

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.784/Del/2020, A.Y. 2016-17

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| M/s. Amadoroco Limited<br>Nicosai Cyprus<br>Esperidon 5, 4 <sup>th</sup> Floor,<br>Strovolos, Cyprus<br>PAN : AAKCA2466M | Vs. | ACIT,<br>Int. Tax. 1(1)(1),<br>New Delhi |
| Appellant  |     | Respondent                               |

|             |  |
|-------------|--|
| Assessee by | Sh. Sumant Chadha, CA & Amit<br>Sharma, Adv. |
| Revenue by  | Sh. Sanjay Kumar, Sr. DR                     |

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|------------------------|------------|
| Date of hearing:       | 23.02.2023 |
| Date of Pronouncement: | 02.03.2023 |

**ORDER**

**Per Anubhav Sharma, JM :**

The Assessee has come in appeal against order dated 17.12.2019 in appeal no. CIT(A), Delhi-42/10217/2018-19 for the assessment year 2016-17 passed by Commissioner of Income Tax (Appeals)-42, New Delhi (hereinafter referred to as the 'First Appellate Authority' or in short 'Ld. F.A.A.') in appeal before it against order dated 21.02.2019 u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 passed by DCIT, Circle 1(1)(1), Int. Tax., New Delhi ( herein after referred to as 'Ld. Assessing officer or in short Ld. AO').

**2. The assessee has come in appeal raising following grounds :-**

*“(1) Confirming the validity of the order passed u/s 143(3) r.w.s 144C (3) of the Income - tax Act (“the Act”)*

*(1.1) On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) - 42, Delhi, has erred in upholding the cogency of the assessment order passed by Learned ACIT, Circle Int Tax 1(1)(1) (‘the learned AO’) under section 143(3) read with section 144C(3) of the Act dated 21<sup>st</sup> February 2019 without appreciating the fact that such order passed is barred by limitation.*

*1.2 On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) - 42, Delhi, has erred in upholding the cogency of the assessment order passed u/s 143(3) r.w.s 144C(3) of the Act dated 21<sup>st</sup> February 2019 on the basis of passing observation w.r.t 144C of the Act made by Honorable Madras High Court while disposing the writ petition no: 7135 and 7138 of 2019 filed under article 226 of the Constitution of India in the case of M/s World Part Ltd vs CIT vide their order dated 30.08.2019 without appreciating the fact that no conclusion was drawn by their lordship with regard to matter in dispute has been curved out rather honorable court left all the question open to the discretion of the parties. Hence, the reliance placed by the Ld. CIT(A) to draw his conclusion is only based on surmises, caprice and whims.*

*1.3 On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) - 42, Delhi, has erred in upholding the cogency of the assessment order passed u/s 143(3) r.w.s 144C(3) of the Act dated 21<sup>st</sup> February 2019 without appreciating the fact that there is no ambiguity in the literal interpretation of provision of section 144C of the Act, Circular no 09/20013 of the CBDT dated 19.11.2013, which is a binding force on the Ld. AO, and judicial pronouncements on the subject matter in issue wherein the Ld. AO is not required to pass a draft assessment order under section 144C of the Act when there is no variance in the income/loss which is prejudicial to the assessee.*

***(2) Denial of benefit of beneficial ownership as provided under Article 11 of India - Cyprus Treaty***

*The findings of the Commissioner of Income Tax (Appeals) - 42 on the facts and in law are erroneous based on the following grounds and hence the impugned order of the CIT (A) is liable to be quashed:*

*(2.1) On the facts and in the circumstances of the case as well as in law, the Commissioner of Income Tax (Appeals) - 42, Delhi has erred in upholding the findings of Ld. AO that the Appellant was not the “beneficial owner” of interest income of INR 3,75,95,192/- earned on compulsory Convertible debenture (“CCDs”) and thereby not entitled to get the tax treaty relief under Article 11 of India - Cyprus Double Tax Avoidance Agreement (“DTAA”) which is bad in law and deserved to be set aside.*

*(2.2) On the facts and in the circumstances of the case as well as in law, the Commissioner of Income Tax (Appeals) - 42, Delhi has erred in upholding the*

*findings of Ld. AO that the Appellant was not the “beneficial owner” without appreciating the plethora of evidences as put forth before him, and confirmed the finding of the Ld. AO with a preconceived notions and subjective opinion.*

*(2.3) On the facts and in the circumstances of the case as well as in law, the Commissioner of Income Tax (Appeals) - 42, Delhi has erred in upholding the findings of Ld. AO that appellant is not a beneficial owner of the interest and not liable to claim a benefit of Article 11 of India - Cyprus DTAA without bringing any cogent evidence on record that the appellant is not operating from Cyprus or has no beneficial interest in the said country which is bad in law and deserved to be set aside.*

*(2.4) On the facts and in the circumstances of the case as well as in law, the Commissioner of Income Tax (Appeals) - 42, Delhi has erred in upholding the findings of Ld. AO that the appellant is conduit company as (a) there is a no commercial rational to form a company in Cyprus but only to take a benefit of tax rate as eligible under article 11 of India Cyprus DTAA (b) As the funds which are used to make an investment in India is not belong to the appellant and without appreciating the fact that the appellant is a commercial concern and have a vested business interest in Cyprus since its incorporation.*

*(2.5) On the facts and in the circumstances of the case as well as in law, the Commissioner of Income Tax (Appeals) - 42, Delhi has erred in upholding the findings of Ld. AO that the appellant is conduit company which was incorporated for the passage of funds and therefore not eligible to claim the benefits under Article 11 of the India - Cyprus DTAA without appreciating the law as settled by the Honorable Supreme court in the case of Vodafone International Holdings B. V. v. UOI (2012) 341ITR 1 that every investment in India should be considered in a holistic manner and the commercial purpose of the entity/appellant.*

*(3) Without prejudice to ground no. 1 and 2, on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) - 42 has erred in not giving the benefit of the DTAA between India and UAE in relation to taxability of interest income, despite holding that holding company of the Appellant namely A.W. Rostamani Holding Co. (LLC.), which is a resident of UAE, is the beneficial owner of such interest income earned from CCDs.*

*(4) On the facts and circumstances of the case and in law and without prejudice to the Appellant’s other grounds, the Appellant prays that as per the provisions of India-Cyprus DTAA, only interest income, which is paid to the non-resident is taxable in India. Consequently, the amount of interest shown as accrued interest by the payer, is not taxable in AY 2016-17 as the same has not been received by the Appellant till date.”*

3. Heard and perused the record.

4. The Ld. Counsel opened the arguments submitting that when there is no proposal for variation in the income, Ld. AO was not required to pass draft assessment order u/s 144C of the Act and accordingly it was submitted that the

assessment order dated 21.02.2019 u/s 143(3) r.w.s. 144C(3) is barred by limitation. Ld. DR however defended the findings of Ld. Tax Authorities Below.

5. Appreciating the matter on record it can be observed that appellant company is registered under the laws of Cyprus, is a tax resident of Cyprus and is engaged in investment and financing activities. The return of assessee income arising from interest income earned from Compulsorily Convertible Debentures was offered to tax as per Article 11(2) of the India-Cyprus Double Taxation Avoidance Agreement at the rate of 10 percent, however, Ld. AO was of view that assessee is not beneficial owner of the interest income and rate of 30% was applicable.

6. The assessee had raised ground no. 1 before Ld. CIT(A) as follows:-

*“5. Vide **Ground No. 1**, the appellant has challenged the action of the AO in passing the assessment order under section 143(3) read with section 144C(3) of the Act dated 22nd February 2019 (‘the impugned order’). The impugned order is void-ab-initio as the provisions of section 144C were not applicable there being no variation in the amount of income and hence, the extended period of limitation was not available and consequentially, the impugned order is without jurisdiction.”*

6.1 However, LD. CIT(A) did not sustain objections with following relevant findings :-

*“5.2 The appellant has challenged the impugned order as the provisions of section 144C were not applicable as there was not variation in mount of income and hence the extended period of limitation was not available. I find that in the present case, the AO has passed draft assessment order on 28.12.2018 u/s 144C (1) of the act. It is a case where the income particulars have not changed but it does involve change of computation of charge of tax on the interest income. The appellant argued that going by the provisions of section 144(c), it is not a case of variation of income/loss. However, it is a case where the assessee is adversely impacted due to higher rate of tax.*

*5.3 It may be relevant to note that Hon’ble Madras High Court vide its order dated 30.08.3019 in WP No. 7135 & 7138/2019 in the case of World Part Ltd*

*dismissed the writ petition and observed at Para 19 as under:*

*“Therefore the jurisdictional fact should be so striking that it strikes at the very root of the exercise of power. To be noted, there is further discussion regarding alternate remedy in the latter part of this order infra. Be that as it may, suffice to say that this court is unable to convince itself that (from a reading of the language in which section 144C of the Act is couched) respondent is completely denuded of the powers to make draft and final assessment orders in cases where the rate at which tax is to be paid by the assessee is put to issue “*

*5.4 It flows from the above observation of the Hon’ble court that reading of the language in which section 144C of the Act is couched that the AO has power to make draft and final assessment orders in cases where the rate at which tax is to be paid by the assessee is put to issue. Thus, in view of the above decision, I do not find merit in the argument of the appellant. Hence, the ground of appeal is **dismissed.**”*

7. Giving thoughtful consideration to the matter on record it can be observed that this issue has been dealt by that co-ordinate benches in ITA No. 3115/Del/2009 and Ors. Vide order dated 20.09.2022 in Super Brands Ltd. [UK] vs. ADIT, ITA no. 7397/Del/2018 Silver Bella Holdings Limited vs. ACIT dated 19.05.2021, Mumbai Bench in ITA no. 7026/Del./2018 Mausmi SA Investments vs. ACIT dated 10.04.2019 and IPF India Property Cyprus vs. DCIT ITA no. 6077/Mum/2018 dated 25.02.2020.

7.1 Further, **Chennai Bench in Wolrdpart Limited, Maharashtra vs Dcit International Taxation**, decided on 1 July, 2022, IT(TP). A.No.36/Chny/2018 while dealing with similar issue of fact and law observed;

*10. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The assessee challenged validity of assessment order passed by the Assessing Officer in light of provisions of section 153(1) of the Act, and argued that the assessment order passed by the Assessing Officer is beyond limitation and thus, invalid and void ab initio. The question of issue of draft assessment order in terms of section 144C arose only in case where any variation in income or loss returned which is prejudicial to the interest of the assessee. Therefore, in order to decide controversy, it is necessary to refer to section 144C(1) and provisions of section 153(1) of the Income Tax Act, 1961. The provisions of section 144C(1) speaks about draft assessment order to be passed by the Assessing Officer IT(TP)A No.*

*36/Chny/2018 making proposed variation in the income or loss returned which is prejudicial to the interest of the assessee. Therefore, from plain reading of the provisions of section 144C(1) of the Act, it is clear that there are two jurisdictional pre-conditions that are to be met before an Assessing Officer can invoke proceedings u/s.144C of the Act and pass a draft assessment order therein. The first pre-condition is that the assessee should be eligible assessee as defined u/s.144C(15) of the Act. The second condition is that the Assessing Officer should propose to make any variation in income or loss returned by an assessee, which is prejudicial to the interest of the assessee. In this case, it is an undisputed fact that the assessee is eligible assessee for the purpose of above said section, which is the first condition. However, it is also evident from above provision that jurisdictional precondition must exist before the Assessing Officer can invoke proceedings u/s.144C of the Act, and pass draft assessment order, as per the Assessing Officer should propose to make any variation in income or loss returned by the assessee, which is prejudicial to the interest of the Revenue. In this case, this condition is not satisfied, because, the assessee has declared total income of IT(TP)A No. 36/Chny/2018 Rs.22,89,76,090/- and the Assessing Officer had also assessed total income of Rs.22,89,76,090/-, however, proposed to levy tax @ 30% as against 10% tax admitted by the assessee in terms of Article 11 of Indo-Cyprus DTAA. From the above, it is very clear that there is no variation in income or loss returned by the assessee, but there is variation in tax payable by the assessee. If you examine provisions of section 144(1) in light of assessment order passed by the Assessing Officer, there is no doubt with regard to fact that second condition is not satisfied. In other words, except taxes payable by the assessee, there is no change in the income returned by the assessee. Therefore, in our considered view, variation as referred to in sub-section (1) of section 144C of the Act, is returned income or loss, but not variation in taxes payable by the assessee. Thus, if you go by above provisions, there is no doubt that the Assessing Officer has wrongly invoked provisions of section 144C(1) and passed draft assessment order, even though, A.O is not required to pass draft assessment order, when there is no variation in income or loss returned by the assessee, which is prejudicial to the interest of the assessee.”*

7.2 Thus, sum and substance of these orders of co-ordinate Benches is that for AYs before the amendment, which has come into effect from 01.04.2020 in Section 144C of the Act, the cases in which no variation in the return income or

loss were proposed, the draft assessment orders were not required to be issued. Accordingly, no extended period for concluding assessment.

8. In the case in hand admittedly there was no proposal for variation in the return income. The assessment order should have been passed by 31<sup>st</sup> December, 2018 while the impugned assessment order has been passed on 21.02.2019. Thus, impugned assessment order is beyond statutory time lines provided u/s 153(1) of the Act. Ld. CIT(A) has taken into account judgment of Hon'ble Madras High Court however, in that case since the assessee had the alternate remedy available by way of appeal before Ld. CIT(A) the writ petition before High Court was disposed, without no findings on merits.

9. Thus, the Bench is of considered opinion that the ground no. 1 goes to the root exercise of jurisdiction of passing assessment order barred by limitations, therefore, the same along with sub grounds stands allowed. **The appeal of assessee is allowed** and the impugned orders of Ld. Tax Authorities below are set aside.

**Order pronounced in the open court on 2<sup>nd</sup> March, 2023.**

Sd/-

(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Sd/-

(ANUBHAV SHARMA)  
JUDICIAL MEMBER

*Date:-02.03.2023*

*\*Binita, SR.P.S\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI