

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.2258/Bang/2016 : Asst.Year 2008-2009

ITA No.2259/Bang/2016 : Asst.Year 2010-2011

The Asst.Commissioner of Income-tax, Circle 4(1)(1) Bangalore.	v.	M/s.Lifestyle International (P) Limited, 77 Town Centre, Building No.3, West Wing, Off HALL Airport Road Yamlur P.O. Bangalore – 560 037. PAN : AAACL2937J.
(Appellant)		(Respondent)

CO No.62/Bang/2016 : Asst.Year 2008-2009

CO No.63/Bang/2016 : Asst.Year 2010-2011

M/s.Lifestyle International (P) Limited, 77 Town Centre, Building No.3, West Wing, Off HALL Airport Road Yamlur P.O., Bangalore – 560 037.	v.	The Asst.Commissioner of Income-tax, Circle 4(1)(1) Bangalore.
(Cross Objector)		(Respondent)

Revenue by : Ms.Neera Malhotra, CIT-DR
Assessee by : Sri.K.R.Vasudevan, Advocate

Date of Hearing : 15.04.2021	Date of Pronouncement : 19.04.2021
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ORDER

Per George George K, JM :

These appeals at the instance of the Revenue and Cross Objections filed by the assessee are directed against two orders of the CIT(A), both dated 30.09.2016. The relevant assessment years are 2008-2009 and 2010-2011.

2. Common issues are raised in these appeals and cross objections, hence, they were heard together and are being disposed of by this consolidate order.

We shall first adjudicate the Revenue's appeals.

ITA No.2258/Bang/2016 & ITA No.2259/Bang/2016

3. Identical grounds are raised, except variance in figures. Ground Nos.1, 5 and 6 are general in nature and does not require any adjudication, hence, the same are dismissed. The effective grounds, namely, ground Nos.2, 3 and 4 relating to assessment year 2008-2009 are reproduced below:-

"2. On facts of the case, whether the ld.CIT(A) is right in allowing the appeal of the assessee by deleting the disallowance made by the AO on professional fee amounting to Rs.76,66,432/- u/s 40A(2) and alternatively u/s 37 of the I T Act holding that the TPO while determining the ALP has not disputed the genuineness of the payment and has accepted the ALP declared by the assessee.

3. On the facts of the case, whether the ld.CIT(A) was justified in deleting the above addition made without appreciating the fact that under sub-section (3) of Section 92C the TPO only computes the arm's length price in relation to an international transaction and is not empowered to examine the genuineness of the said payment.

4. On facts of the case, whether the ld.CIT(A) is right in deleting the disallowance made on premium on forward cover u/s 43(5) treating it as speculative loss which is capital in nature and allowing the appeal of the assessee."

Ground Nos.2 and 3 (Professional fees) :

4. The assessee has made payment to its group / associate enterprises, namely, RNA Resources Group Limited (RNA) as

professional fees. For the assessment year 2008-2009, the amount paid was to the tune of Rs.76,66,432. For the assessment year 2010-2011 the amount paid as professional fees for stores set up (post set up) was Rs.63,09,804. The professional fees, it is claimed is in the nature of consultancy and were towards setting up of new stores and running the same after its set up. It is also stated that professional fees paid for setting up stores were capitalized in the books of account of the assessee and depreciation was claimed accordingly. As regards professional fees for post set up of stores (for running the store by RNA), the same is claimed by the assessee as revenue expenditure. For rendering of professional services, a consultancy agreement was executed between the assessee and RNA on 15.12.2004.

4.1 The Assessing Officer for assessment years 2008-2009 and 2010-2011 disallowed the professional fees paid by the assessee to RNA by stating following reasons:-

- (i) The payments made to RNA were unreasonable and excessive and without legitimate need of business.
- (ii) The assessee has full-fledged management team with expertise needed to execute such operations and there was no such necessity to procure services of RNA.
- (iii) According to AO, the employee cost incurred and legal and professional charges paid during the year added to its overall conclusion of it being unreasonable and excessive.

- (iv) Alternatively, for disallowance under section 37 of the Act, the AO concluded the payments to be not incurred exclusively for the purpose of business.

4.2 Aggrieved, the assessee preferred an appeal to the first appellate authority. The CIT(A) after analyzing the facts and legal position, directed the A.O. to delete the aforesaid disallowance. The findings of the CIT(A) is briefly summarized as follows:-

- (i) The CIT(A) accepted the judicial precedents quoted by the assessee and stated that there cannot be unwarranted deviation when the international transactions are declared at arm's length price.
- (ii) The AO has erroneously disallowed the aforesaid expense under section 40A(2) of the I.T.Act, without specifying what is excess or unreasonable in the payments made. The AO failed to bring on record fair market value analysis for making such disallowance.
- (iii) In the context of section 37 of the I.T.Act, the AO had not explained as to how and why the aforesaid expense is not wholly and exclusively incurred for business purpose.
- (iv) The aforesaid expense is a capital expenditure of the assessee and therefore, to this extent, the section 40A(2) of the Act / section 37 of the Act itself cannot be made applicable.

4.3 Aggrieved by the order of the CIT(A), the Revenue has filed this appeal before the Tribunal. The learned Departmental Representative relied on two orders of the Bangalore Benches of the Tribunal in the case of (i) DRHL India Services (P.) Ltd. [2019] 102 taxmann.com 334 (Bang.Trib.), and (ii) Gemplus India (P.) Ltd. [2010] 3 taxmann.com 755 (Bang.Trib.), and contended that since evidence filed by the assessee did not substantiate the nature of services rendered by the holding company / associate enterprises, disallowance u/s 40A(2) / 37 of the I.T.Act is correct.

4.4 The learned AR, on the other hand, submitted a brief written submission essentially reiterating the submissions made before the Income Tax Authorities. The AR also filed a paper book comprising of judicial pronouncements, which were cited before the CIT(A). Apart from the judicial pronouncements cited before the CIT(A), the learned AR also relied on the orders of the Bangalore Benches of the Tribunal in the case of (i) Manipal Health Systems Private Limited [ITA No.1667 and 1668/Bang/2016 – order dated 27.06.2018] and (ii) Cisco Systems Capital India Private Limited [IT(TP)A No.1558/Bang/2012 – order dated 19.09.2014], for the proposition that onus is on the A.O. to bring on record comparable cases to prove that payment made by the assessee is in excess of fair market value and provisions of section 40A(2) of the I.T.Act are not automatic. It was further stated by the learned AR that since in the facts of this case, the A.O. has not proved that the expenditure incurred is in excess of fair market value,

provisions of section 40A(2) of the I.T.Act does not have application.

4.5 We have heard rival submissions and perused the material on record. In the instant case, the admitted facts are RNA is an associate enterprise of the assessee and professional fees paid by the assessee to RNA was considered by the assessee as an international transaction in its transfer pricing study and also disclosed in Form 3CEB. During the course of assessment proceedings for assessment years 2008-2009 and 2010-2011, the A.O. referred the said international transaction to the TPO for determining the arms length price. The TPO by orders for the assessment years 2008-2009 and 2010-2011, came to the conclusion that no adjustment is required as the impugned transaction is at arms length. The Assessing Officer has not relied on the order of the TPO and has gone ahead by disallowing the professional fees paid u/s 40A(2) of the I.T.Act. In the case of Oracle India Pvt. Ltd. v. ACIT reported in 337 ITR (AT) 103 (Del.), the Delhi Benches of the Tribunal has held that the Assessing Officer is required to compute the total income of the assessee in regard to the arms length price determined by the TPO. It was concluded by the Delhi Tribunal that when payments are already been accepted at arms length by the TPO, then there was no justification on the part of the A.O. to hold that the expenditure is unreasonable and invoke the provisions of section 40A(2) of the I.T.Act. Similar view has been held by the Bangalore Benches of the Tribunal in the case of Herbalife International India (P) Ltd. v. ACIT reported in

(2016) 65 taxmann.com 143 (Bang.Trib.). The relevant finding of the Tribunal in this regard, reads as follow:-

“10.4 We have considered the rival submissions as well as the relevant material on record. This transaction of payment of administrative service fee has been declared by the assessee as international transaction and is also subjected to TP provisions of sec.92CA, however, the AO made an alternative addition by invoking the provisions of sec.40A(2) of the Act. The AO allowed only 2% of the turnover amounting to Rs.1,02,62,530/- and the balance of Rs.4,81,97,802/- has been disallowed under section 40A(2) of the Act. There is no dispute that the transaction has been reported by the assessee as international transaction which was also accepted by the AO and the TPO as an international transaction. Thus, once a particular transaction is admitted as international transaction then the same falls in the ambit of the provisions of X chapter of the Act which are specific provisions to deal with such transactions between the assessee and its AE. Therefore, once the transaction is undisputedly subject matter of Chapter X of the IT Act, then the other general provisions of the Act cannot be applied simultaneously. The AO, having considered the transaction being international transaction and making a reference to the TPO for determination of the ALP cannot go back to the provisions of sec.40A(2) for determining the reasonableness of the price paid by the assessee. Our attention was invited by the learned authorised representative of the assessee that for the assessment year 2001-02 to 2002-03 the payment in question was subjected to MAP and only 25% is charged to tax. Therefore, it was accepted by the department that the services were rendered by the AE to the assessee in India. We further note that the AO has not conducted any inquiry or investigation to find out the excessiveness of the payment made by the assessee to its AE.”

4.5.1 Moreover, the AO has not compared the reasonableness of payment with respect to fair market value of services provided by RNA vis-à-vis outside parties. The Hon’ble Delhi High Court in the case of CIT v. Nestle India Ltd. reported in [2011] 11 taxmann.com 106 (Delhi) had held that “once the

assessee has discharged initial onus, the burden would be shifted to the Revenue to show that the expense was unreasonable and excessive having regard to the legitimate needs of business based on material or evidence on record and that the assessee had made less than ordinary profits". The Bangalore Benches of the Tribunal in the case of Manipal Health Systems Private Limited (supra) had held that "onus is on the A.O. to bring on record comparable cases to prove that payment made by the assessee is in excess of fair market value and the provisions of section 40A(2) of the I.T.Act are not automatic". The relevant finding of the Tribunal reads as follow:-

"10. On perusal of the record, we also find that AO was not consistent in restricting the disallowances during the assessment year 2009-10 to 2011-12. In assessment year 2009-10, 2010-11 he made a disallowance of 33% of the total claim and in the impugned assessment year he made a disallowance of 50% without assigning any reasons. Whereas the assessee has placed substantial material on record to establish that various services were rendered by MEMGIPL. We have also carefully perused the judgment referred to by the assessee and we find that it has been repeatedly held through various judicial pronouncements that the onus is on the AO to bring on record the comparable cases to prove that payment made by the assessee is in excess of fair market value and hence the same in his opinion is found to be excessive or unreasonable. It was also held that provisions of section 40A(2) are not automatic and can be called into play only if the AO establishes that expenditure incurred is in fact in excess of fair market value. In the case of CIT v. Modi Revlon (Pvt.) Ltd. (supra), the Hon'ble Delhi High Court has held that in order to determine whether the payment is not sustainable, the AO has to first return a finding that payment made is excessive, under section 40A(2) of the Act. If it is found to be so, that AO has to determine what constitutes the fair market value of the services rendered and disallow the difference between what is claimed and what is such value determined fair market value. In the case of the DCIT Vs. Institute of planning and Management Pvt. Ltd., (supra) it was held that if incurring of expenses had not

been doubted, there should be some evidence on the basis of which action of the AO would be held to be justified to show that expenses are unreasonable or excessive. In the case of DCIT Vs. Microtex Separators Ltd., (supra) the jurisdictional High Court has held that so long as there is no intention to evade tax and so long as the commission is not shocking, the said commission has to be accepted particularly in the light of the wordings of the section 40A(2) of the Act.”

4.5.2 In view of the aforesaid reasoning, we are of the view that the A.O. has erred in invoking the provisions of section 40A(2) of the I.T.Act to disallow the claim of expense as excessive and not legitimate to the business needs, especially in view of the fact that the TPO, in its transfer pricing orders for assessment years 2008-2009 and 2010-2011, had held the impugned transaction at arms length.

4.5.3 The A.O. has also disallowed the said expenditure u/s 37 of the I.T.Act considering that it is not incurred wholly and exclusively for the purpose of business or profession. The Assessing Officer has disallowance u/s 37 of the I.T.Act without stating the reason as to why the expenditure is considered to be not incurred wholly and exclusively for the purpose of business. As per section 37 of the I.T.Act, expenditure laid out and expended wholly and exclusively for the purpose of business or profession shall be allowed as deduction while computing the business income. To qualify as a business expenditure, the following the conditions are to be satisfied :-

- (i) expenditure must be revenue in nature;

- (ii) expenditure should not be in the nature of capital expenditure or transfer expense;
- (iii) expenditure should not be in the nature of fine or penalty;
- (iv) expenditure should be expended wholly and exclusively for the purpose of business.

4.5.4 The assessee had entered into consultancy agreement dated 15.12.2004. The relevant clauses of the consultancy agreement are extracted in the assessment order and hence, the same is not reproduced. On perusal of the relevant clauses of the consultancy agreement, it is seen that clauses (a) to (f) are with regard to setting up of stores and necessary inputs to be given with regard to the same by RNA. Clauses (g) to (l) are with regard to running of the stores subsequent to the setting up by the RNA and providing inputs to the assessee for the same. Broadly, the services of RNA to assessee includes the following:-

- (i) Advising on choosing locations;
- (ii) Evaluating and advising on the technical and commercial aspects like profitability, return on investments etc.
- (iii) Advising on the ambience, designing and set up of showrooms, display of hardware and products etc.
- (iv) Sharing of knowledge on global trends, advices on sourcing of the products from global markets,

advising on way to increase footfalls and other similar services.

4.5.5 RNA has rich experience in setting up, running of stores and other related matters. It is providing such inputs to the other group concerns world over. The A.O. has nowhere doubted the genuineness of the agreement, the retention of services as well as the fact of actual payment of professional fees. The A.O. has disallowed the payment merely because he considered that there was no necessity of incurring such expenses by stating that the assessee had full-fledged management team and well-equipped resources. The A.O. cannot take a place of the management of the company and decide from its own point of view, whether an expense has to be incurred or not. Merely because there is expert management and team and resources, it cannot be contended that the expenditure was not at all required. The Hon'ble Delhi High Court in the case of CIT v. Dalmia Cement (P.) Ltd. reported in [2002] 254 ITR 377 (Delhi) had held that *"the jurisdiction of the revenue is confined to deciding reality of the expenditure, namely, whether the amount claimed as deduction was factually expended or laid down and whether it was wholly and exclusively for the purpose of the business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was nexus between the expenditure and the purpose of business, the revenue cannot justifiably claim to put itself in the armchair of a businessman or in the position of the board of directors and assume the said role to decide how*

much is a reasonable expenditure having regard to the circumstances of the case.....it is settled position in law that no businessman can be compelled to maximise his profits”.

4.5.6 The above judgment of the Hon’ble Delhi High Court was confirmed by the Hon’ble Apex Court in the case reported in [2007] 288 ITR 1 (SC).

4.5.7 For the aforesaid reasoning and the judgments relied on, we are of the view that the A.O. is not correct in disallowing the expenditure also u/s 37 of the I.T.Act.

4.5.8 Now coming to the decision relied on by the learned DR, we are of the view that the above orders of Bangalore Bench of ITAT are distinguishable on facts. In the cases cited by the learned DR, the TPO had made adjustment to the arms length price, whereas, in the instant case, the TPO has accepted the international transaction at arms length and no adjustment was made. Therefore, the case laws cited by the learned DR has no application to the facts of the instant case. Hence, ground Nos. 2 and 3 of the Revenue are rejected.

Ground No.4 (Disallowance of premium on forward cover):

5. The brief facts in relation to the above ground is that the assessee had imported certain trade merchandise from parties located outside India. Payments to such foreign vendors is required to be made in future on specified dates in foreign currency. The assessee had also obtained foreign currency

working capital loans and repayment needs to be made on future specified dates in foreign currency. The assessee in order to secure itself from adverse foreign exchange movements, i.e., making payments at higher rate than the rate at which expense was booked has entered into currency hedging contracts with State Bank of India (SBI) and Indian Overseas Bank (IOB) as per FEMA Guidelines. The bankers levy premium for entering into such forward contracts. The assessee during the relevant assessment years, had incurred expenses on premium on forward cover amounting to Rs.71,56,668 and Rs.73,88,783 for A.Y's 2008-2009 and 2010-2011, respectively.

5.1 The Assessing Officer for A.Y's 2008-2009 and 2010-2011 disallowed the same u/s 43(5) r.w.s. 73 of the I.T.Act by stating that - (i) it is in the nature of speculation transaction u/s 43(5) of the I.T.Act considering that the settlement is happening on the currencies and not on the goods in which the assessee is trading, and (ii) the transaction does not fall within any of the exclusive provisos u/s 43(5) of the I.T.Act.

5.2 Aggrieved by the orders of the Assessing Officer for A.Y's 2008-2009 and 2010-2011, the assessee preferred appeals to the first appellate authority. The CIT(A) deleted the disallowance made by the Assessing Officer. The relevant finding of the CIT(A) for Asst.Year 2008-2009, reads as follow:-

"8.3. The observations / findings of the AO and submissions of the Appellant have been carefully perused. The judicial position on the issue at hand has been analysed. The primary argument of the AO is that, the since the final settlement of the forward

contracts, happened on currency, even though admittedly on trading items and working loan, the same had to be deemed as speculative. The Assessee on the other hand, has contended that, the transactions under reference, fall 'abinitio' out of the ambit of speculative-character, as per law and as held by several courts, in identical facts & circumstances.

The Appellant has contended that, the impugned forward-contracts were entered to hedge the import payments & working capital loans, in the attempt to secure from foreign exchange risk, which is found to be in the course of its routine business activity.

The consideration being paid to the Bank is typically in the nature of Bank charges, which therefore essentially assume a revenue-character, in the present circumstances.

The Assessee has disputed the AO's stand that, the present transactions would fall under the 'speculative' definition in terms of section 43(5) of the I.T. Act. It is pointed out that, out of the conditionalities specified in section 43(5) for a transaction to be considered speculative, several of these are not met in the present case. It is submitted that, a forex-cover being in nature of a contract for sale, thus the first characteristic as per section 43(5) is met in the present situation. It is contended that, the impugned purchases should be of shares /stocks or commodity, to constitute a speculative transactions as per section 43(5). Since, in the present case, forex-cover is not a contract for purchase of shares / stock or commodity, but towards foreign currency, the definition u/s 43(5) would not apply to the present case.

In respect of the definition / meaning of commodity and in respect of the legality of AO's action, the Appellant has. placed reliance on several judicial precedents which are found to be in favour of the Assessee's stand.

These include: The Delhi Bench of ITAT in the case of Munjal Showa Ltd Vs DCIT; Hon'ble Calcutta High Court in the case of CIT Vs Britannia Industries Ltd; Hon'ble Supreme Court in the case of ACIT Vs Elecon Engg. Co. Ltd; Hon'ble Gujarat High Court in the case of CIT Vs Friends and Friends Shipping (P) Ltd; Hon'ble Bombay High Court in the case of CIT Vs Badridas Gauridu (P) Ltd.

In background of the above detailed discussion, facts & circumstances of the case and judicial position on the subject, the AO's action of disallowing Rs.71,56,668 /- on account of premium on forward-cover, cannot be upheld. The disallowance is accordingly directed to be deleted.”

5.3 Revenue being aggrieved, has raised this appeal before the Tribunal. The learned DR relied on the grounds and the order of the Assessing Officer.

5.4 The learned AR reiterated the submission made before the Income Tax Authorities and relied on the findings of the CIT(A).

5.5 We have heard rival submissions and perused the material on record. The forward contracts were entered into mainly to hedge the import payments and working capital loans repayment which is in the ordinary course of trade or business of the assessee. The hedging contracts are in the nature of foreign exchange contract to purchase foreign exchange on a specified future date at a predetermined date. The bankers levied premium for entering into such forward contract. These are in the nature of actual charges levied by the bankers. It is nothing but bank charges which is purely revenue in nature. The said expenditure is incurred to secure the assessee's business from foreign exchange fluctuation risk. In case the assessee would not have taken the forward contract to cover itself from fluctuation risk, it can lead to making higher payment of imports and incurring huge losses, which could result in lesser profit. The Hon'ble Calcutta High Court in the case of CIT v. Britannia Industries Ltd. reported in [2015] 376 ITR 299 (Calcutta) had held that “*consideration paid by the*

assessee to the authorized dealer of foreign exchange, which is the bank in this case, in order to obtain protection from fluctuation of foreign exchange rates is a revenue expenditure”.

5.6 As per section 43(5) of the I.T.Act, speculative transaction means a transaction in which the contract for purchase or sale of any commodity including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. The definition also provides for certain exceptions. A speculative transaction is characterized by four features, namely -

- (i) it is a contract for purchase or sale;
- (ii) The purchase or sale should be of a share, stock or commodity;
- (iii) There should be periodical or ultimate settlement of the contract;
- (iv) Settlement to be otherwise than by actual delivery or transfer.

5.7 In order to attract the definition of a speculative transaction, all the characteristics mentioned in the said definition is required to be satisfied. Definition of a speculative transaction vis-a-vis forward cover are as follows:-

- (i) A forex cover is a contract for purchase or sale and thus the first characteristic as per section 43(5) is satisfied. The third and fourth characteristic of periodic and ultimate settlement and settlement other than by

actual delivery would be satisfied in a forex cover transaction.

(ii) The second characteristic is that the purchase should be of a share, or stock or commodity. A forex cover is not a contract for the purchase of a share or a stock. In a forex cover, the purchase or sale is towards foreign currency. Therefore it has to be seen whether foreign currency can be equated with the term "commodity" such that its purchase or sale triggers the definition of a speculative transaction under the Act.

5.8 The term "commodity" has not been defined under the Income Tax Act Black's Law Dictionary (8th Edition) defines the term "commodity" as an article of trade or commerce; the term embraces only tangible goods, such as products or merchandise, as distinguished from services; an economic good, especially a raw material or an agricultural product.

5.9 The other definitions include:

- (i) Articles of commerce
- (ii) Anything movable which is bought and sold
- (iii) A raw material that can be sold
- (iv) An article of trade or commerce, especially an agricultural or mining product that can be processed and resold

(v) Reasonably homogenous good or material bought and sold freely as an article of commerce. Commodities include agricultural products, fuels, metals, etc., and are traded in bulk on a commodity exchange or on spot market.

5.10 The Delhi Bench of ITAT in the case of Munjal Showa Ltd.

v. DCIT, has held as under:

"Foreign currency or any currency is neither commodity nor shares. The Sale of Goods Act specifically excludes cash from the definition of goods. Besides, no person other than authorised dealers and money changers are allowed in India to trade in foreign currency, much less speculate. S. 8 of the Foreign Exchange Regulations Act, 1973, provides that except with prior general or special permission of the RBI, no person other than an authorised dealer shall purchase, acquire, borrow or sell foreign currency. In fact, prior to the LERMS, residents in India were not even permitted to cancel forward contracts. The presumption of any speculative transaction is, therefore, directly rebutted in view of the legal impossibility and in view of the fact that foreign currency was neither commodity nor shares. "

5.11 Based on the above, foreign currency does not fall within the purview of the term "commodity" and hence this characteristic of a speculative transaction is not satisfied. Since, the definition of speculative transaction itself is not applicable to the assessee's case as all the conditions were not satisfied, treating the transaction as speculative in nature is not sustainable in law. Therefore, we hold that the CIT(A) is correct in deleting the disallowance of premium on forward contract and no interference is called for. It is ordered accordingly.

5.12 Therefore, the appeals filed by the Revenue for A.Y's 2008-2009 and 2010-2011 are dismissed.

CO No.62/Bang/2016 & C.O.No.63/Bang/2016

6. The above cross objections filed by the are only supporting the orders of the CIT(A) for A.Y's 2008-2009 and 2010-2011, hence, the same are dismissed.

7. In the result, the appeals filed by the Revenue and the cross objections filed by the assessee are dismissed.

Order pronounced on this 19th day of April, 2021.

Sd/-
(B.R.Baskaran)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 19th April, 2021.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-4, Bangalore.
4. The CIT-4, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore