AND  
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

**ITA No. 465/PUN/2022 : A.Y. 2017-18**

Prodair Air Products India Pvt. Ltd.  
Office No. 003/004 Pentagon Tower  
2, Magarpatta City, Hadapsar  
PUNE – 411 013  
PAN: AAFCP 0045 E

Appellant

Vs.

The Asstt. CIT Cir. 4, Pune.

Respondent

Appellant by : Shri Dhanesh Bafna, Riddi Maru  
& Sailee Faterpekar

Respondent by : Shri J.P. Chandraker

Date of Hearing : 02-02-2023

Date of Pronouncement : 03-02-2023

**ORDER**

**PER SHRI PARTHA SARATHI CHAUDHURY, JM**

This appeal preferred by the assessee emanates from order of the Id. D.R.P. dated 14-03-222 for A.Y. 2017-18 as per the following grounds of appeal.

**Ground No. 1**

*On the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP') erred in disregarding the fact that while passing the draft assessment order, the National Faceless Assessment Centre ('NaFAC') erred in passing the draft assessment order dated 29 June 2021 without following the mandate as laid down by section 144C of the Income Tax Act, 1961 ('the Act') and issuing the notice of demand u/s 156 of the Act along with the draft assessment order.*

*The Appellant prays that the draft assessment order is null and void being passed in violation of the law making the assessment proceedings non est and invalid.*

**Ground No. 2:**

*On the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income Tax- 4, Pune ('the ACIT') erred in passing the final assessment order in the absence of jurisdiction as per the provisions of Section 144B rendering the final assessment order to be null and void.*

*The Appellant prays that the final assessment order is null and void being passed in violation of the law and deserves to be quashed.*

**Ground NO.3:**

*On the facts and in the circumstances of the case, and in law, the Ld. ACIT, pursuant to the directions of the Ld. DRP, erred in making a transfer pricing ('TP') adjustment of INR 75,00,000 to the income of the Appellant, by holding that the Appellant's*

*international transactions pertaining to interest on External Commercial Borrowing ('ECB') is not at arm's length. Further, the Ld. DRP /Ld. ACIT /Ld. TPO while making adjustment on account of interest on ECB Loan erred in:*

- (a)** *Rejecting the benchmarking analysis conducted by the Appellant*
- (b)** *Allowing only a marginal spread of 25 basis points over the SBI Base Rate for determining the Arm's Length Price by concluding that the credit risk is minimal in case of inter-company loan transaction.*

*In light of above the Appellant prays that the TP adjustment ought to be deleted.*

**Ground NO.4:**

*Without prejudice to above, on the facts and in the circumstances of the case and in law, the Ld. DRP /Ld. ACIT /Ld. TPO erred in rejecting the alternate benchmarking analysis conducted by the Appellant after considering the range of normal lending rates of various banks prevailing in India during the quarter when the loan agreements were entered into.*

**Ground No. 5:**

*On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating the penalty proceedings under Section 274 r.w.s. 270 of the Act.*

*In view of foregoing grounds of appeal, the Appellant most humbly prays that the abovementioned TP adjustment ought to be deleted.*

*The above grounds are independent of and without prejudice to each other. The Appellant craves leave to add, alter, amend, or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."*

5. The assessee has raised both the legal grounds as well as grounds on merit. We would first adjudicate the legal ground raised by the assessee which is as follows:

*On the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP') erred in disregarding the fact that while passing the draft assessment order, the National Faceless Assessment Centre ('NaFAC') erred in passing the draft assessment order dated 29 June 2021 without following the mandate as laid down by section 144C of the Income Tax Act, 1961 ('the Act') and issuing the notice of demand u/s 156 of the Act along with the draft assessment order.*

*The Appellant prays that the draft assessment order is null and void being passed in violation of the law making the assessment proceedings non-est and invalid.*

6. The Id. A.R of the assessee submitted that section 144C of the Income-tax Act, 1961 (hereinafter referred to as "the Act") which is a non obstante provision specifies that the A.O shall forward a draft assessment order to the concerned assessee if the A.O proposes to make any variation which is prejudicial to the

interest of the assessee. However, in the instant case, the A.O instead of draft assessment order has passed the final assessment order and along with it, had issued demand notice u/s 156 of the Act. Therefore, such assessment order is null and void being passed in violation of the law making the assessment proceedings non-est and invalid. The factual matrix of this issue is that the assessee had made a reference to the T.P.O for determining the Arm's Length Price (ALP) of the international transactions. The T.P.O passed the order u/s 92CA(3) of the Act dated 29-07-2021 making an adjustment of Rs. 3,04,70,548/- on account of international transactions pertaining to interest on ECB. Subsequently, the A.O had issued a draft assessment order dated 29-01-2021. It is the assessee's contention that the A.O had issued the final assessment order as he had mentioned the words "assessment order" on the first page of the draft assessment order. Also it is the contention of the assessee that the demand notice was issued and penalty proceedings u/s 270A of the Act were initiated. Therefore, the A.O has given finality to the assessment and the draft assessment order issued by the A.O is not as per legal procedure laid down under the Act which renders it to be invalid. In effect, the A.O passed the final assessment order without according an opportunity to the assessee to file objections before the Id. D.R.P.

7. It was further submitted by the Id. A.R that the assessee had filed objections before the Id. D.R.P against the alleged draft assessment order and the same was disposed of by the Id. D.R.P and thereafter the alleged final assessment order dated 29-04-2022 was passed but the proceedings subsequent to the assessment order dated 29-06-2021 are vitiated after issuance of demand notice u/s 156 and the notice of penalty u/s 274 r.w.s. 270A of the Act. The Id. A.R. also pointed out that at no point of time, the notices u/s 156 and the notice u/s 274 r.w.s. 270A of

the Act issued by the A.O were withdrawn.

8. Per contra, the Id. D.R submitted that due procedure has been followed by the revenue authorities in passing the final assessment order. The A.O after receiving the order from T.P.O u/s 92CA(3) of the Act passed a draft assessment order on 29-06-2021 u/s 143(3) r.w.s. 144B of the Act. The assessee thereafter had filed objections before the Id. D.R.P. The objections of the assessee were disposed of by the Id. D.R.P vide directions dated 14-03-2022. Thereafter, the final assessment order was passed by the A.O on 29-04-2022.

9. We have heard the rival contentions, perused the orders of the subordinate authorities and considered the judicial pronouncements placed on record. The contention of the assessee is that since the A.O had issued a demand notice u/s 156 and notice for initiating penalty proceedings u/s 274 r.w.s. 270A of the Act along with the draft assessment order dated 29-06-2021, the draft assessment becomes a final assessment order. The A.O failed to pass the draft assessment order which is in violation of provisions of sec. 144C of the Act.

10. 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." Sub-section (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 Id. DRP. In case, the assessee accepts the variation in the draft order or no objections are received within 30 days, then sub-section (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 sub-section (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 Id. DRP.

11. 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 Id. DRP, the final assessment order is passed by the AO u/s.144C (13) giving effect to the directions given by the Id. 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 Id. DRP or the Id. 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.

12. The Hon<sup>ble</sup> 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<sup>ble</sup> 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.

13. Reverting to the facts of the present case, it is observed that the A.O had issued notice of demand on 29-06-2021 which is the same date on which the

alleged final assessment order was passed. Statutorily it was incumbent upon the A.O to pass the final assessment order after the draft assessment order and then issue notice of demand. Issuance of notice of demand brings finality on the process of assessment. Before the notice of demand is issued one cannot say that the assessment has concluded.

14. The Hon<sup>ble</sup> 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<sup>ble</sup> 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<sup>ble</sup> 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<sup>ble</sup> 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.

15. Similar issue came up for consideration before the Pune Benches of the Tribunal in *Skoda Auto India Ltd. Vs. ACIT*. In ITA No. 2344/PUN/2022 for A.Y. 2008-09, order dated 03-06-2019. 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*.

16. We also observe that the facts and circumstances of the instant case are similar to those considered by Pune Bench of the Tribunal in the case of *Skoda Auto India Pvt. Ltd. Vs. ACIT* in ITA No. 2344/PUN/2022 for A.Y. 2008-09, order dated 03-06-2019 and *DCIT Circle 8 Pune Vs. Atlas Copco (India) Ltd.* in ITA No. 649/PUN/2013 and 1726/PUN/2014 for A.Y. 2008-09 and 2009-10, order dated 29-08-2019. Since the A.O in the present case had issued notice of demand at the stage of draft order which actually ought to have been done at the stage of passing a final order, thereby assigning finality to the assessment at the stage of draft order itself. We hold that the resultant final assessment order actually got vitiated in the eyes of law and hence cannot stand. The A.O wanted the assessee to treat the order dated 29-06-2021 as the draft assessment order. Then he should not have issued demand notice and penalty notice to the assessee and even when he had issued he should have withdrawn them i.e. the said demand notice and penalty notice which in fact he had not done. The demand notice and the penalty notice are issued only after the final assessment is completed. Therefore, the A.O



violated the provisions of section 144C of the Act. Accordingly, we set aside the assessment order declaring it null and void. The legal ground raised by the assessee is answered in favour of the assessee and against the revenue. Consequently, all other grounds pertaining to merits becomes infructuous hence dismissed.

17. In the result, appeal of the assessee stands partly allowed.

Order pronounced in the open court on 03<sup>rd</sup> day of February 2023.

Sd/-

sd/-

**(R.S. SYAL)**  
**VICE PRESIDENT**

**(PARTHA SARATHI CHAUDHURY)**  
**JUDICIAL MEMBER**

Pune; Dated, 03<sup>rd</sup> day of February 2023.  
Ankam

**Copy of the Order forwarded to :**

1. The Assessee
2. The Respondent
3. The DRP 3, WZ Bombay
4. The Pr. CIT concerned .
6. DR, ITAT, „C“ Bench Pune  
Guard File.

BY ORDER,

Sr. Private Secretary  
ITAT, Pune

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1	Draft dictated on	02-02-2023	Sr.PS
2	Draft placed before author	03-02-2023	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	03-02-2023	Sr.PS/PS
7	Date of uploading of order	03-02-2023	Sr.PS/PS
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