

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA NO.1073/DEL/2018
(ASSESSMENT Year 2006-07)**

Addl.CIT, Spl. Range 6,
New Delhi.

vs. M/s. Nokia India Pvt. Ltd.,
Unit No.1213, 12th Floor,
Kailash Building,
Kasturba Gandhi Marg,
New Delhi – 110 001.

(PAN : AAACN2170R)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Deepak Chopra, Advocate

Shri Ankul Goel, Advocate

REVENUE BY : Ms. Sarita Kumari, CIT DR

Date of Hearing : 03.11.2021

Date of Order : 26.11.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Addl.CIT, Special Range 6, New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 29.11.2017 passed by the Commissioner of Income-tax (Appeals)-44, New Delhi on the grounds inter alia that :-

“1. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in allowing appeal of the assessee on merely procedural irregularity in giving appeal effect to

findings and directions of the Hon'ble ITAT issued u/s 254 of the Income Tax Act, 1961 (the Act)?

2. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in allowing appeal of the assessee by holding the Assessing Officer (the AO) failed to refer the order giving effects to findings and directions of the Hon'ble ITAT to Dispute Resolution Panel (DRP) u/s 144C of the Act?"

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Nokia India Private Limited is a company incorporated under provisions of Companies Act, 1956 and was engaged in the business of providing services in the nature of installation, commissioning and erection of telecommunication equipment, selling (trading) of mobile phones, networks and accessories, research and development services during the assessment year.

3. This is second round of litigation. IN the first round of litigation, draft assessment order was passed on December 24, 2009 under section 143(3) read with section 140C of the Income-tax Act, 1961 (for short 'the Act') by making disallowances as under :-

Particulars	Amount (Rs.)
De-recognition of revenue from BSNL project	30,96,98,566
Disallowance of provision for warranty	53,89,72,000
Disallowance of expenditure in relation to handsets issued on free of cost (FOC) basis	28,40,20,105
Disallowance of provision for obsolescence of inventory	3,05,93,250
Disallowance of depreciation on computer peripherals @ of 60% and limiting the same to 15%	2,01,17,941
Transfer pricing adjustment	4,27,32,000

4. When assessee approached the Id. DRP who has partly allowed the objections by reducing the adjustment to Rs.68,71,61,862/- and pursuant thereto, final assessment order dated November 29, 2010 was passed by making following adjustments :-

Particulars	Amount (Rs.)
De-recognition of revenue from BSNL project	30,96,98,566
Disallowance of expenditure in relation to handsets issued on FOC basis	28,40,20,105
Disallowance of provision for obsolescence of inventory	3,05,93,250
Depreciation on computer peripherals	2,01,17,941
Transfer pricing adjustment	4,27,32,000
Total adjustments as per the final assessment order dated November 29, 2010	68,71,61,862

5. Then assessee approached the Tribunal which has allowed one issue pertaining to claiming depreciation on computer peripheral in favour of the assessee and remanded the remaining issue back to the AO for fresh consideration. Thereafter, AO passed assessment order dated 28.03.2013 which was challenged by the assessee before the Id. CIT (A) who has decided the appeal in favour of the assessee by deleting the addition made in the order dated 28.03.2013 on legal issue.

6. Feeling aggrieved by the order passed by the Id. CIT (A), the Revenue has come up before the Tribunal by way of filing the present appeal.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. We have perused the impugned order passed by the Id. CIT (A) who has decided the appeal in favour of the assessee by following the order passed by the **Hon'ble Delhi High Court passed in assessee's own case for AY 2008-09 in WP (C) No.3629/2017 order dated 07.09.2017** by returning following findings :

“5.7 I have perused the impugned order of the AO dated March 28, 2013 under section 143(3) of the Act which is part of the record. The facts of the case for the year under reference are the same as that of AY 2008-09 In the impugned AY also, the Hon'ble ITAT passed it's order on November 24, 2011, wherein certain issues were remanded back to the Assessing Officer for fresh consideration. Pursuant to the directions of the ITAT, the AO after giving opportunity of hearing to the appellant vide notice dated January 1, 2013, passed final assessment order dated March 28, 2013 on the matters referred back by the Hon'ble ITAT under the provisions of section 143 (3) read with section 254 of the Act wherein he did not agree to the contention of the appellant on any of the issues remanded back by the ITAT to the AO. Perusal of the assessment order under reference shows that the AO has passed final order dated March 28, 2013 under section 143(3) of the Act without passing the draft assessment order in accordance with the provisions of section 144C(1) of the Act.

5.8 The case of the appellant is squarely covered by the order of the Hon'ble High Court in it's case for AY 2008-09 as well as that of JCB India Ltd. v. Deputy Commissioner of Income Tax)(supra) where the Delhi High Court followed its decision in Turner International (supra). The Court held that not referring the transfer pricing issues to the TPO was a violation of section 144C(1) of the Act which was a non curable effect in terms of section 292B of the Act. In view of the same Ground No 2 is

decided in favour of the appellant. The additions made by the AO/TPO made on various grounds is deleted.”

9. Bare perusal of the impugned order passed by the Id. CIT(A) leads to the conclusion that when case was remanded to the assessee to decide afresh on all the issues except one issue already decided in favour of the assessee, the AO was mandatorily required to pass a draft assessment order as per provisions contained u/s 144C(1) of the Act, but AO has straightaway passed final assessment order which is not sustainable in the eyes of law. Identical questions having already been decided by the Hon'ble **Delhi High Court in assessee's own case for AY 2008-09** as to not passing a draft assessment order in accordance with the provisions contained u/s 144C(1) is a non-curable defect, we find no illegality or perversity in the impugned findings returned by the Id. CIT(A), hence the appeal filed by the Revenue is hereby dismissed.

Order pronounced in open court on this 26th day of November, 2021.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 26th day of November, 2021.

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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-44, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.