

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>ITA No. 656/Bang/2021</b>
<b>Assessment Year : 2013-14</b>

M/s. Brocade Communications Systems Pvt. Ltd., Floor 3, B & C Wing and Floor 8, D Wing, S1 Wipro Electronic City SEZ, Doddathogur Village, Bengaluru – 560 100. <b>PAN: AACCB4490N</b>	<b>Vs.</b>	The Principal Commissioner of Income Tax – 1, Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Revenue by	:	Smt. Priyadarshini Baseganni, Addl. CIT (DR)

Date of Hearing	:	28-07-2022
Date of Pronouncement	:	30-08-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by the assessee against order dated 18/03/2020 passed by the Ld.Pr.CIT for A.Y. 2013-14 on following grounds of appeal:

*“1. The order of the Principal Commissioner of Income Tax (Pr.CIT) passed under Section 263 of the Income-tax Act, 1961 (the Act), is bad in law and liable to be quashed.*

*2. The Learned Pr.CIT erred in law and facts in concluding that the order of the Assessing Officer (AO) is "erroneous*

*and prejudicial to the interests of the revenue" and accordingly has erred in directing the AO to redo the assessment afresh.*

*Scope of revision proceedings*

*3. The Learned Pr.CIT erred in law and facts in initiating the proceedings under Section 263 of the Act with respect to the order dated 25 September 2017 passed under Section 143(3) r.w.s 1440(13) of the Act, in as much as the order passed by the Assessing Officer was neither erroneous, nor prejudicial to the interests of the revenue.*

*4. The Learned Pr.CIT erred in law and facts in holding that the AO had not made any inquiry or verification regarding the matter of taxability of assets received free of cost amounting to Rs. 20,63,61.677 during the regular assessment proceedings. although details regarding the same were appropriately disclosed in the financial statements and made available to the AO.*

*5. That in any event, the Learned Pr. CIT ought to have appreciated that the addition under Section 28(iv) Act was not warranted and is at best debatable in nature, with at least two views possible, and therefore the revisional proceedings were without jurisdiction. Without prejudice to the grounds above, the Learned Pr. CIT erred in not appreciating the fact that the Company is eligible for deduction under Section 10AA of the Act on its profits and accordingly. any additions made, will be eligible for enhanced benefit under Section 10AA of the Act. and therefore there can be no prejudice caused to the interests of the revenue.*

*6. That without prejudice. the final assessment order having been passed pursuant to the directions of the Dispute Resolution Panel, which consists of three officers in the rank of the Commissioner of Income-tax. the order was not amenable for revision under Section 263 of the Act.*

*7. That the Appellant craves leave, to add, amend, modify, rescind, supplement, or alter any or all of the Grounds stated herein above, either before or at the time of hearing of this appeal."*

**2. Brief facts of the case are as under:**

2.1 Assessee is a company engaged in the business of software development and support services. During the year under

consideration, it was observed that assessee had international transactions with associated enterprises amounting to Rs.192,54,32,057/-. The order u/s. 92CA was passed on 21/10/2016 wherein the Ld.TPO made an adjustment to the arms length price to the tune of Rs.14,88,72,773/-. The said order was received by the Ld.AO on 24/10/2016 and a draft assessment order was passed that was sent to the assessee on 30/11/2016.

2.2 The assessee thereafter raised objections before the DRP and the DRP after considering the submissions by assessee passed directions u/s. 144C(5) on 22/08/2017. The said order was received by the Ld.AO on 31/08/2017 and the final assessment order u/s. 143(3) r.w.s. 144C(13) was passed on 25/09/2017 by making an addition based on the adjustment made by the Ld.TPO u/s. 92CA which was enhanced by the directions of the DRP to Rs. 15,34,02,063/-.

2.3 Subsequently, the Ld.PCIT on verification of the assessment record, was of the opinion that assessee had received capital goods free of cost amounting to Rs.20,63,61,677/- which was recorded in the Note No. 24, being Notes to the financial statement. The Ld.PCIT, also noticed that assessee had not claimed depreciation on the goods received free of cost. The Ld.PCIT thus issued notice u/s. 263 on 04/02/2020 scanned and reproduced herein below calling upon assessee to enquire by holding the assessment order to be erroneous insofar as prejudicial to the interest of the revenue.



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
INCOME TAX DEPARTMENT  
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX  
Pr.CIT-1, BANGALORE

To, BROCADE COMMUNICATIONS SYSTEMS PRIVATE LIMITED FLOOR 3B C WING AND FLOOR 8D WING S1, WIPRO ELECTRONIC CITY SEZ DODDATHOGUR VILLAGE BENGALURU 560100, Karnataka India	
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PAN: AACCB4490N	Assessment Year: 2013-14	Dated: 04/02/2020	DIN & Letter No : ITBA/COM/F/17/2019-20/1024640213(1)
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Sir/ Madam/ M/s,

Subject: Revision U/s 263 of the IT Act in the case of M/s Brocade Communications Systems Private Limited for AY 2013-14- reg.

Please refer to the above.

The scrutiny assessment in your case was completed u/s 143(3) r.w.s 144C(13) of the IT Act dated 25/09/2017 by making addition Rs.15,34,02,063/- and order was passed by DCIT-Circle-1(1)(2), Bengaluru. As verified from records, the said assessment needs to be revised u/s 263 of the I T Act for the following reason:

The AO observed from the foot note to item of No.24 of the notes to the financial statements, that assessee had received a benefit in the nature of receipt of assets free of cost amounting to Rs.20,63,61,677/- (the assessee has not claimed depreciation on the same). The receipt of assets free of cost would certainly equivalent to the value of a benefit which is what is covered by section 28(iv) of Income-Tax Act. Thus it is not the actual receipt of money, but the receipt of a benefit or perquisite which has a monetary value as contemplated under the above section ibid.

Note: If digitally signed, the date of digital signature may be taken as date of document.  
BMTc BUILDING, 80 FEET ROAD, 6TH BLOCK, NEAR KHB GAMES VILLAGE, KORAMANGALA, BENGALURU, Karnataka, 560095  
Email: BANGALORE.PCIT1@INCOMETAX.GOV.IN.

DIN- Document Identification No.

In this connection you are requested to appear personally or through your authorized representative along with the requisite documents to support your claim on 11.02.2020 at 12:30 pm.

SRINIVAS RAO GOLI  
Pr.CIT-1, BANGALORE

2.4 In response to notice, representative of the assessee appeared before the Ld.PCIT and filed written submission along with the details of the assets received free of cost. The Ld.PCIT after considering the details and examining the submissions filed by the assessee observed and held as under:

5.1 The submission of the AR has been examined. It is seen that, as the assessing officer had not called for records to examine the details on asset received on free of cost and respective deduction u/s 10AA. The break up of the assets received show that these assets are mostly networking equipment and other office accessories. Further the notes to the financial statements also categorically state that assessee had received the assets free of cost. Section 28 (iv) clearly contemplates the value of such assets as benefit and as taxable income.

5.2 There is nothing on record to show that any inquiry or verification was made on this issue which the AO was otherwise bound to make. Since, the basic exercise of inquiry or verification of transaction has not been made in the instant case, the order passed by the AO is deemed to be erroneous and prejudicial to the interests of the revenue in terms of explanation 2(a) of section 263.

5.2 Further, the assessee has made a claim that addition of value of assets received u/s 28(iv) would result in consequent benefit u/s 10AA on the enhanced income. It is seen that the assessee has declared Rs 30,79,49,453/- under the head income from business, out of which only Rs 10,87,06,118 is claimed as deduction u/s 10AA. Therefore, the claim of the assessee that addition, if any, on account of section 28(iv) would entail consequential benefit u/s 10AA is without any basis. In any case, the assessee in its return of income has not made the claim of deduction u/s 10AA on the value of assets received free of cost and neither has the AO examined this aspect in the assessment proceedings. In view of this, the claim of the assessee is rejected.

6. The Hon'ble Supreme Court in the case of M/s Deniel Merchants P. Ltd. Vs Income Tax Officer dated 29.11.2017, has upheld the action of PCIT in invoking the provisions of section 263 in a case where the AO had not made proper inquiry while making the assessment and held that :

*"...We have find that the Commissioner of Income Tax had passed an order under section 263 of the Income Tax Act, 1961 with the observations that the Assessing Office did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry through and detailed*

*inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court".*

Considering the facts of the case and decision of Supreme Court, I am of the opinion that, assessment order u/s 143(3)rws 144C(13) dated 25.09.2017 erroneous and prejudicial to the interests of the revenue and requires to be revised in terms of section 263. Accordingly, the assessment order is set-aside with a direction to examine the issue of assessing the value of assets amounting to Rs.20,63,61,677/- received free of cost as taxable income.

2.5 Aggrieved by the order passed by the Ld.PCIT, assessee is in appeal before this *Tribunal*.

3. At the outset, the Ld.AR challenged the exercise of powers u/s. 263 of the Act by submitting that the Ld.PCIT could not have revised an order that was based on the directions issued by the DRP that consisted of three officers in the rank of Commissioner of Income Tax. She placed reliance on the decision of *Hon'ble Mumbai Tribunal* in case of *Barclays Bank PLC vs. CIT* in ITA No. 827/Mum/2021 by order dated 03/01/2022. The Ld.AR vehemently argued that in exercise of power u/s. 263, the Ld.PCIT cannot be superseded the satisfaction of the collegium of three Commissioners. On the contrary, the Ld.DR relied on the decision of *Coordinate Bench of this Tribunal* in case of *Adamas Builders Pvt. Ltd. vs. PCIT* in ITA No. 709/Bang/2021 by order dated 27/06/2022 for A.Y. 2013-14 wherein a similar argument was dismissed by this *Tribunal* placing reliance on the decision of *Hon'ble Karnataka High Court* in case of *Devas Multimedia Pvt. Ltd. vs. Prl.CIT* reported in 419 ITR 391. He submitted that the decision relied by the Ld.AR rendered by *Hon'ble Mumbai Tribunal* has been also dealt with in the said decision.

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

4. We note that *Coordinate Bench of this Tribunal* in case of *Adamas Builders Pvt. Ltd. vs. PCIT (supra)* has observed as under:

“9. The next contention of the learned Counsel for the assessee was that the draft Assessment Order was passed by the AO on 21.11.2016 and the assessee filed objections before the DRP and the DRP gave its directions under section 144C(5) of the Act dated 23.08.2017. It was argued that under the provisions of 144C(8) of the Act, the DRP had the power to enhance the addition suggested in the draft Order of Assessment and since the DRP has not done so, the Commissioner in exercise of his powers under section 263 of the Act cannot seek to revise the order of the

*AO which was already been a subject matter of directions by the DRP. In this regard, learned Counsel for the assessee placed reliance on the decision of the ITAT Mumbai Bench in the case of Barclays Bank PLC Vs. CIT ITA No.827/Mum/2021 order dated 03.01.2022. In that case, the draft Assessment Order was passed by the AO dated 31.12.2016 and the assessee filed objections before DRP and the DRP gave directions dated 06.01.2017. The AO passed final Order of Assessment pursuant to the directions of the DRP which was a subject matter of proceedings under section 263 of the Act. On a challenge to the Order under section 263 of the Act, the Tribunal held that as per the scheme of the Act, the provisions of sub-section (7) of section 144C empowers the DRP to make any further enquiry or cause any further enquiry to be made by the Income-tax authority as it thinks fit. Explanation to sub-section (8) of section 144C duly provides that DRP has power to enhance the variation and the power includes to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee. Section 144C(13) provides that upon receipt of the directions issued by DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment without providing any further opportunity of being heard to the Appellant. The Tribunal held that what the AO could not have directly done by making change in the final assessment order after the direction of the DRP. then the PCIT also cannot indirectly make any change so as to circumvent the provision of section 144C(13) of the Act. The Tribunal further held that the constitution of DRP is a collegium comprising of three Principal Commissioners or Commissioners of Income-tax and are individually equivalent in rank to the CIT, who is initiating proceedings u/s. 263 against the order passed by the AO pursuant to their direction. The tribunal held that single CIT is not superior to a `colliguum of 3 CIT and in this regard held that the DRP stands at a higher pedestal than the CIT passing an order alone. The tribunal therefore held that the CIT cannot legally assume jurisdiction u/s. 263 of the act on an order passed by the AO pursuant to the direction of DRP.*

*10. Learned DR on the other hand relied on the order of the CIT(A).*

*11. We have given a careful consideration to the rival submissions. We find that in the decision of the ITAT Mumbai Bench in the case of Barclays Bank (supra) which*

*was cited by the learned counsel for the Assessee, there is a reference to a decision of the Hon'ble Karnataka High Court in the case of Devas Multimedia Pvt.Ltd. Vs. Prl.CIT 419 ITR 391 (Karnataka) wherein it was held that there is no bar for Principal Commissioner to invoke section 263 in order to examine the final assessment order passed by AO pursuant to DRP direction. This decision was however not followed by the Mumbai ITAT for the reason that the same was contrary to the law laid down by the Bombay High Court in the case of Vodafone India Services Pvt.Ltd. Vs. Union of India 368 ITR 1 (Bom). Therefore, we are of the view that the decision rendered by the ITAT Mumbai which is contrary to the law laid down by the Jurisdictional Karnataka High Court, cannot be of any assistance to the plea of the Assessee before us. As far as the decision of the Hon'ble ITAT, Mumbai Bench in the case of Barclays Bank PLI is concerned, factually the AO in that case had examined the issue that was subject matter of proceedings under section 263 of the Act and in that scenario, the Tribunal came to the conclusion that the directions of the DRP will have the effect of ousting the power of the Commissioner under section 263 of the Act from revising the order which was already a subject matter of DRP's direction. Therefore, the decision in the case of Barclays Bank PLI stand on a different footing and not applicable to the facts of the present case. If in a case where Explanation to Sec.144C(8) of the Act is not applicable and if there is a error in the draft assessment order in failure to make enquiry on an issue which ought to have been examined, then the only remedy for the revenue is to invoke jurisdiction u/s.263 of the Act and that right cannot be defeated by a broad reading of the provisions of Sec.144C(8) of the Act and explanation thereto.*

*12. In our view, explanation 1 clause ( c) to section 263(1) of the Act provides that the powers of the CIT u/s.263 of the Act, shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal before the appellate authorities. Therefore, if any issue has not been considered and decided by the First Appellate Authority, then on such matters, the CIT has powers to exercise jurisdiction under section 263 of the Act. The learned Counsel for the assessee however submitted that the aforesaid provisions are not applicable to the direction of the DRP. We are of the view that though the aforesaid provisions did not make a reference to the order of the DRP, yet the powers of the CIT(A) under section 263 of the Act even prior to insertion of clause c, explanation 1 to section 263(1) of the Act, there*

*were divergent opinions on power of the Commissioner whether it can extend to the matters not decided by the Commissioner. Some Courts took the view that the power of the Commissioner extended to the matters that were considered and decided by the First Appellate Authority. The statutory amendment in the form of clause c explanation 1 to section 263(1) of the Act accepts the aforesaid view. In our view, the absence of the reference to the directions of the DRP in clause (c) to explanation 1 to Sec.263(1) of the Act, will only mean that the power of CIT(A) under section 263 will extend only to matters not decided and considered by the DRP. Apart from the above, we also find that under section 144C(8) and explanation thereto, it is only a matter which arises out of the assessment proceedings relating to the draft order over which the DRP can exercise powers of enhancement. The admitted position is that the share application money issue was not considered by the AO in the draft Order of Assessment and therefore the DRP under section 144C(8) of the Act could not have exercised powers of enhancement on the aforesaid issue. Therefore, the Commissioner was free under section 263 of the Act to revise the order of the AO on the ground that the AO failed to make necessary enquiries before concluding the assessment.”*

**Accordingly, Ground nos. 1-3 raised by assessee stands dismissed.**

5. A specific query was raised by the bench to the Ld.AR, if there was any enquiry or verification, in respect of taxability of assets received by assessee free of cost from its AE, during the draft assessment order stage or final assessment order stage by the Ld.AO. The reply was in negative by the Ld.AR. Therefore no further arguments need to be considered; This is further clear from the draft assessment order passed and the final assessment order passed clear case of no enquiry by the Ld.AO, on the aspect that was raked up by the Ld.PCIT in the revision proceedings.

Accordingly, we do not find any infirmity in the directions issued by the Ld.PCIT in the impugned order which is to examine the issue by the Ld.AO.

In sofar as the deduction claimed by assessee u/s. 10AA, principally we agree that the assessee is eligible for the claim in accordance with law, subject to necessary verification of the income so declared being in the nature of trade receipts. We therefore uphold the directions of the Ld.PCIT. We may also direct the Ld.AO that, in the event the said assets received by assessee free of cost from its AE is capitalised, then depreciation has to be granted on the same.

Accordingly, the appeal filed by the assessee stands partly allowed.

**In the result, the appeal filed by the assessee stands partly allowed.**

**Order pronounced in the open court on 30<sup>th</sup> August, 2022.**

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 30<sup>th</sup> August, 2022.  
/MS /

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,  
ITAT, Bangalore