

**IN THE INCOME TAX APPELLATE TRIBUNAL ‘I’ BENCH, MUMBAI**  
**BEFORE SHRI M. BALAGANESH, AM AND MS. KAVITHA RAJAGOPAL, JM**

ITA No. 1621/Mum/2021  
(Assessment Year: 2014-15)

Marriott International Licensing Company BVV C/o. Marriott Hotels India Pvt. Ltd. 303 A, 304 Fulcrum, B-Wing, Hirrandani Business Park, Sahar Road, Andheri (E), Mumbai-400 099	Vs.	DCIT (International Taxation)- 3(2)(1), Mumbai
PAN/GIR No. AADCM 0918 R		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	Shri Paras Salva
<b>Revenue by</b>	:	Shri Ujjawal Chavhan
<b>Date of Hearing</b>	:	09.11.2022
<b>Date of Pronouncement</b>	:	03.02.2023

**ORDER**

**Per Kavitha Rajagopal, J M:**

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals)-57, Mumbai passed u/s.143(3) r.w.s. 144C(3) the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2014-15.

2. The assessee has challenged the order of the ld. CIT(A) in holding that the receipts raised pursuant to the International Marketing Program Participation Agreement (IMPPA for short) are taxable in India and taxing IMPAA receipts in India as 'business income' on the basis that the assessee has permanent establishment in India as per the provision under Article 5 of the Double Taxation Avoidance Agreement (DTAA for short) between

India and Netherland. The assessee has also raised additional ground stating that the draft assessment order dated 29.12.2016 passed by the Assessing Officer (A.O. for short) along with the notice of demand u/s. 156 of the Act is in violation of section 144C of the Act and the same is bad in law.

3. The brief facts are that the assessee company is incorporated in and a tax resident of the Netherland. It is observed that the assessee has entered into License and Royalty Agreement (LRA) with various Indian hotels for granting license to use various brands such as Marriott, Courtyard and Renaissance brands ('Marriott brands') which is given worldwide to any hotel as per the terms and conditions under LRA. The assessee filed its return of income declaring total income at Rs.Nil dated 30.09.2014 and revised its return of income dated 31.03.2016, declaring returned income of Rs. Nil. The assessee's case was selected for scrutiny and the assessment order dated 14.02.2017 was passed u/s. 143(3) r.w.s. 144C(3)(iii) of the Act, where the A.O. determined the total income at Rs.39,07,35,806/- by making various additions/disallowances.

4. In an appeal before the Id. CIT(A), on various grounds, the Id. CIT(A) holding that the receipts pertaining to IMPAA are taxable in India for the reason that the assessee has a permanent establishment in India by relying on the provision of the Article 5 of DTAA between India and Netherland.

5. Further aggrieved, the assessee is in appeal before us. The assessee vide an application dated 24.06.2022 filed an additional ground before us challenging the assessment order dated 14.02.2017 on the ground that the A.O's action in passing the

draft assessment order dated 29.12.2016 along with notice of demand u/s. 156 of the Act was passed in violation of section 144C of the Act. It is necessary to decide this legal issue before getting into the merit of the case as the said legal ground goes to be root of the present case. We hereby admit the additional ground raised by the assessee as it does not require verification of any fresh facts by relying on the decision of the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT* [1998] 229 ITR 383 (SC).

6. The assessee has submitted that the assessee has not involved in the operation or management of Indian hotels which were done only by Indian entity the Marriott Group based on the operating agreement entered between Marriott Indian entity and the Indian hotel owners. The assessee only sub licenses Marriott trade mark and renders sales and marketing services to Indian hotel owners. The A.O. held that IMPPA receipts received by the assessee is 'royalty' as per the provisions of section 9(1)(vi) of the Act and Article 12(4) of the Indian Netherland Tax Treaty. The A.O. also held that the expenses incurred are in the nature of FTS u/s. 9(1)(vii) of the Act and Article 12(5) of the Indian Netherland Tax Treaty for the reason that the assessee has deputed persons for rendering services to Indian hotels, which according to the A.O. are ancillary and subsidiary to the enjoyment of the right to use 'Marriott' brand. The Id. CIT(A) confirmed the decision of the A.O. on the ground that the tribunal in A.Ys. 2003-04, 2004-05 and 2007-08 has dealt with this issue and held that the receipt cannot be held as 'royalty' and has to be treated as 'receipt' in the nature of business profit covered under Rule 7 of DTAA and that the same can be taxed in India only if the assessee has a permanent establishment in India. In the second round of appeal for the said assessment years, the Id. CIT(A) held that the assessee has permanent establishment in India and had acted through its dependent agents

consists of various franchise hotels and that the assessee had office in India thereby holding that the receipts to be taxable in India as 'business profits'. The ld. CIT(A) for the impugned year relied on the decision of the Tribunal in holding the same as 'business profit' and the decision of the ld. CIT(A) for previous years that the same is taxable as 'business income' for the reason that the assessee has a permanent establishment in India.

7. The assessee has challenged the said order before us and had also filed an additional ground for the reason that the draft assessment order dated 29.12.2016 along with the notice of demand u/s. 156 of the Act are deemed to be bad in law as the same violates section 144C of the Act.

8. The ld. AR for the assessee contended that the draft demand notice dated 29.12.2016 was sent along with the notice of demand u/s. 156 of the Act and notice u/s. 271(1)(c) dated 29.12.2016 and subsequently passed the assessment order dated 14.02.2017 u/s. 143(3) r.w.s. 144C(3) of the Act. The ld. AR further contended that the said draft assessment order was sent by the A.O. along with the demand notice and the penalty notice was also sent, which implies that the A.O. has not followed the mandatory procedures prescribed by the Act and cannot be considered as a mere procedural irregularity. The ld. AR relied on a catena of decisions to substantiate that the draft assessment order passed by the A.O. accompanied by notice of demand u/s. 156 is in violation of section 144C and the same is to be considered as bad in law.

9. The learned Departmental Representative (ld. DR for short), on the other hand, argued that it was mere procedural irregularity and stated that the demand notice u/s. 156 of the Act had mentioned that it was a draft order and not the final demand notice. The ld.

DR relied on the decision of the co-ordinate bench in *BS Ltd. vs. ACIT* [2018] 94 taxmann.com 346 (Hyd) (Trib), which held that the same was only procedural mistake.

10. We have heard the rival submissions and perused the material available on record. It is evident that the A.O. had passed a draft assessment order dated 29.12.2016 and had proposed variation to the return filed by the assessee, thereby determining the assessee to be an eligible assessee. It is observed that the A.O. has issued the draft assessment order along with the notice of demand u/s. 156 and also notice u/s. 271(1)(c) of the Act dated 29.12.2016. The moot question here is whether the A.O.'s action in issuing the demand notice along with the draft assessment order is only a procedural defect or it makes the assessment order bad in law, thereby making it *null and void*. For this proposition, we would like to place our reliance on some of the decisions cited by the assessee which are as follows:

Sr. No.	Case Law	Citation
1	Vijay Television (P.) Ltd. vs. DRP	[2014] 46 taxmann.com 100 (Madras)
2	Aker Powergas P. Ltd. vs. DCIT0	ITA No. 7211/Mum/2017
3	Perfetti Van Melle (India) Pvt. Ltd. vs. ACIT	ITA No. 9116/Del/2019
4	DCIT vs. Atlas Copco (India) Limited	ITA No. 649/Mum/2013 & 1726/Pun/2014

11. The assessee has relied on the decision of the Hon'ble Madras High Court in the case of *Vijay Television (P.) Ltd.* (supra), which has held that when there is an omission by the A.O. in following the mandatory procedure prescribed by the law, then the said omission cannot be considered as a mere procedural irregularity and the same cannot be cured. The ld. AR also placed reliance on the decision of the co-ordinate bench in the

case of *Aker Powergas P. Ltd.* (supra), which has held that the issuing of draft assessment order along with the demand notice is said to be not following the mandatory provisions of the Act as per section 144C of the Act, wherein the assessment order was treated as *void*. The said decision by the Tribunal has considered various decisions of the Hon'ble Apex Court and the Hon'ble High Court decision in the case of *Sun Engineering Works* and various other decisions. The Tribunal has also held that the participation in subsequent proceedings does not prevent the assessee from challenging the validity of the order by relying on the decision of the Hon'ble Apex Court in the case of *CIT vs. V. MR. P. Firm*, Mura 56 ITR 67 (SC) and the assessment proceeding culminated on the issue of demand notice and the penalty notice u/s. 274 of the Act, thereby is making subsequent proceedings to be non-est in law. The said decision of the tribunal has also stated that section 156 of the Act does not state a draft demand notice thereby buttressing the contention of the Id.DR that the impugned demand notice was only a draft demand notice. We would also place our reliance on the decision of the co-ordinate bench in the case of *Atlas Copco (India) Limited* (supra), which held that the issuance of notice of demand at the stage of draft order has brought a finality to the assessment at the stage of the draft order itself and the resultant final assessment is vitiated in law and is unsustainable.

12. From the above observation, we are of the considered view that the assessment order passed subsequent to the issue of draft assessment order along with the demand notice has been held to be bad in law and not just mere procedural defect. On a perusal of

the above decision cited, the issue in hand is identical to the said decisions and we hereby hold that the assessment order dated 14.02.2017 to be *null and void*.

13. As the additional ground raised by the assessee is allowed, there is no need of adjudication on the other grounds and hence are left open.

14. In the result, the appeal filed by the assessee is allowed.

*Order pronounced in the open court on 03.02.2023*

Sd/-

Sd/-

(M. Balaganesh)  
Accountant Member

(Kavitha Rajagopal)  
Judicial Member

Mumbai; Dated : 03.02.2023

Roshani, Sr. PS

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai