

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH : BANGALORE

BEFORE SHRI. PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA 900 & 901/Bang/2019
Assessment Years : 2008 - 09 & 2009 - 10

M/s. Cisco Systems Capital (India) Pvt. Ltd., Brigade South Parade, No. 10, M. G. Road, Bengaluru - 560 001. PAN NO : AACCC 4552 A	Vs.	Deputy Commissioner of Income Tax, Circle - 2(1) (1) (1), Room No. 217, 2 nd Floor, BMTc Building, Koramangala, Bengaluru.
APPELLANT		RESPONDENT

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ITA 1009 & 1010/Bang/2019
Assessment Years : 2008 - 09 & 2009 - 10

Joint Commissioner of Income - Tax, Special Range - 2, Room No. 245, 2 nd Floor, BMTc Building, 80 Feet Road, Koramangala, Bangalore.	Vs.	M/s. Cisco Systems Capital India Pvt. Ltd., 2 nd Floor, Brigade South Parade, No. 10, M. G. Road, Bangalore - 560 001. PAN NO : AACCC 4552 A
APPELLANT		RESPONDENT

Appellant by	:	Shri. Rajan Vora, CA
Respondent by	:	Ms. Neera Malhotra, CIT - DR

Date of Hearing	:	26-02-2020
Date of Pronouncement	:	06 -03-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals have been filed by assessee as well as revenue against order dated 27/02/2019 and 28/02/2019 passed

by Ld.CIT (A)-2, Bengaluru for assessment years 2008-09 and 2009-10.

Ground No. 1-2 raised by assessee is challenging validity of order passed by Ld.AO u/s. 143 (3) read with section 254 read with section 263 of the Act as under:

A. Grounds of appeal relating to validity of order passed u/s. 143(3) r.w.s. 254 r.w.s. 263 of the ACT.

1. *The Ld. CIT(A) has erred in not quashing the order passed u/s. 143(3) r.w.s. 254 r.w.s. 263 of the Act which is in violation of the mandate of section 144C of the Act;*
2. *The Ld. CIT(A) has erred in rejecting the Appellant's plea that the order passed u/s. 143(3) r.w.s. 254 r.w.s. 263 of the Act in pursuance of transfer pricing order is void ab initio as the Assessing Officer has violated the mandate of section 144C of the Act.*

2. It has been submitted that, validity of order passed by Ld.AO has been challenged for assessment year 2009-10 on identical facts. He submitted that, legal issue raised by assessee shall be considered before going into merits of the case.

Ground 1-2 (Assessee's Appeal)

3. Ld.AR submitted that, the issue of validity of order passed by Ld.AO was challenged before Ld. CIT-(A) wherein Ld. CIT-(A) decided the issue by observing as under:

6.3 In Ground No.10, the appellant has contended that the AO should have issued draft assessment order while giving effect to the order of the tribunal wherein the tribunal had set aside the matter to the file of AO in relation to corporate tax matters pertaining to allowance of depreciation of networking equipment's and on trans-apprising matters relating to payment of administrative support services. In this regard, the appellant has placed

reliance on the decision of Hon'ble Supreme Court in case of ACIT vs Nokia Pvt. Ltd., (SLP (Civil) Diary No(s) 7302/2018) wherein the Supreme Court has affirmed the decision of orderable Delhi High Court (WPC No. 3629/2017) wherein it was held as follows:

“Once there is a clear order of setting aside of an assessment order with the requirement of the AO/TPO to undertake a fresh exercise of determining the arm's length price, the failure to pass a draft assessment order, would violate 144C (1) of the Act. This is not a curable defect in terms of section 292B of the Act as held by this court in its decision dated 17/07/2015 in ITA No. 275/2015 Pr. CIT vs Citi Financial Consumer Finance India Pvt. Ltd.,.”

Therefore, is submitted that once the TPO's order is remanded back to the TPO/AO by the ITAT, the AO/TPO should have ideally passed the draft order considering the written submissions filed and not a final order and it is not curable defect as per the SC order. However, it is seen that the Hon'ble tribunal had set aside the matter to the file of the AO in relation to the corporate tax matters pertaining to allowance of depreciation of networking equipment's and on transfer pricing matters relating to payment of advertisement support services. The TPO while passing the original TP order u/s.92CA had followed the due procedure passing the draft assessment order and since there is no change in the order pursuant in pursuant of 254 order, the TPO has not passed again a draft order and therefore the action of TPO in passing the order u/s.92 CA r.w.s. 254 without draft order is justified. This ground is therefore dismissed.”

4. Ld.AR submitted that, authorities below failed to appreciate that, final assessment order stands vitiated for failure to adhere to the mandate of requirements of first passing draft assessment order in terms of section 144C (1) of the Act. He submitted that, there is series of decisions by various *High Courts* to which Ld.AR has referred to in written submission filed before us, dated 18/09/2019 which are as under:

1. *Hon'ble Supreme Court in the case of ACIT Vs. Nokia India Pvt. Ltd., (Special Leave Petition (Civil) Diary No. 7302 of 2018).*
2. *Hon'ble Supreme Court in the case of Control Risk India Pvt. Ltd., Vs. DCIT (W.P.(C) 5722/2017 & C.M. No. 23860/2017).*
3. *Hon'ble Delhi High Court in the case of Turner International India (P) Ltd., Vs. CIT[2017] 82 taxmann.com 124 (Delhi).*
4. *Hon'ble High Court of Delhi in JCB India Vs. DCIT [2017] 85 taxmann.com 155 (Del).*
5. *PCIT Vs. Lionbridge Technologies Pvt. Ltd., (Income Tax Appeal No. 522 OF 2016).*
6. *Zuari Cement Ltd., Vs. ACIT (decision dated 21st February, 2013 in WP(C) No. 5557/20212), the Division Bench (DB) of the Andhra Pradesh High Court.*
7. *Vijay Television (P.) Ltd., Vs. Dispute Resolution Panel [2014] 369 ITR 113 (Mad.).*
8. *ESPN Sports Mauritius S.N. C. ET Compagnie Vs. Union of India [2016] 388 ITR 383 (Del.).*

5. On the contrary, Ld. CIT DR submitted that, there is nothing in the wording of section 144C (1) which would indicate that this requirement of passing draft assessment order in the remand proceedings of an issue by ITAT is to be satisfied. It was submitted that, assessment order cannot be considered to be invalid because even if there is any failure to pass draft assessment order u/s 144C of the Act the same is curable u/s. 292B of the Act.

We have perused submissions advanced by both sides in light of records placed before us

6. The issue that arises from arguments advanced by both sides is; whether on a remand by *Tribunal* in case of an eligible

assessee, can Ld.AO without issuing draft assessment order u/s. 144C (1) of the Act, straightaway passed the final assessment order u/s. 143 (3) of the Act.

Sequence of events in the present appeals are as under:

- Peculiarity in these orders are as that, subsequent to passing of final assessment order in original proceedings, on 12/10/2012 and 31/12/2013 for years under consideration respectively, Ld.Pr.CIT initiated review proceedings u/s. 263. Order u/s.263 was passed on 30/03/2015 for both years under consideration by holding assessment order in original proceeding by Ld.AO to be erroneous and prejudicial to the interest of the revenue. Ld.Pr.CIT was of the view that, Ld.AO proceeded with assessment without making any enquiry with regard to eligibility of depreciation in the hands of assessee, without ascertaining whether assessee could be considered to be the owner of assets, as is required by section 32 of the Act. This order u/s.263 was challenged by assessee before this *Tribunal*, which was quashed for reasons recorded therein.
- Simultaneously, against final assessment order in original proceedings was challenged by assessee before this *Tribunal*. This *Tribunal* vide order dated 19/09/2014 in ITA (TP) A No. 1558/B/2012 for assessment year 2007-08 and vide order dated 10/10/2014 in ITA (TP) A No. 116/B/2014, remanded corporate tax issue pertaining to depreciation allowable on audio-visual equipments as well as transfer pricing issue regarding international transaction of availing administrative

services by assessee from its AE to Ld.AO/TPO for re-adjudicating afresh.

- Ld.TPO vide separate orders dated 28/03/2016 computed proposed adjustment at Rs.2,16,37,189/- for assessment year 2008-09 and for assessment year 2009-10 proposed adjustment was computed at Rs.7,35,53,154/-.
- For assessment year 2008-09 Ld.TPO passed final assessment order dated 13/03/2016 u/s. 143 (3) r.w.s.254 r.w.s.263 of the Act computing addition and issuing demand notice and challan.
- For assessment year 2009-10 similar order was passed on 26/10/2016, u/s.143 (3) r.w.s.254 r.w.s.263 of the Act computing addition, and issuing demand notice and challan.

7. Ld.AO while passing impugned orders has not followed due procedure of law laid down u/s. 144C of the Act. For assessment year 2008-09, Ld.AO passed final assessment order immediately within 2 days of receipt of report from Ld. TPO whereas for assessment year 2009-10 final assessment order was passed after a period of 6 months from the date of receipt of transfer pricing report.

8. Admittedly, present assessee is an eligible assessee, as defined in section 144C (15) (b) of the Act. On perusal of section 144C of the Act, non-compliance with section in case of an eligible assessee cannot be considered to be a mere irregularity as has been argued by Ld. CIT-DR. Plethora of decisions referred to herein above and relied upon by Ld.AR supports this view. Admittedly, in present facts of the case, for years under

consideration, the Ld.AO has not followed the mandate required under section 144C (1), wherein he is required to forward draft of proposed order of assessment to the eligible assessee, if he proposes to make any variation in the income or loss returned, which is prejudicial to the interest of assessee. This is a non-obstinate clause that gives an overriding effect to the procedure.

9. Hon'ble Court's in decisions relied upon hereinabove has held that procedure laid down u/s 144C of the Act is of great importance. It has been held that, when an assessing officer proposes to make variation to the returned income declared by an eligible assessee, he has to first pass draft order, provide a copy thereof to assessee and only thereupon the assessee could exercise the right under 144C (2) of the Act to raise objections before DRP on proposed variations. This requirement the courts has been held to be mandatory that gives substantive rights to assessee to object to any additions, before they are made, and such objections have to be considered not by the assessing officer but by the DRP. We therefore reject the argument of Ld. CIT DR that failure to adhere to requirement under 144C (1) is curable defect u/s. 292B of the Act.

Respectfully following ratio laid down by various High Courts on this issue referred to herein above, we set aside and quash orders dated 30/03/2016 for assessment year 2008-09 and 26/10/2016 for assessment year 2009-10.

Accordingly, assessee succeeds on legal issue raised in ground 1-2 for both years under consideration.

Other grounds raised on merits by assessee now becomes academic and therefore not adjudicated by us.

Accordingly, appeal filed by assessee for assessment years 2008-09 and 2009-10 stands allowed.

In revenue's appeal the challenge is on the issue considered by Ld. AO while giving order effect to order passed u/a. 263 by Ld. Pr. CIT.

10. At the outset both sides submits that, as assessment order itself stands quashed and set-aside revenue's appeal becomes infructuous. In any event, while the order giving effect of order u/s. 263 was passed by Ld. AO this *Tribunal* had quashed order passed by Principal CIT, u/s. 263 of the Act.

We therefore dismiss appeals filed by revenue as no cause of action arises out of the same.

In the result appeal filed by assessee for assessment years 2008-09 and 2009-10 stands allowed on legal issue raised and appeals filed by revenue for assessment years 2008-09 and 2009-10 stands dismissed.

Order pronounced in the open court on 6th March, 2020.

Sd/-
(PRADIP KUMAR KEDIA)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 6th March, 2020.
/Vms/

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
Income Tax Appellate Tribunal.
Bangalore.

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	04-03-2020		Sr.PS
3.	Draft proposed & placed before the second member	05-03-2020		JM/AM
4.	Draft discussed/approved by Second Member.	05-03-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	05-03-2020		Sr.PS/PS
6.	Kept for pronouncement on	06-03-2020		Sr.PS
7.	Date of uploading the order on Website	10-03-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	10-03-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS