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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **W.P. (C) No. 3629/2017 & C.M. APPL. 15963/2017 (STAY)**

NOKIA INDIA PRIVATE LIMITED ...Petitioner
Through: Mr. Vikas Srivastava, Mr. Jatinder Pal Singh, Mr. Sumit Mangal and Ms. Kanika Jain, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX ...Respondent
Through: Mr. Rahul Chaudhary and Mr.N.P. Sahni, Senior Standing Counsels with Mr.Sanjay Kumar, Junior Standing Counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRA THIBA M. SINGH

O R D E R
% **07.09.2017**

Dr. S. Muralidhar, J

1.This writ petition by Nokia India Private Limited ('Assessee') challenges an order dated 28th March 2017 passed under Section 143 (3) read with Section 254 of the Income Tax Act, 1961 ('Act') by the Additional Commissioner of Income Tax, Special Range-6 (hereafter Assessing Officer -'AO') for the Assessment Year ('AY') 2008-09.

2. The Assessee was engaged during the relevant period, i.e. Financial Year ('FY') 2007-08, *inter alia,* in manufacture and sale of mobile handsets. The Assessee filed its return of income for AY 2008-09 on 30th September 2008 declaring an income of Rs. 909,98,53, 004/-.

3. Since, during the AY in question, the Assessee had entered into international transactions with its Associated Enterprises ('AEs'), the AO made a reference to the Transfer Pricing Officer ('TPO') under Section 92CA of the Act for benchmarking of the international transactions.

4. On 24th October 2011, the TPO recommended additions of Rs. 431,08,15,993/- and thereafter, a draft assessment order was passed by the AO on 23rd December 2011 under Section 143 (3) read with Section 144C of the Act proposing addition of Rs. 633,26,11,353/- in terms of the additions recommended by the TPO. The Assessee then went before the Dispute Resolution Panel ('DRP') which by the order dated 28th September 2012 more or less affirmed the additions recommended by the TPO.

5. The final assessment order was thereafter passed by the AO on 30th November 2012 under Section 143 (3) read with Section 144C of the Act. A total addition of Rs. 610,45,63,770/- was made to the returned income of the Assessee and its total income was assessed at Rs. 1520,44,16,770/-.

6. By the order dated 30th August 2013, the Assessee's appeal was allowed by the Income Tax Appellate Tribunal ('ITAT'). The matter concerning transfer pricing addition on account of Advertising, Marketing and Promotion ('AMP') expenses was remanded to the TPO/AO. The TPO then passed a fresh order on remand on 28th October 2016. When the matter went before the AO thereafter, the Petitioner, by the letter dated

7th December 2016, informed the AO that the assessment proceedings had become time-barred by virtue of Section 153 (2A) of the Act. However, without disposing of that objection, the AO passed the impugned final assessment order dated 28th March 2017.

7. The principal ground of challenge by the Petitioner is that the impugned final order of the AO has been passed in violation of Section 144C of the Act inasmuch as it was not preceded by a draft assessment order as was mandatory in terms of Section 144C (1) of the Act. The second ground is that the impugned order was passed beyond the period of limitation.

8. The principal ground of challenge should succeed as it is squarely covered in favour of the Assessee and against the Revenue by the decision dated 17th May 2017 passed by this Court in W.P. (C) No. 4260/2015 (***Turner International India Pvt. Ltd. v. Deputy Commissioner of Income Tax, Circle 25(2), New Delhi***). There, the Court categorically held that the mandatory requirements under Section 144C (1) of the Act had to be met even where the TPO had passed the order in the second round on remand by the ITAT.

9. This is also the view of the Gujarat High Court in its decision dated 31st July 2017 in Tax Appeal No. 542 of 2017 (***Commissioner of Income Tax, Vadodara-2 v. C-Sam (India) Pvt. Ltd.***)

10. By a separate order passed today in W.P. (C) Nos. 3399/2016, 3429/2016 and 3431/2016 (***JCB India Ltd. v. Deputy Commissioner Of Income Tax***), the Court followed its decision in ***Turner International***

(*supra*) and quashed the final assessment order which was challenged in those cases.

11. 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 Section 144C (1) of the Act result. This is not a curable defect in terms of Section 292B of the Act as held by this Court in its decision dated 17th July 2015 in ITA No. 275/2015 (***Pr. Commissioner of Income Tax, Delhi-2, New Delhi v. Citi Financial Consumer Finance India Pvt. Ltd.***)

12. In view of the fact that the Court is accepting the first ground of challenge raised by the Assessee as regards violation of Section 144 C, the Court is not examining the ground of limitation.

13. For all of the aforementioned reasons, the writ petition is allowed and the impugned final assessment order dated 28th March 2017 passed by the AO/TPO and the consequent orders passed thereafter, including initiation of penalty proceedings and penalty orders, are hereby set aside. The application is disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 07, 2017
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