

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH: 'D': NEW DELHI)**

**BEFORE SHRI KUL BHARAT JUDICIAL MEMBER &  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No:- 5052/Del/2019  
(Assessment Year: 2014-15)**

Alexandria Real Estate Cyprus No. 1, Nicosia, Cyprus.	Vs.	DCIT, Circle-1(1)(1), New Delhi.
<b>PAN No:</b> AAICA7162N		
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : None  
**Revenue by** : Shri Vizay B. Vasanta, CIT(DR)

**Date of Hearing** : 08.06.2023  
**Date of Pronouncement** : 20.06.2023

**ORDER**

**PER KUL BHARAT, JM**

This appeal by the Assessee is directed against the order of Ld. Commissioner of Income Tax (International Taxation)-I, New Delhi passed under Section 263 of Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 29.03.2019 for Assessment Year 2014-15. Assessee has raised the following grounds of appeal:

**"1. Common Grounds**

*1.1 On the facts and circumstances of the case and in law, the Learned Commissioner of Income-tax ("Ld. CIT") erred in finalising an order of revision that suffers from legal defects such as but not limited to, being passed in violation of principles of natural justice as well as the provisions of the Act, is devoid of merits and is contrary to facts on record and applicable*

*law, and has been completed without adequate inquiries and as such is liable to be set aside or quashed.*

*1.2. On the facts and circumstances of the case and in law, the Ld. CTF erred in passing an order under section 263 of the Act ("Revision Order") in violation of the statutory conditions of section 263 of the Act while enhancing the order of assessment passed by the Ld. AO under section 143(3) of the Act ("Assessment Order").*

*1.3. On the facts and circumstances of the case and in law, the LA. CIT erred in not issuing a valid show cause notice under section 263 of the Act, which is a jurisdictional notice and failed further, in affording the Appellant a reasonable opportunity of being heard.*

## **2. Question of Jurisdiction**

*2.1. On the facts and circumstances of the case and in law, the Ld. CIT has erred in exercising his power of revision under section 263 of the Act.*

*2.2. On the facts and circumstances of the case and in law, the Revision Order passed by the Ld. CIT is without jurisdiction since the impugned proceeding was based on the proposal of the Ld. AO and not based on an examination initiated by the Ld. CIT or based on subjective satisfaction of the Ld. CIT.*

*2.3. On the facts and circumstances of the case and in law, the Revenue authorities have attempted to revise the assessment, clearly when reopening of the assessment under section 147 of the Act was not possible, as it would tantamount to a change of opinion, when the interest income was the only stream of income for the Appellant, which has been assessed to tax by a scrutiny assessment. It is an attempt to indirectly accomplish an end, which was not directly possible to be accomplished.*

*2.4 On the facts and circumstances of the case and in law, the Ld. CIT erred in passing in revision order without the Assessment Order being erroneous and prejudicial to this interest of the Appellant, being the twin conditions, which are required to exist, before the right to revision can be exercised by the LA. CIT.*

*2.5. On the facts and circumstances of the case and in law, the Ld. CIT erred in exercising his jurisdiction under section 263 of the Act, without appreciating that the Assessment Order was passed, after making due enquiries and verification of records.*

## **3. Denial of benefit, available to the Appellant, under the Tax Treaty between India and Cyprus**

*3.1 On the facts and circumstances of the case and in law, the Ld. CIT erred in concluding that the Appellant is not entitled to the benefit of the Tax Treaty between India and Cyprus.*

*3.2 On the facts and circumstances of the case and in law, the Ld. CIT has not brought on any evidence to demonstrate that the Appellant is not the beneficial owner of the interest income, before concluding that the Tax Treaty between India and Cyprus would not be applicable. The Ld. CIT has proceeded purely on surmises and suspicions in arriving at the above conclusion.*

*3.3 On the facts and circumstances of the case and in law, without prejudice to the above ground, even if the Ld. CIT could have validly concluded that the Tax Treaty between India and Cyprus should not apply, on account of the beneficial owner being a tax resident of USA, then he should have applied the rate of tax applicable for interest income as per Tax Treaty between India and USA and he should not have applied the rate of 40 percent as per the Act.*

