

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'T' BENCH, MUMBAI**

**[Coram: Justice P.P. Bhatt (President)
and Pramod Kumar (Vice President)]**

ITA No.6077/Mum/2018
Assessment year: 2014-15

IPF India Property Cyprus (No.1) Ltd. **Appellant**
*C/o SRBC & Associates LLP, 14th Floor,
The Ruby, 29 Senapati Bapat Marg,
Dadar (W), Mumbai 400028[PAN:AACCI5435D]*

Vs

Deputy Commissioner of Income Tax
International Taxation Circle 2(2)(2), Mumbai **Respondent**

Appearances by

P.J Pardiwala along with **Madhur Agarwal** for the appellant
Avaneesh Tiwari for the respondent

Date of concluding the hearing : February 5th, 2020
Date of pronouncement : February 25th, 2020

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of DRP's order dated 26.07.2018 in the matter of assessment under section 144(C)(1) r.w.s. 143(3) of the Income Tax Act 1961 for the assessment year 2014-15.

2. In the first and grounds of appeal, which we will take up together, the assessee appellant has raised the following grievance:

The learned AO has erred in passing a draft assessment order under section 143(3) read with section 144C(1) of the Act, even when no variation has been proposed therein to the income or loss returned by the appellant.

The learned AO has erred in passing the final assessment order under section 143(3) of the Act, after the due date provided under section 153 of the Act, thus making the final assessment order illegal, bad in law and non-est.

3. The short question that we are thus required to adjudicate in this appeal is whether or not the Assessing Officer was justified in passing a draft assessment order on the facts of this case, and, whether, the fact that the assessee chose to issue the draft assessment order, even though he was not required to pass the draft assessment order, would result in affecting the normal time limit within which the normal assessment order under section 143(3) is to be issued.

4. We have heard the rival submissions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. So far as the first issue is concerned, we find that, in the present case, there are no variations in the returned income and the assessee income. The controversy is thus confined to the question as to what will be the rate on which income returned by the assessee is to be taxed. While the assessee has claimed taxation @ 10% under article 11(2) of the India Cyprus DTAA, the Assessing Officer has declined the said treaty protection on the ground that the assessee was not beneficial owner of the said interest, and, accordingly, brought the income is to tax @ 40% thereof. There is, quite clearly, no variation in the quantum of income. The question whether it was a case in which the Assessing Officer could have issued the draft assessment order, on the facts of this case, needs to be examined in the light of provisions of Section 144C(1) which provides that, "The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward⁵ a draft of the proposed order of assessment (hereafter 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 [*Emphasis, by underlining, supplied by us*]. The assessee before us is a non-resident company incorporated, and fiscally domiciled, in Cyprus. Accordingly, in terms of Section 144C(15)(b)(ii), the assessee is an eligible assessee but then there is no change in the figure of income returned by the assessee vis-a-vis the income assessed by the Assessing Officer. Clearly, there is no variation in the income returned by the assessee. There is, therefore, no question of a draft assessment order being issued in this case. It is also important to note that the Finance Bill proposes to make the issuance of draft assessment orders in the case of eligible assessee mandatory even when there is no variation in the income or loss returned by the assessee but then this amendment seeks to amend the law with effect from 1st April 2020. Explaining this amendment, Memorandum Explaining Amendments in the Finance Bill 2020 states as follows:

Amendment in Dispute Resolution Panel (DRP).

Section 144C of the Act provides that in case of certain eligible assessee, viz., foreign companies and any person in whose case transfer pricing adjustments have been made under sub-section (3) of section 92CA of the Act, the Assessing Officer (AO) is required to forward a draft assessment order to the eligible assessee, if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Such eligible assessee with respect to such variation may file his objection to the DRP, a collegium of three Principal Commissioners or Commissioners of Income-tax. DRP has nine months to pass directions which are binding on the AO.

It is proposed that the provisions of section 144C of the Act may be suitably amended to:-

(A) include cases, where the AO proposes to make any variation which is prejudicial to the interest of the assessee, within the ambit of section 144C;

(B) expand the scope of the said section by defining eligible assessee as a non-resident not being a company, or a foreign company.

This amendment will take effect from 1st April, 2020. Thus, if the AO proposes to make any variation after this date, in case of eligible assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable.

6. Once this amendment is being introduced with effect from 1st April 2020, it is beyond any doubt of controversy that so far as the period prior to 1st April 2020 is concerned, the cases in which no variations in the returned income or loss were proposed, the draft assessment orders were not required to be issued. We, therefore, uphold the plea of the assessee on this point.

7. Coming to the second point, we find that there is no dispute that if no draft assessment order was to be issued in this case, the assessment would have been time barred on 31st December 2017 but the present assessment order is passed on 17th August 2018. Once we hold that no draft assessment order could have been issued in this case, as the provisions of Section 144C(1) could not have been invoked in this case, the time limit of completion of assessment was available only upto 31st December 2017. The mere issuance of draft assessment order, when it was legally not required to be issued, cannot end up enhancing the time limit for completing the assessment under section 143(3). We, therefore, uphold the plea of the assessee on this point as well. The impugned assessment order is indeed, in our considered view, time barred. We, accordingly, hold so.

8. As the impugned assessment order itself is held to be time barred, all other grievances raised in appeal, which deal with the merits of stand taken by the Assessing Officer in the assessment order, are rendered academic and infructuous. No adjudication, therefore, is required on these grievances at this stage.

9. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 25th day of February, 2020.

Sd/-

Justice P.P Bhatt
(President)

Sd/-

Pramod Kumar
(Vice President)

Mumbai, dated the 25th day of February, 2020

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai