

I.T.A. Nos. 1511 & 1512/Del/2022

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" : DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT

A N D

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A Nos. 1511 AND 1512/Del/2022
निर्धारणवर्ष /Assessment Years: 2015-16 & 2016-17

Little Fairy Limited, Office 601, 6 th Floor, Anastasio Building, 15- Dimitriou Karatasou, Strovolos, Cyprus, Not Listed, 2024.	<u>बनाम</u> Vs.	ACIT, Circle : 2(2)(1) International Taxation, New Delhi.
PAN No. AACCL1478L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितकीओरसे /Assessee by :	Shri G. C. Srivastava, Shri Mayank Patwari; Adv.; & Shri Kalrav Mehrotra, C.A.;
राजस्वकीओरसे / Department by :	Ms. Prajna Paramita; [CIT] - D. R.

सुनवाईकीतारीख/ Date of hearing :	6/07/2023
उद्घोषणाकीतारीख/Pronouncement on :	25/09/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. These two appeals are filed by the assessee against different orders of the Id. Commissioner of Income Tax (Appeals)

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New Delhi [hereinafter referred to CIT (Appeals)] for assessment years 2015-16 and 2016-17. The assessee filed application for admission of the following additional grounds in both these appeals.

Assessment year : 2015-16

We refer to the above-mentioned appeal filed by the Appellant before D Bench. On perusal of records it is gathered that one additional Ground of Appeal is absolutely necessary for rendering substantial justice in the matter and to resolve the areas of dispute.

The Appellant further submits that the additional ground of appeal is purely a legal issue and do not involve any investigation of facts and should be allowed to be raised even at the appellate stage.

Reference in this regard is drawn from the case of National Thermal Power Co. Ltd. v. CIT in [1998] 229 ITR 383 (SC) wherein the powers of the Tribunal to admit additional grounds of appeal were analyzed by quoting another decision of the Hon'ble Apex Court. The relevant paras as follows:

"In the case of Jute Corporation of India Ltdv. CIT [1991] 187 ITR 688, this court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the

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same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeal before the Tribunal also.

The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388 (Delhi), CIT v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj) [FB]). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

Assessment year : 2016-17

We refer to the above-mentioned appeal filed by the Appellant before D Bench. On perusal of records, it is gathered that one additional Ground of Appeal is absolutely necessary for rendering substantial justice in the matter and to resolve the areas of dispute.

The Appellant further submits that the additional ground of appeal is purely a legal issue and do not involve any investigation of facts and should be allowed to be raised even at the appellate stage.

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The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388 (Delhi), CIT v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and CIT v. Cellulose Products of India Ltd. (1985) 151 ITR 499 (Guj) [FB]). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the

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The reframed question, therefore is answered in the affirmative, i.e.the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

2. The ld. Counsel for the assessee submits that the additional grounds of appeal raised by the assessee in both these appeals are purely a legal issue and do not involve any investigation of facts and, therefore, should be allowed to be raised before the Tribunal. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT [(1998) 229 ITR 383 (SC)].

3. On hearing both the sides perusing the additional ground filed by the assessee we admit the additional ground being purely a legal ground following the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT (supra). Ld. Counsel for the assessee submits that in both these assessment years the assessment order passed under section 143(3) read with section 144C of the Income Tax Act, 1961 (the Act) is barred by limitation. Ld. Counsel for the assessee narrated the sequence of events as under:-

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<u>Assessment Year 2015-16.</u>	<u>Assessment Year 2016-17.</u>
(i) Return filed on 27.11.2015	(i) Return filed on 29.11.2016
(ii) Draft assessment order passed on 29.12.2018	(ii) Draft assessment order passed on 30.12.2018
(iii) Final assessment order 11.02.2019	(iii) Final assessment order 20.02.2019

4. The Id. Counsel for the assessee further made the following submissions:-

i) As per Section 144C(1) of the Act, the A.O. shall in the first instance forward a draft of the proposed order of assessment (draft 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 the assessee.

ii) As per Section 144C(15) of the Act, 'Eligible Assessee' means -

(a) Any person in whose case variation referred to in Section 144C(1) of the Act arises as a consequence of the order of the TPO passed under 92CA(3) of the Act; and

(b) Any foreign company.

iii) Therefore, for passing a draft order under Section 144C, following conditions are required to be fulfilled cumulatively:-

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(a) The Assessee should be an 'Eligible Assessee' as defined in Section 144C(15) of the Act; and

(b) The Ld. A.O. proposes to make any variation in the income or loss returned, which is prejudicial to the interest of the Assessee.

iv) It is an undisputed fact that the Appellant, being a foreign company, is an eligible assessee in terms of Section 144C(15) of the Act.

v) However, it is important to note that in the case of the Appellant, while passing the draft order, the Ld. A.O. did not propose to make any variation to the returned income or loss, which is prejudicial to the interest of the Appellant. Therefore, in this case, there was no such adjustment to the returned income, the Ld. A.O. ought not to have passed the draft assessment order under Section 144C(1) of the Act. Instead, the Ld. A.O. ought to have passed the assessment order under Section 143(3) of the Act.

(This has now been amended vide Finance Act, 2020 w.e.f. 01.04.2020 and the phrase 'returned income or loss' has now been omitted).

vi) Accordingly, in the instant case i.e, for A.Y. 2015-16 and 2016-17, the last date of completing the assessment and passing the order for subject assessment year was 31.12.2017 and 31.12.2018 (in terms of Section 153(1) which prescribe a time limit of 21 months from the end of the A.Y. in which the income was first assessable). Against this, since the A.O. passed order under Section

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143(3) r.w.s 144C on 11.02.2019 and 20.02.2019 respectively, the impugned order is barred by limitation.

vii) The issue is squarely covered by the decision of this Hon'ble bench in the case of ACIT vs. SA Chitra Ventures Ltd. [ITA 6144 & 6145/DEL/2018].

viii) In any case, the issue is squarely covered by the decision of the Hon'ble ITAT Mumbai in the case of IPF India Property Cyprus (No. 1 Ltd.) ITA. 6077/Mum/2018.

5. The ld. DR strongly placed reliance on the orders of the authorities below.

6. On hearing both the sides we find that the issue is covered in favour of the assessee by the order of the Tribunal in the case of S.A. Chitra Ventures Ltd. in ITA. Nos. 6144 and 6145/Del/2018 dated 21.07.2022 wherein the co-ordinate bench on similar facts considering the decision of the Mumbai Bench in the case of IPF India Property Cyprus [No.1] Ltd. in ITA. No. 6077/Mum/2018 (order dated 25.02.2020) held that the assessment order passed is barred by limitation observing as under:-

”10. We have given thoughtful consideration to the rival contentions and have carefully perused the assessment order. In so far as the facts of the case are concerned, there is no quarrel. The returned income of Rs. 27,38,71,150/- was assessed as such with the only difference that the Assessing Officer denied the benefit of India - Cyprus DTAA and taxed the income @ 20% u/s 115A of the Act.

11. On these undisputed facts, all that has to be decided is as to whether the Assessing Officer was justified in passing a draft assessment order when there is no variation in income

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or loss returned which is prejudicial to the interest of the assessee.

12. Section 144C(1) of the Act provides that :

“The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment 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.”

13. As mentioned elsewhere, there is no variation in the income returned by the assessee and returned income has been assessed as such. It is also not in dispute that the assessee is an eligible assessee in terms of section 144C(15)(b)(ii) of the Act, but then, there is no change in the figure of income returned by the assessee vis a vis income assessed by the Assessing Officer.

14. As pointed out by the Id. DR, Finance Bill 2020 proposes to make issuance of draft assessment order in the case of eligible assessee mandatory even when there is no variation in income or loss returned by the assessee but this amendment may take effect from 01.04.2020. The relevant part of the Finance Bills reads as under:

“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.

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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 j case of eligible assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable.”

15. Similar view was taken by the co-ordinate bench at Mumbai in the case of IPF India Property Cyprus [No. 1] Ltd [supra]. The relevant findings read as under:

“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 31stDecember 2017 but the present assessment order is passed on 17'1 ' 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.”

16. In light of the above, we hold the assessment order to be time barred and since the assessment order itself has been held to be time barred, all the issues raised by the Revenue in its appeals which deal with the merits of stand taken by the Assessing Officer in the assessment order become academic and infructuous and require no separate adjudication.”

7. Facts being identical respectfully following the said decision we hold that the assessment order passed under section 143(3) read with section 144C(13) is barred by limitation for both the assessment years 2015-16 and 2016-17. Additional grounds raised by the assessee are accordingly allowed.

8. As we have held that the assessment order itself is barred by limitation all other issues raised in appeals on merits and their adjudication became academic and infructuous.

9. In the result both the appeals of the assessee are allowed as indicated above.

Order pronounced in the open court on : 25/09/2023.

Sd/-
(G. S. PANNU)
PRESIDENT

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 25/09/2023.

MEHTA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक / Assessee
2. राजस्व / Revenue
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)

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5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, DELHI /
DR, ITAT, DELHI
6. गार्ड फाइल / Guard file.

By order

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	18.09.2023
Date on which the typed draft is placed before the dictating Member	19.09.2023
Date on which the typed draft is placed before the Other Member	25.09.2023
Date on which the approved draft comes to the Sr. PS/PS	25.09.2023
Date on which the fair order is placed before the Dictating Member for pronouncement	25.09.2023
Date on which the fair order comes back to the Sr. PS/PS	25.09.2023
Date on which the final order is uploaded on the website of ITAT	25.09.2023
Date on which the file goes to the Bench Clerk	25.09.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	