Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 77 OF 2015

Gigabyte Technology (India) Private Ltd,
B-411, BSEL Tech Park, Sector 30A,
Vashi, Maharashtra – 400705
Presently at :
807 & 808, 8th Floor, Naman
Midtown, B-Wing,
Elphinstone Road, Mumbai
Maharashtra – 400 013.
PAN : AABCD7556N. ... Appellant

Versus

Commissioner of Income Tax
Plot No.5, Patto,
Aaykar Bhavan, Patto, Panaji, Goa. ... Respondent

Mr. Vishal Kalra, Advocate along with Mr. Nikhil Pai, Advocate for the Respondent.

Ms. Susan Linhares, Advocate for the Appellant.

AND
TAX APPEAL NO. 78 OF 2015

Gigabyte Technology (India) Private Ltd,
B-411, BSEL Tech Park, Sector 30A,
Vashi, Maharashtra – 400705
Presently at :
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PAN : AABCD7556N. ... Appellant

Versus

Commissioner of Income Tax
Circle – 1, Margao, Goa. ... Respondent

Mr. Vishal Kalra, Advocate for the Appellant.

Ms. Susan Linhares, Standing Counsel, with Ms. S. Pinto, Advocate for the Respondent.

Coram:- M. S. SONAK &
DAMA SESHADRI NAIDU, JJ.

Reserved on:- 30th September, 2020

Pronounced on:- 19th October, 2020

JUDGMENT : (Per M. S. Sonak, J.):

Heard the learned Counsel for the parties.

2. The learned Counsel for the parties submit that both these Tax Appeals can be disposed of by a common Judgment and Order, since, the decision in Tax Appeal No.77/2015 will govern the decision in Tax Appeal No.78/2015. The learned Counsel agree that in case Tax Appeal No.77/2015 is decided in favour of the Assessee, then, Tax Appeal No. 78/2015 will also have to be decided in favour of the

Assessee. However, if Tax Appeal No.77/2015 is decided against the Assessee, then, Tax Appeal No.78/2015 will also have to be dismissed.

3. Tax Appeal No.77/2015 was admitted on 11/2/2016, on the following substantial questions of law :

> *1. Whether on the facts and circumstances of the case and in law, the Tribunal erred in holding that there was no infirmity in assuming revisionary jurisdiction by the CIT under section 263 of the Act, without appreciating that the assessment order which was sought to be revised by such revisionary action was itself bad in law and void ab initio ?*
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> *2. Whether on the facts and circumstances of the case and in law, the Tribunal erred in upholding the action of the CIT under section 263 of the Act, without appreciating that such action of the CIT directing the AO to frame de novo assessment would result in extending the period of limitation as provided in section 153 of the Act, to complete the assessment proceedings, and thus, the action of the CIT was non-est, invalid and illegal?*

4. In this case, the Appellant-Assessee is engaged in the trading of computer components and peripherals, including motherboards, AGP cards, and optical disk drives. On 27/11/2006, the Appellant filed a return of income for the Assessment Year 2006-07. Notices under Sections 143(2) and 142(1) of the Income Tax Act, 1961 (said Act) were issued to the Assessee on 25/10/2007. On 27/3/2008, the Assessee's return of income was processed under Section 143(1) of the

said Act, since the Assessee had entered into international transactions during the subject assessment year. The matter was referred to Transfer Pricing Officer (TPO) for computing the arm's length price.

5. The TPO made an order dated 29/10/2009 under Section 92CA(3) of the said Act proposing an addition of Rs.7,30,40,428/- in respect of the international transactions for the purchases made from the associated enterprises. On 18/12/2009, the Assessing Officer (AO) made the final assessment order under Section 143(3) of the said Act, assessing the total income of the Assessee at Rs.6,38,06,928/-.

6. The Assessee aggrieved by Assessment Order dated 18/12/2009, appealed to the Commissioner (Appeals) on 27/01/2010. One of the main grounds urged by the Assessee was that in this case, the AO was duty-bound to follow the provisions of Section 144C of the said Act and, in terms thereof, to provide the Assessee with a draft assessment order before the assessment order would be made under Section 143(3) of the said Act.

7. The Commissioner (Appeals) called for a remand report from the AO, which was duly submitted by the AO on 2/2/2012. It is the case of the Assessee that the remand report form, with the provision of Section 144C of the said Act, was not complied with by

the AO in this matter.

8. On 20/03/2012, the Commissioner of Income Tax (CIT) issued a notice under Section 263(1) of the said Act, purporting to exercise his revisional jurisdiction in the matter of the assessment order dated 18/12/2009 made by the AO. This notice states that the AO, by failing to provide the draft assessment order in terms of Section 144C(1) of the said Act to the Assessee, had violated the principles of natural justice and, therefore, the assessment order dated 18/12/2009, was erroneous and deserved to be set aside.

9. The Assessee, on 19/3/2012, filed a detailed response to the notice dated 23/2/2012 objecting to the very initiation of the revisional proceedings. The Assessee pointed out that the assessment order dated 18/12/2009 was not merely illegal, but was *void ab initio* and, therefore, a nullity. In any case, the Assessee pointed out that the assessment order dated 18/12/2009 was certainly not prejudicial to the interest of the Revenue and, therefore, there was no question of exercise of the powers under Section 263 of the said Act.

10. On the very next day *i.e.* 20/3/2012, the CIT passed an order under Section 263 of the said Act, setting aside the assessment order dated 18/12/2009 and directing the AO to issue the Assessee

draft assessment order as contemplated by Section 144C(1) of the said Act.

11. On 30/3/2012, the Commissioner (Appeals) dismissed the Assessee's appeal against the assessment order dated 18/12/2009 on the ground that the appeal was rendered infructuous because the CIT, in the exercise of powers under Section 263 of the said Act, had already set aside the assessment order dated 18/12/2009.

12. The Assessee appealed to the Income Tax Appellant Tribunal (ITAT), challenging both, the CIT's order dated 23/2/2012 purporting to exercise the revisional jurisdiction and the order of the Commissioner (Appeals) dated 30/03/2012, dismissing the Assessee's appeal. The ITAT, vide order dated 31/10/2014, dismissed both these appeals. Hence these two appeals under Section 260A of the said Act by the Assessee.

13. Tax Appeal No.77/2015 concerns the order dated 30/3/2012 made by the CIT in the purported exercise of its revisional jurisdiction under section 263 of the said Act. If this order, as well as the order of the ITAT dated 31/10/2014 confirming this order, are set aside, then, obviously the assessment order dated 18/12/2009 and the order of the Commissioner (Appeals) dated 30/3/2012, will also have to be set

aside

14. Accordingly, it is only appropriate that both these Appeals are disposed of by a common Judgment and Order by treating Tax Appeal No.77/2015 as the lead matter.

15. Mr. Vishal Kalra, the learned Counsel for the Appellant-Assessee, at the outset, submitted that the AO was duty-bound to follow the provisions of Section 144C of the said Act and since, admittedly, these provisions were not followed, the assessment order dated 18/12/2009 was *void ab initio* and a nullity. He submits that as against the order which was *void ab initio*, or a nullity, the revisional jurisdiction under Section 263 of the said Act could never have been invoked. He submits that Section 263 of the said Act presupposes the existence of an order which may be erroneous, but not an order which is *void ab initio* or a nullity. In support of this proposition, Mr. Kalra relies upon the following decisions :

(*i*) *Keshab Narayan Banerjee vs. Commissioner of Income-tax*[1]

(ii) P. Abdulkadar Hamza vs. Commissioner of Income-tax[2]*;*

(iii) Commissioner of Income-tax[3]*;*

(iv) Westlife Development Ltd. vs. Principal Commissioner of Income

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1 [1998] 101 Taxman 512 (Cal)
2 [2001] 116 Taxman 455 (Ker)
3 [1990] 48 Taxman 297 (Delhi)

Tax-5, Mumbai[4]*;*

(v) Inder Kumar Bachani (HUF) vs. Income Tax Officer[5]*; and*

(vi) Paul John, Delicious Cashew Co. vs. The Income Tax Officer[6]

16. Mr. Kalra also referred to some of the decisions which take the view that assessment orders made without following the provisions of Section 144C of the said Act (wherever applicable) are a nullity and consequently unsustainable. These decisions are :

(a) M/s. Zuari Cement Ltd. vs. The Assistant Commissioner of Income Tax; Tirupathi[7]*;*

(b) Control Risk India (P.) Ltd. vs. Deputy Commissioner of Income Tax[8]*;*

(c) International Air Transport Association vs. Deputy Commissioner of Income-tax[9]*;*

(d) Principal Commissioner of Income-tax-15 vs. Lionbridge Technologies (P.) Ltd.[10]*; and*

(e) Vijay Television (P.) Ltd. vs. Dispute Resolution Panel, Chennai[11]*.*

17. Mr. Kalra submits that in this case, even it were to be assumed that the assessment order dated 18/12/2009 was merely

4 [2016] 49 ITR (T) 406 (Mumbai)
5 MANU/LU/0488/2005
6 MANU/IN/0421/2004
7 WP No.5557 of 2012 dated 21/2/2013 by AP High Court.
8 [2019] 107 taxmann.com 82 (Delhi)
9 [2016] 68 taxmann.com 246 (Bombay.)
10 [2019] 260 Taxman 273 (Bombay.)
11 [2014] 46 taxmann.com 100 (Madras)

erroneous and not a nullity, the revisional jurisdiction could not have been exercised, because, the assessment order dated 18/12/2009 was, in no manner, prejudicial to the interest of the Revenue. He submits that unless and until the twin conditions *i.e.* the order being erroneous and the order being prejudicial to the interest of the Revenue, are established, there is no jurisdiction to exercise the revisional powers under Section 263 of the said Act.

18. Mr. Kalra submits that in any case, by incorrectly exercising the revisional jurisdiction of Section 263 of the said Act, the CIT has purported to extend the period of limitation for making the assessment order, which is impermissible. He relies upon the decision of the Full Bench of the ITAT (Chennai Bench) in case of *V. Narayanan vs. ACIT*[12]. He submits that the decision of the Full Bench in *V. Narayanan* (supra) was binding upon the ITAT in the present case, in view of the law laid down by the Hon'ble Supreme Court in *Union of India & others vs. Kamlakshi Finance Corporation Limited*[13]*;* the decision of the Bombay High Court in *CIT vs. Goodlas Nerolac Paints Limited*[14] and *CIT vs. L.G. Ramamurthi*[15]*.*

19. For all the aforesaid reasons, Mr. Kalra submits that the

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12 [2010] 2 ITD 446 (Chennai)
13 SLP (C) No.7717 of 1990 (SC)
14 [1991] 188 ITR 1 (Bom).
15 [1977] 110 ITR 453 (Mad)

substantial questions of law, as framed in these matters, are required to be answered in favour of the Assessee and against the Revenue.

20. Ms. Linhares, the learned Standing Counsel for the Revenue, defends the order made by the ITAT based on the reasoning reflected therein. She submits that the assessment order dated 18/12/2009 was not a nullity, but it was merely an erroneous order made in breach of the procedure prescribed under Section 144C of the said Act. She points out that the assessment order dated 18/12/2009 was prejudicial to the interest of the Revenue because the said assessment order could have been easily set aside by the appellate authorities on the ground of breach of procedure. She submits that accordingly the two preconditions for the exercise of the revisional jurisdiction under Section 263 of the said Act were fulfilled and there was nothing wrong in the exercise of the revisional jurisdiction by the CIT in these matters. On this basis, Ms. Linhares submits that the substantial questions of law are required to be answered against the Assessee and in favour of the Revenue.

21. The rival contentions now fall for our determination.

22. In this case, there is no dispute that the provisions of Section 144C of the said Act were applicable and, further, such provisions were

not complied with by the AO before passing the assessment order dated 18/12/2009.

23. Section 144C(1) of the said Act provides that the Assessing Officer shall, notwithstanding anything to the contrary contained in the said Act, in the first instance, forward a draft of the proposed order of assessment (hereinafter in this section referred to as the draft order) to the eligible Assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such Assessee.

24. Section 144C(2) then provides that on receipt of the draft order, the eligible Assessee shall, within thirty days of the receipt by him of the draft order, - file his acceptance of the variations to the AO; or - file his objections, if any, to such variation with,– (*i*) the Dispute Resolution Panel; and (*ii*) the Assessing Officer.

25. Section 144C(3) then provides that the AO shall complete the assessment based on the draft order, if the assessee intimates to the AO the acceptance of the variation; or no objections are received within the period specified in sub-section (2).

26. Section 144C(4) provides that the AO shall, notwithstanding anything contained in Section 153, pass the assessment order under

sub-section (3) within one month from the end of the month in which, the acceptance is received, or the period of filing of objections under sub-section (2) expires.

27. Section 144C(5) provides that the DRP shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the AO to enable him to complete the assessment.

28. Section 144C(6) provides that the DRP shall issue the directions referred to in sub-section (5), after considering the following:

(*a*) draft order;
(*b*) objections filed by the assessee;
(*c*) the evidence furnished by the assessee;
(d) the report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
(*e*) records relating to the draft order;
(*f*) evidence collected by, or caused to be collected by, it; and
(*g*) result of any inquiry made by or caused to be made by, it.

29. Section 144C(7) provides that the DRP may, before issuing any directions referred to in sub-section (5), make such further inquiry, as it thinks fit; or cause any further inquiry to be made by any income-tax authority and report the result of the same to it.

30. Section 144C(8) provides that the DRP may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

31. In this case, there is no dispute that the provisions of Section 144C, read with Section 92CA of the said Act were applicable. There is no dispute that in the present case, the AO before making the assessment order dated 18/12/2009 gave a complete go-by to the detailed provisions contained in Section 144C of the said Act. Therefore, the first question that arises for determination is, whether the assessment order dated 18/12/2009 made by the AO in clear breach of the mandatory provisions of Section 144C of the said Act, was merely erroneous, as contended by Ms. Linhares, or, whether the same was null and void as contended by Mr. Kalra, the learned Counsel for the Assessee.

32. In *Zuari Cement Ltd. (supra),* the Division Bench of the Andhra Pradesh High Court, in almost identical circumstances, held that the assessment order is contrary to the mandatory provisions of Section 144C of the said Act and is *'one without jurisdiction, null and*

void and unenforceable'. In answer to the objection that no writ petition be entertained because the Assessee had a statutory appellate remedy, the Court held that since the impugned order was without jurisdiction, the objection about alternate remedy will not come in the way of the writ Court to grant relief. By order dated 21/2/2012, the Hon'ble Supreme Court dismissed the Special Leave to Appeal against the decision of the Division Bench of Andhra Pradesh High Court in *M/s. Zuari Cement Ltd.* (supra).

33. In *Control Risk India (P.) Ltd.* (supra), the Division Bench of Delhi High Court, held that consequent upon order of TPO under Section 92 CA(3) of the said Act, it is incumbent upon the AO to pass a draft assessment order under Section 144C of the said Act and this is a settled position as explained by the Court in its decision in *Turner International India (P.) Ltd. vs. CIT* [2017] 82 taxmann.com 125. In the said case the AO overlooked the above legal position and proceeded to pass the final order, thereby depriving the Assessee of an opportunity of questioning the draft assessment order under Section 144C of the said Act before the DRP, the Court had no hesitation in setting aside the impugned assessment order and consequently the notice of demand. Again the Special Leave to Appeal against this decision was dismissed by the Hon'ble Supreme Court on 16/3/2018.

34. In *International Air Transport Association* (supra), the Division Bench of this Court has also taken a view that special rights are made available to an eligible Assessee under Section 144C of the said Act. These special rights contemplate the making of a draft assessment order under Section 144C by the AO before he makes a final assessment order under Section 143(3) of the said Act. Such a draft assessment order bestows certain rights upon an eligible Assessee, such as to approach the DRP with its objections to such a draft assessment order. This is for the reason that an eligible Assessee's grievance can be addressed before a final assessment order is passed and appellate proceedings invoked by it. However, these special rights were made available to eligible Assessee under Section 144C of the said Act are rendered futile, if directly a final order under Section 143(3) of the said Act is passed, without being preceded by a draft assessment order. In such a situation, the assessment order made by the AO *'is completely without jurisdiction'*. The Division Bench of this Court followed the decision of Andhra Pradesh High Court in *M/s. Zuari Cement Ltd.* (supra) and based on the same, not only set aside the assessment order but also consequential order on rectification application, as well as the penalty.

35. Again in *Lionbridge Technologies (P.) Ltd.* (supra), another Division Bench of this Court, following the decision in *International*

Air Transport Association (supra) held that a draft assessment order is necessary in terms of Section 144C(1) of the said Act before the AO can proceed to pass a final assessment order. In the absence thereof, the order is without jurisdiction. Non-issue of draft assessment order could not be corrected by issuing a corrigendum to a final assessment order. The Division Bench even rejected the contention that the Assessee was estopped from challenging the corrigendum, as it was expected by it that such a contention overlooked the fact that there can be no estoppel on the issue of law about jurisdiction. This Court held that if the corrigendum dated 16/4/2004 and the order dated 12/3/2014 of the AO were without jurisdiction, then, such an issue of jurisdiction can be raised at any time and the principles of estoppel will not apply. Mere consent of the parties does not bestow jurisdiction if the order is beyond jurisdiction.

36. To a similar effect is the law laid down by Madras High Court in *Vijay Television (P.) Ltd.* (supra). The Court held that the order passed by the AO lacked jurisdiction and when there is a statutory violation in not following the procedure prescribed and such an order cannot be cured by merely issuing a corrigendum. This decision has been approved by the Division Bench of this Court in *Lionbridge Technologies (P.) Ltd.* (supra).

36. Thus, from the conspectus of the aforesaid decisions, the legal

position which emerges is that where a final assessment order is made by the AO without compliance with the mandate of section 144C of the said Act, the same is not merely an erroneous order as contended by Ms. Linhares, but such an order is without jurisdiction, as held by this Court or, null and void, as held by Andhra Pradesh High Court. The assessment order dated 18/12/2009 was therefore not merely an erroneous order but the same was an order without jurisdiction, null and void.

37. Even the CIT, in his order dated 20/3/2012 made in the purported exercise of revisional jurisdiction, held that the AO could not have passed the final assessment order dated 18/12/2009, without providing a draft assessment order in terms of Section 144C(1) of the said Act to the Assessee in the present case. However, the CIT chose to style this final assessment order dated 18/12/2009 as merely *'erroneous'*. Further, at least, in the notice dated 23/2/2012, by which the Commissioner purported to invoke the provisions of Section 263 of the said Act, there is no reference to the assessment order dated 18/12/2009 being prejudicial to the interest of the Revenue.

38. The Notice dated 23/2/2012, issued by the Commissioner invoking the revisional powers under Section 263 of the said Act, reads as follows :

"OFFICE OF THE COMMISSIONER OF INCOME-TAX "AAYAKAR BHAVAN", PLOT NO.5, EDC COMPLEX, PATTO PLAZE, PANAJI-403 001, GOA
PHONE N0.0832-2438461 FAX 0832-2438460
F .NO. 263/CIT-PNJ/2011-12
DATED 23-02.2012

To,
M/s: Gigabyte Technology (India) Ltd.
Plot No. L-5, Verna Electronic City,
Verna Plateu, Verna, Goa - 403 722

Sir,

Sub: Notice u/s 263 of I.T. Act 1961, for A.Y. 2006-07 for A.Y. 2006-07 reg. PAN-AABCD7556N

Please refer to the above.

2. In your case, assessment order u/s 143(3) for assessment year 2006-07 has been passed by Assistant Commissioner of Income-tax, Circle-l, Margao, on 18.12.2009 and income was assessed at Rs.6,38,06,926/-.

3. While going through the assessment records for the above mentioned year, it is noticed that the aforesaid order is erroneous for the following reasons. The details are as under:

4. In the said assessment order, additions towards TPO adjustments u/s 92CA of Rs.7,30,40,428/- was made in pursuant to the order passed u/s 92CA of the I.T. Act, dated 29.10.2009 by the Joint Director of income Tax (TP)-l,

Bangalore. The said TPO's order was received in this office on 30.11.2009.

5. On receipt of the TPO's order, an opportunity of hearing was given to the assessee by this office, vide letter dated 10.12.2009 and the assessee has filed its submissions, dated 17.12.2009. On receipt of the assessees submissions, an order u/s 143(3) of the I.T. Act was passed on 18.12.2009. However, it is seen from the records that no draft assessment order was sent to the assessee before passing an order u/s. 143(3) of the I.T. Act as required u/s 144C of the I.T.Act.

6. As per the provisions of section u/s 144C of the l.T. Act as enacted and inserted by the Finance Act 2009, with effect fnom 01.04.2009 a dratt assessment order should have been provided to the assessee before passing order u/s 143(3) of the I.T. Act in order to raise its objections before Dispute Resolution Panel (DRP). Therefore, the order passed u/s 143(3) is not in accordance with the provisions of section 144C of the I.T.Act.

7. In view of the above facts, it is quite clear that the assessment order is erroneous, since the AO has failed to provide draft assessment order before passing order u/s 143(3) of I.T. Act on the issues discussed above. The AO has violated the principle of natural justice and therefore the order passed is erroneous. I therefore prepose to pass appropriate order u/s 263 of the I.T. Act in your case for the A.Y. 2006-07 to set aside the assessment. You are hereby provided an opportunity of being heard in the matter within the meaning of sec. 263(1). The date fixed for hearing is 29.02.2012 at 11.30 am. If you do not avail this opportunity. It will be presumed that you have nothing to

say in the matter and the issue will be decided on the basis of the facts available on record and on legal merits of the case.

Yours faithfully,
Sd/-
(M.L.KARMAKAR)
Commissioner of Income-tax
Panaji-Goa"

39. Now, the legal position in so far as the invocation of the revisional powers under Section 263 of the said Act is quite clear. Before such invocation, the Commissioner is required to be satisfied that the order which is proposed to be revised is erroneous, as well as prejudicial to the interest of the Revenue. Unless and until these conditions are satisfied, there is no question of invocation of powers under Section 263 of the said Act. There are several decisions, which have taken this view, the leading decision being *Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax*[16].

40. In this case, the notice dated 23/2/2012, by which the Commissioner has purported to invoke his revisional powers, only points out that the assessment order dated 18/12/2009 which he proposed to revise, was erroneous because, the AO, in this case, failed to comply with the provisions under Section 144C of the said Act, though such provisions were clearly attracted in the facts and

[16] 243 ITR 83 (SC)

circumstances of the present case. However, there was absolutely no satisfaction recorded on the aspect of the assessment order dated 18/12/2009 being prejudicial to the interest of the Revenue. In absence of a record of any such satisfaction, there was no question of invoking the revisional powers under Section 263 of the said Act.

41. Some of the decisions relied upon by Mr. Kalra also support the view that revisional jurisdiction under Section 263 of the said Act cannot be invoked in respect of an assessment order which is without jurisdiction or a nullity or *void ab initio*. However, according to us, it is not necessary to go into this issue, primarily because, the record, in this case, indicates that before the Commissioner invoked the revisional jurisdiction by the issuance of Notice dated 23/2/2012, the Commissioner nowhere recorded his satisfaction that the assessment order dated 18/12/2009 was prejudicial to the interest of the Revenue.

42. The ITAT, in this case, has not gone into the issue as to whether the Commissioner at all recorded any satisfaction that the assessment order dated 18/12/2009 was prejudicial to the interest of the Revenue. Instead, the ITAT has reasoned that since the assessment order dated 18/12/2009 was in breach of the provisions of Section 144C of the said Act, the assessment order would not have withstood the challenge in appeal, and in that sense the assessment order dated

18/12/2009 was prejudicial to the interest of the Revenue. Based on such reasoning, the ITAT virtually permitted the CIT to not only assume the revisional jurisdiction, in absence of satisfaction of one of the twin conditions, it further permitted the CIT to even extend the period for completion of the assessment in terms of Sections 143 and 144C of the said Act.

43. The Full Bench of the ITAT in the case of *V. Narayanan* (supra), has held that revisional jurisdiction under Section 263 of the said Act cannot be invoked to give a fresh lease of life for making an assessment order where the period prescribed for making such an assessment order has already expired. This decision of the Full Bench was binding upon the ITAT in absence of any contrary decision of the Hon'ble Supreme Court or the jurisdictional High Court.

44. The ITAT has sought to distinguish the decisions in *M/s. Zuari Cement Ltd.* (supra), *Control Risk India (P.) Ltd.* (supra); *International Air Transport Association; Lionbridge Technologies (P.) Ltd. (supra)* and *Vijay Television (P.) Ltd.* (supra) on the basis that all these were decisions rendered in Writ Petitions where the High Courts held that the assessment orders without following the provisions under Section 144C of the said Act, is in excess of jurisdiction or null and void. The ITAT has reasoned that since in this case the Assessee had

not instituted a Writ Petition and got the assessment order dated 18/12/2009 *void ab initio* or a nullity, such assessment order dated 18/12/2009 could always have been revised by the revisional authority.

45. According to us, the issue is whether the assessment order dated 18/12/2009 in this case, is v*oid ab initio* or not. Going by the decisions in *M/s. Zuari Cement Ltd.* (supra), *Control Risk India (P.) Ltd.* (supra); *International Air Transport Association; Lionbridge Technologies (P.) Ltd. (supra)* and *Vijay Television (P.) Ltd.* (supra), we have to hold that the assessment order dated 18/12/2009, in the present case, was clearly without jurisdiction and, therefore, null and void or *void ab initio*. The fact that the Assessee, in this case, may have not instituted a Writ Petition to challenge the same, but has instituted only an appeal challenging the same, can make no difference to the legal position which is otherwise quite clear. This was not a case where the assessee was merely throwing some collateral challenge to the assessment order dated 18/12/2009. The assessee had frontally challenged this order by instituting an appeal against the same. Therefore, all these decisions could not have been ignored by the ITAT by merely observing that these were the decisions in Writ Petitions instituted by the Assessees.

46. For all the aforesaid reasons, the two substantial questions of

law will have to be answered in favour of the assessee and against the revenue. Further, the order dated 23/2/2012 made by the CIT in the purported exercise of jurisdiction under Section 263 of the said Act, is liable to be set aside. Since this order has merged into the order of the ITAT dated 31/10/2014, even this impugned order made by the ITAT is required to be set aside.

47. As a consequence, even the two substantial questions of law, as framed in Tax Appeal No.78/2015, will have to be answered in favour of the Assessee and against the Revenue. Further, the impugned orders in the said appeal will also have to be set aside.

48. Both the Appeals are disposed of in the aforesaid terms. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J. *M. S. SONAK, J.*