

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.878/Bang/2018
Assessment Year : 2009-10

M/s. Dell International Services India Pvt. Ltd., (for the merged entity Dell India Private Limited), Diyashree Greens, Sy.Nos.12/1, 12/2A, 13/1A, Challaghatta Village, Varthur Hobli, Bengaluru-560 071. PAN : AAACH 1925 Q	Vs.	The Joint Commissioner of Income Tax (LTU), Bengaluru.
APPELLANT		RESPONDENT

ITA No.901/Bang/2016
Assessment Year : 2009-10

M/s. Dell International Services India Pvt. Ltd., (for the merged entity Dell India Private Limited), Bengaluru-560 071. PAN : AAACD 8893 L	Vs.	The Commissioner of Income Tax (LTU), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Percy Pardiwala, Sr. Counsel
Respondent by	:	Shri. Muzaffar Hussain, CIT(DR)(OSD)(ITAT), Bengaluru

Date of hearing	:	24.11.2021
Date of Pronouncement	:	29.11.2021

ORDER

Per N. V. Vasudevan, Vice President:

ITA No.901/Bang/2016 is an appeal by the Assessee against the order dated 11.3.2016 of CIT, Large Tax Payers Unit (LTU) passed u/s.263 of the Income Tax Act, 1961 (Act) in relation to AY 2009-10. ITA No.878/Bang/2018 is an appeal by the Assessee against order dated 18.12.2017 of CIT(A)-5, Bengaluru, in relation to AY 2009-10. This appeal arises out of the order of assessment passed by the AO pursuant to the order dated 11.3.2016 passed under Section 263 of the Act.

2. The Assessee is primarily engaged in the business of trading, manufacturing and sale of computer hardware and peripheral products. The Assessee filed its return of income on 30 September 2009 for AY 2009-10 declaring a loss from business amounting to Rs.3,956,399. During the assessment proceedings, the Assessee was asked to explain as to why there is a difference in the sales as per sales tax return as compared to sales revenue disclosed in the financial statement. The Assessee explained that it offers post sales warranty services as well as post sales maintenance and services. The sale price includes warranty charges and post sale maintenance for the period beyond the relevant AY. It was specifically submitted that revenue from extended warranty service contracts, which spreads over two to three financial years, would be recognized as revenue over the period of contract. However, as the applicable Value Added Tax ('VAT')/Service Tax would have been discharged on such consideration there would arise a difference in revenue disclosed as per sales/service tax

return and as per financials. The Assessee's submission was accepted and an order u/s 143(3) r.w.s. 144C dated 31 January 2014 was passed without any adjustment in relation to income deferred for recognition over the period of contract.

3. Subsequently, after passing the draft assessment order for AY 2010-11, a notice u/s 148 of the Act was issued and re-assessment proceedings were initiated for the AY 2009-10 contending that revenue deferred for recognition has escaped assessment. In response to the same, the Assessee filed its objections vide letter dated 9 May 2014 contending that the re-assessment proceedings has arisen out of change of opinion: based on the assessment proceedings for AY 2010-11, wherein an adjustment was made on account of deferred revenue. However, the objection filed by the Assessee was rejected vide letter dated 24 February 2015. Without prejudice, the Assessee vide its submissions dated 25 March 2015 and 27 March 2015, submitted the details for a substantial amount (i.e. Rs. 2,133,727,154 out of Rs. 2,168,900,773) explaining the recognition of revenue in tile subsequent years over the period of contract. In this regard, though it was accepted that the Assessee has been able to demonstrate that it has offered to tax substantial amount out of Rs. 2,168,900,773, however, it was mentioned that there is no concept of deferred revenue under the Income-tax Act and accordingly the order u/s 147 of the Act was passed on 30 March 2015 by making an adjustment for deferred revenue of Rs. 2,168,900,773.

4. Subsequently, the Assessee challenged the re-assessment proceedings and filed a writ petition before the High Court contending that since there is a change of opinion, the initiation of re-assessment proceedings is null and void. The writ petition was dismissed by the single member bench and hence the Appellant filed a writ appeal before the High Court of Karnataka against the order of Honourable single member bench. The jurisdictional High Court, vide order dated 02 September 2015, prima facie held that there is change of opinion, however, due to divergent views taken by co-ordinate bench, the matter was referred to larger bench and is currently pending for disposal.

5. Thereafter, Commissioner of Income Tax ('CIT') initiated proceedings u/s 263 of the Act by issue of a show cause notice (SCN) under section 263 of the Act dated 22.01.2016 proposing to revise the first Order of Assessment dated 31.01.2014 passed under section 143(3) of the Act and an order was passed on 11 March 2016 directing the Assessing Officer ('AO') to consider the issue of deferred revenue afresh. The Assessee has filed the present appeal before the Tribunal against the order under section 263 of the Act.

6. We have heard the rival submissions. From a perusal of the sequence of events, we notice that the assessment for AY 2009-10 was completed u/s.143(3) of the Act on 31.1.2014. Thereafter proceedings u/s.147 of the Act were initiated and a sum of Rs.216,89,00,773/- was brought to tax as revenue accrued but deferred by the Assessee by an order of assessment u/s.147 of the Act dated 30.3.2015. Thereafter show cause

notice dated 22.1.2016 u/s.263 of the Act was issued by the CIT seeking to revise the order dated 31.1.2014 on the ground that a sum of Rs.216,89,00,773/- was revenue accrued but deferred by the Assessee and not offered to tax and consequently there was loss to the revenue. In fact by virtue of the order dated 30.3.2015 passed u/s.147 of the Act, the deferred revenue was already brought to tax. There was no prejudice or loss to the revenue whatsoever when the show cause notice u/s.263 of the Act, dated 22.1.2016 was issued by the CIT and when the CIT passed the impugned order dated 11.3.2016. The alleged loss of revenue to the tune of Rs.216,89,00,773/- has already been brought to tax by the revenue in the order dated 30.3.2015 in the reassessment proceedings.

7. The law is well settled that by the decision of the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC), wherein their Lordship have held that twin conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the Commissioner of Income Tax (in short, 'CIT'). The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated an issue before him; then the assessment order passed by the Assessing Officer can be termed as an erroneous order. Coming next to the second limb, which is required to be

examined is as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue? The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. The said principal has been reiterated by Hon'ble Court in its subsequent judgment titled as CIT V/s Max India Ltd. **(295 ITR 282)**. The Hon'ble Karnataka High Court in the case of V. G. Krishnamurthy - [1985] 20 Taxman 65 has held that Section 263 can be invoked by the Commissioner only when he prima facie finds that the order made by the ITO was erroneous and was prejudicial to the interests of the revenue. Both these factors must simultaneously exist. An order that is erroneous must also have resulted in loss of revenue or prejudicial to the interests of the revenue. Unless both these factors co-exist or exist simultaneously, the Commissioner cannot invoke or resort to section 263. It cannot be exercised to correct every conceivable error committed by an ITO. Before the suo moto power of revision can be exercised, the Commissioner must at least prima facie find both the requirements of section 263, namely, that the order sought to be revised is prima facie erroneous and prejudicial to the interests of the revenue. If one of the other factor was absent, the Commissioner cannot exercise the suo moto power of revision under section 263.

8. In the light of the law as explained above, we are of the view that the impugned order u/s.263 of the Act is liable to be quashed and is hereby quashed.

9. As far as ITA No.878/Bang/2018 is concerned, pursuant to the order under section 263 of the Act, the AO has passed the order under section 143(3) r.w.s. 263 dated 14 March 2017 and has brought to tax the deferred revenue amounting to Rs. 2,168,900,773 by adding the same to the assessed income. The CIT(A) by the impugned order confirmed the same.

10. Since, the very foundation of the impugned order is the order dated 11.3.2016 passed u/s.263 of the Act and since the said order has been quashed, we are of the view that the subsequent orders have no legs to stand and therefore they have to be annulled. Consequently, the impugned order of the CIT(A) is also quashed.

11. In the result, both the appeals are allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated : 29.11.2021.
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Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.