*The Appellant humbly prays that directions be given, to grant all such reliefs arising from the grounds of appeal mentioned supra, and all consequential relief thereto.*

*The grounds of appeal raised by the Appellant herein are without prejudice to each other. The Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal."*

2. The facts given rise to the present appeal are that the M/s Alexandria Real Estate Cyprus No. 1 Limited (hereinafter referred to 'the assessee') filed its return of income through electronic mode on 28.11.2014 declaring total income of Rs. 6,24,25,240/-. The Assessing Officer ("AO") while framing the assessment, noticed that there was a difference in the income as disclosed in Return of Income and Revenue / interest receipts shown in Form 26AS. There was a difference of Rs. 1,42,845/-, the AO added this amount and assessed income at Rs. 6,25,68,083/- and charged tax @ 10% vide order dated 23.02.2017 passed u/s 143(3)/144C(3) of the Act. Thereafter, the Ld. CIT(International Taxation) after examining the return, issued a show cause notice U/s 263 of the Act calling upon the assessee as to why, it is not to be treated a beneficial owner of interest income and therefore the issue to be reconsidered and treaty benefits to the extent of interest income given to it should not be withdrawn. In

response to the notice, no one attended the proceedings. Therefore, the Ld.CIT(International Taxation) proceeded to pass impugned order in the absence of the assessee on the basis of material available on record. Thus, the Ld.CIT(International Taxation) cancelled the assessment order dated 23.02.2017 being erroneous insofar it was prejudicial to the interest of Revenue and directed to make assessment afresh.

3. Aggrieved by this, the assessee has filed the present appeal before the Tribunal.

4. At the time of hearing, no one attended the proceeding. The notices sent through registry by speed post have been returned back by the postal authority with remarks left without address. The assessee had not provided any other address to the registry. Under these facts, the appeal of the assessee is taken up for hearing in the absence of the assessee and is being decided on the basis of material available on records.

5. The Ld. CIT DR submitted that the Assessing Officer has pointed out that there was a deficiency in disclosing correct income by the assessee, as the Assessing Officer has noted in the Assessment Order as per Form 26AS. Moreover, the AO granted treaty benefit mechanically without appreciating and examining the facts properly.

6. We have heard Ld.CIT DR and perused the materials available on record. We find that the Ld. CIT(International Taxation) has given a finding on facts and it is also noticed that there was no representation on behalf of the assessee before him. The relevant contents of the order of the Ld. CIT(International Taxation) are reproduced as under:

"5. *This notice was duly served through email at sodos.polycarpou@cmacyprus.com. This email was as per the latest record of the assessee available with the Department as well as per the tax return filed by the assessee for the captioned assessment year. The email was successfully delivered on 25.03.2019 as per the system delivery report. The case was fixed for hearing on the 28th of March, 2019. However, none appeared on behalf of the assessee. In this case, outer time limit for taking action under section 263 of IT Act is two year from the end of the financial year in which the order sought to be revised was passed. Thus the limitation for action u/s 263 expires on 31.03.2019. Accordingly, this order is being passed in accordance with facts of the case, material available on record and available jurisprudence in the matter.*

**Facts of the case - Assessee not the beneficial owner of Interest received.**

*5. In order to tax the interest income at lower tax rate @ 10% under India-Cyprus DTAA, assessee has to be beneficial owner of such interest income. The article 11 of the India-Cyprus DTAA is reproduced as under:*

**ARTICLE 11**

**INTEREST**

*1. "Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

*2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the interest."*

*6. Following points regarding the concept of beneficial ownership in DTAAS may be noted-*

*(i) Interest income is in nature of passive income. Since 1977 an anti-tax avoidance clause has been provided in OECD Model treaty in respect of dividend, royalty and interest in the articles related to these types of income itself. Thus the requirement of beneficial ownership is there in OECD Model treaty since long.*

*(ii) The meaning of beneficial ownership has to be construed in accordance with Vienna Convention on the Law of Treaties of May 23 1969 (VC). According to this, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose of the treaty (Article 31, para 1, or the VC):*

*(iii) India has also used this concept in its treaties and most of our treaties were signed after 1977 OECD model and has taken this concept from it. Present treaty has used similar phrase as provided in OECD MC,*

*(iv) The commentary provides three examples of persons who should be considered as the beneficial owner of the income:*

*a. –Agents*

*b. -Nominees*

*c. -Conduit companies which have, as a practical matter, very narrow powers which render them, in relation to the income concerned, mere fiduciaries or administrators acting on account of the other interested parties*

*(v) The OECD Commentary was revised in 2014 and provides for the following in relation with the notion of beneficial ownership: "In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the interest is not the beneficial owner because that recipient's right to use and enjoy the interest is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist 90 the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person.*

***7. M/s Alexandria Real Estate Cyprus No. 1 Ltd appears to be a pass through entity/ conduit:*** *The funds have been obtained by the assessee company through its holding company in USA. The interest received by the assessee from the Indian company has been passed over to the holding company in USA. There is no rationale for incorporation of the intervening entity in Cyprus except for obtaining the benefit of the Indo-Cyprus treaty. No explanation has been provided regarding the rationale of incorporation of the assessee in Cyprus. The benefit may have been available, had the company been the beneficial owner of the interest earned. But that is not the case here. The beneficial owner is the holding company of the Cyprus based M/s Alexandria Real Estate Cyprus No. 1 Ltd ie Alexandria Real Estate Equities L.P., USA. As per the language of the India-Cyprus DTAA, the treaty benefit is available only if the M/s Alexandria Real Estate Cyprus No. 1 Ltd is able to show that it is the beneficial owner. It appears M/s Alexandria Real Estate Cyprus No. 1 Ltd is not involved in any meaningful business activity in Cyprus. The funds have been given by the USA based company and the interest has been received also by the USA based holding company. The only difference is that the interest has been routed through the Cyprus based company. In such circumstances, the M/s Alexandria Real Estate Cyprus No. 1 Ltd can't be held to be the beneficial owner of interest income received on CCDs. Hence benefit of Indo Cyprus Treaty can not be given to M/s Alexandria Real Estate Cyprus No. 1 Ltd.*

***8. No worthwhile physical or economic activity in Cyprus:*** *It has been mentioned by the DCIT sending the proposal for action under section 263 of IT Act that "the assessee was asked to furnish details in respect of numbers of employees working in the Cyprus office with their name and duties. No details regarding the query have been provided by the assessee company. It is not*

*known what kind of office assessee has in Cyprus and whether it is functioning office or only a paper office It is not clear what "country risk of Cyprus has been taken by the assessee company. Assessee does not seem to have any substantial or worthwhile physical and economic activity in Cyprus i also does not bear country Risk of Cyprus"*

**Findings & Order**

*9. Thus, after careful consideration of the matter and in view of the facts of the case, material available on record and jurisprudence available on the issue, the assessee is not a beneficial owner of interest income on these tests and thus treaty benefits has been wrongly allowed in the assessment framed by the AO under section 14U TERSE income has been taxed @ 10% where as it should have been taxed @ 40% applicable as per Indian Income Tax Act after denying the assessee benefit of reduced rate under Indo-Cyprus treaty. Thus the assessment framed by the AO under section 143(3) 144C(3) dated 23.02.2017 is erroneous in so far as it is prejudicial to the interest of revenue. An opportunity of being heard has been allowed to the assessee which has not been availed. Accordingly, in exercise of powers conferred by section 263 of IT Act, 1961, assessment framed by the AO under section 143(3) 144C(3) dated 23.02.2017 is cancelled. The Assessing Officer is directed to make a fresh assessment in accordance with the facts mentioned in this order."*

6.1 The above finding of the Ld. CIT(International Taxation) is not rebutted by the assessee by placing any contrary material on record. Therefore, we do not see any reason to interfere into the finding of the Ld. CIT (International Taxation), same is hereby affirmed. The grounds raised by the assessee are dismissed.

7. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 20<sup>th</sup> June, 2023.

**Sd/-**  
**(M. BALAGANESH)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KUL BHARAT)**  
**JUDICIAL MEMBER**

Dated: 20/06/2023.  
Pooja/-

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI