IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT &
MS PADMAVATHY S, AM

I.T.A. No. 3041/Mum/2024
(Assessment Year: 2013-14)

Dy. Commissioner of Income Tax (IT)-3(3)(2), 1607, Air India Building, Nariman Point, Mumbai-400021.	Vs.	**Pramarica ASPF II Cyprus Holding Ltd.** C/O Price Water House Coopers Pvt. Ltd., Tower C, 18th Floor, Building No. 10 DLF, Cyber City, Gurugram-122002. **PAN : AAECP5087H**
Appellant)	:	**Respondent)**

C.O. No. 168/Mum/2024
(Assessment Year: 2013-14)

Pramarica ASPF II Cyprus Holding Ltd. C/O Price Water House Coopers Pvt. Ltd., Tower C, 18th Floor, Building No. 10 DLF, Cyber City, Gurugram-122002. **PAN : AAECP5087H**	Vs.	**Dy. Commissioner of Income Tax (IT)-3(3)(2),** 1607, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent)**

I.T.A. No. 3040/Mum/2024
(Assessment Year: 2015-16)

Dy. Commissioner of Income Tax (IT)-3(3)(2), 1607, Air India Building,	Vs.	**Pramarica ASPF II Cyprus Holding Ltd.** C/O Price Water House Coopers

Nariman Point, Mumbai-400021.		Pvt. Ltd., Tower C, 18th Floor, Building No. 10 DLF, Cyber City, Gurugram-122002. **PAN : AAECP5087H**
Appellant)	:	**Respondent)**

C.O. No. 138/Mum/2024
(Assessment Year: 2015-16)

Pramarica ASPF II Cyprus Holding Ltd. C/O Price Water House Coopers Pvt. Ltd., Tower C, 18th Floor, Building No. 10 DLF, Cyber City, Gurugram-122002. **PAN : AAECP5087H**	Vs.	**Dy. Commissioner of Income Tax (IT)-3(3)(2),** 1607, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent)**

Appellant /Assessee by	:	Ms. Hirali Desai/ Shri Yogesh Malpani, AR
Revenue / Respondent by	:	Shri Krishna Kumar, Sr. DR
Date of Hearing	:	17.12.2024
Date of Pronouncement	:	07.01.2025

O R D E R

Per Padmavathy S, AM:

These appeals by the Revenue and the C.O. of the assessee are against the separate orders of Commissioner of Income Tax (Appeals)-57, Mumbai [in short "the CIT(A)]" dated 14.03.2024 for the AY 2015-16 and 2013-14.

2. For AY 2015-16 the ld. AR raised the contentions that the appeal filed by the Revenue is not maintainable for the reason that the tax effect is less than the monetary limit as mentioned in the CBDT Circular No.09/2024 dated 17.09.2024. The ld. DR fairly conceded the said contentions of the ld. AR. Accordingly, the appeal of the Revenue for AY 2015-16 is dismissed as not maintainable and the C.O. of the assessee for AY 2015-16 which has become infructuous is also dismissed.

ITA.No. 3041/Mum/2024 – AY 2013-14

3. The assessee is a company and tax resident of Cyprus. Asia Property Fund II Gmbh and Co. Germany held 100% shares in assessee company. The assessee filed the return of income for AY 2013-14 on 28.11.2013 declaring a total income of Rs. 11,87,38,528/-. Subsequently the assessee filed the revised return of income on 11.11.2014 declaring total income of Rs. 9,13,20,446/-. During the year the assessee received interest income from investment in "Compulsory Convertible Debentures" (CCD) from Pacifica Chennai Infrastructure Company Pvt. Ltd. to the tune of Rs. 4,38,90,309/- and from Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Pvt. Ltd. to the tune of Rs. 2,40,48,219/- and Rs. 2,33,81,918/-from Marathon IT Infrastructure Pvt. Ltd. The assessee offered the interest income from investment of CCD for tax in India at 10% under Article 10 of India-Cyprus DTAA. The return was processed under section 143(1) of the Act. Subsequently a notice under section 148 dated 29.11.2018 was issued and the final order of assessment under section 143(1) r.w.s. 144C(3) of the Act was passed on 17.09.2019. In the said order of reassessment the AO held that the assessee is not the beneficial owner of the interest income and is only a conduit entity to avail the beneficial tax rate under the treaty. Therefore the AO held that the interest income is to be taxed at 20% as per section 115A(1)(a)(ii) of the Act instead of the rate of

10% as offered by the assessee claiming the beneficial provision of India-Cyprus DTAA. On further appeal the CIT(A) vide order dated 11.02.2021 allowed the appeal of the assessee holding that the approach of the AO in adopting the procedure prescribed under section 144C was not in accordance with law since there is no change to the income declared by the assessee and consequently the assessment order passed by the AO got vitiated.

4. The AO subsequently initiated the 2nd round of reassessment proceedings, by issuing notice under section 148 on 31.03.2021 in response to which the assessee filed the return of income on 26.04.2021. The assessee filed objections to the reopening and the AO disposed of the objections vide order dated 17.12.2021. In the objections the assessee raised the contentions that the reasons for reopening are based on material which are already part of record and that the same has already been verified by the AO during the first round of reassessment proceeding. Therefore, the assessee objected that the 2nd round of reassessment is based on no new material and hence not maintainable. The assessee also contended that the 2nd round of reassessment is initiation is mere change of opinion based on the same records. The AO while disposing of the objections held that since the first round of reassessment proceeding have been quashed no opinion was formed by the AO and therefore there is no change of opinion. The AO also held that there are some documents freshly examined to re-initiate the reassessment proceedings. In the 2nd round of reassessment though the AO accepted the income returned by the assessee, the claim of the assessee that the same is taxable at 10% under India-Cyprus DTAA was rejected. The AO proceeded to tax the interest income at 20% with surcharge and cess under section 115A(1)(a)(ii) of the Act.

5. In the 2nd round of appellate proceedings before the CIT(A), the assessee contended that the reopening which is done beyond 4 years is not valid since the assessee has disclosed all material facts and evidences in the first round of reassessment itself and that the AO has once again initiated the reassessment proceedings on mere change of opinion. The CIT(A) allowed the contention in favour of the assessee stating that the AO is not justified in reopening the assessment when true and full disclosure of all material facts were disclosed by the assessee during the original reassessment proceedings itself. The CIT(A) also allowed the contentions of the assessee that the reassessment proceedings has been initiated without any new tangible material that is brought on record. However, the CIT(A) did not accept the contention of the assessee that the reopening is based on mere change of opinion and the CIT(A) also rejected the claim on percentage of tax on merits.

6. The grounds raised in the appeal of the Revenue and the C.O. of the assessee are reproduced below:

Grounds in Revenue's appeal

"1. On the facts and circumstances of the case & in law, the Ld. CIT (A) erred in holding that the reassessment proceedings initiated under section 147 of the Act is bad in law and void ab-initio.

2. On the facts and circumstances of the case & in law, the Ld. CIT(A) erred in quashing the notice u/s 147 and setting aside the re-opening proceedings initiated by the A.O.

3. On the facts and circumstances of the case & in law, the Ld. CIT(A) erred in holding that the AO was not justified to re-open the assessment when true and full disclosure of material facts were disclosed by the appellant during the original re-assessment proceedings when the original re- assessment proceedings was already quashed and set aside.

4. On the facts and circumstances of the case & in law, the Ld. CIT (A) erred in holding that, the AO was not justified to re-open the assessment when the AO was not in possession of any new tangible material, when in fact the AO has recorded the detailed reasons for reopening based on which the notice u/s 148 was issued to the assessee?

5. On the facts and circumstances of the case & in law, the Ld. CIT (A) erred in holding that the assessee is the beneficial owner of the interest income on CCDs received from India and thus, interest income was taxable @10% as per India- Cyprus DTAA?

6. On the facts and circumstances of the case & in law, the Ld. CIT (A) erred in placing reliance on the Hon'ble ITAT's order in the case of the assessee for A.Y 2010-11 dated 29.02.2016 when the facts of the case for A.Y 2010-11 are completely different from that of the present case under consideration?"

Grounds in assessee's CO

"1. On the facts and in the circumstances of the case and is law, the re-assessment proceeding initiated by the learned Assessing Officer ('Ld. AO') and the order dated 27 May 2022 paved under section 147 read with section 144C(3) of the Act are bad in law and void-ab-initio. Despite holding so, the Ld. CIT(A):

1.1. Erred in not appreciating that the reassessment proceedings initiated by the Ld. AO vide notice issued on 1 April 2021 under section 148 of the Act and the reassessment order dated 27 May 2022 are barred by limitation, without jurisdiction, in violation of the relevant provisions of the Act dealing with reassessment as amended by the Finance Act 2021 and therefore, were void-ab-initio and bad in law.

1.2. Erred in not appreciating that the reassessment proceedings under section 147 of the Act were bad in law as the same were concluded without providing the assessee a copy of the sanction obtained under section 151 of the Act.

1.3. Erred in holding that the Ld. AO was justified in invoking Explanation 2(b) to section 147 of the Act.

1.4. Erred in holding that there was no change of opinion by Ld AO in the second reopening of assessment.

1.5. Erred in not appreciating that the Ld. AO had erred in short grating TDS credit amounting to Rs. 13,80,8222/-"

7. The ld. AR vehemently argued that the reason recorded by the AO while reopening the assessment in 2nd time is based on the same issue to test the beneficial ownership of interest income which was already examined by the AO in the first reassessment proceeding. The ld. AR in this regard drew our attention to the reason recorded in the first round of reassessment proceeding (page no. 2 to 8 of PB) and also the reasons recorded in the 2nd round of reassessment proceeding (page no. 341 to 348 of PB). The ld. AR further drew our attention to the final assessment order passed under section 143(3) r.w.s. 147 r.w.s. 144C(3) (page no. 169 to 247 of PB) in the first round, where the issue of beneficial ownership of interest income is examined in detail by the AO based on various materials submitted by the assessee. Therefore, the ld. AR argued that the AO in the 2nd round of reassessment has reopened the assessment without bringing any new material on record. The ld. AR further submitted that in the first reassessment proceedings were quashed by the CIT(A) for the technical reason that 144C cannot be invoked when there is no change to the income assessed and this cannot vitiate the fact that the AO has done detailed enquiries during the first reassessment proceeding on the impugned issue. The ld. AR in this regard placed reliance on the decision of the Hon'ble Delhi High Court in the case of ESS Advertising (Mauritius) S.N.C.Et Compagnie Vs. ACIT [2021] 128 taxmann.com 120 (Del.).

8. The ld. DR on the other hand submitted that the AO in the 2nd round of reassessment had reason to belief that income has escaped assessment based on certain new materials as has been mentioned in the order disposing of the objections raised by the assessee (page no. 387 to 393 of PB). The ld. DR further submitted that the reassessment order in the first round has been quashed by the

CIT(A) and is non-est. Therefore, the ld. DR argued that the 2nd round of reassessment should be considered as fresh reassessment proceeding based on certain new materials which the AO has relied on in the reasons recorded.

9. We heard the parties and perused the material on record. The assessee being a tax resident of Cyprus has availed the benefit of Article 11 of India Cyprus DTAA and offered interest on investment in CCD in India at 10% for taxation. The AO reopened the assessment to test that the assessee is not the beneficial owner of the interest income and is a mere conduit to avail the benefit under the treaty provisions. The AO completed the reassessment proceedings vide order dated 17.09.2019 wherein he held that the assessee is not entitled to avail the reduced tax rate under the India Cyprus DTAA since the assessee is not the beneficial owner of the interest income. Accordingly the AO held that the interest income is to be taxed at 20% as per the provisions of section 115A(1)(a)(ii) of the Act. It is relevant to mention here that the AO for the purpose of coming to the said conclusion has examined the various documentary evidences submitted by the assessee including the ownership, the constitution of the Board, number of employees working in Cyprus office, etc. In the first round of appellate proceedings, the CIT(A) quashed the reassessment order stating that the AO is not correct in adopting the procedure prescribed under section 144C since there is no variation in the income or loss returned by the assessee.

10. Subsequently the AO once again issued a notice under section 148 dated 31.03.2021 recording the reasons that the assessee has incorrectly availed the benefit of treaty provisions and that the assessee is not the beneficial owner of the interest income. On perusal of the reasons recorded, we notice that the documents relied on by the AO in the 2nd round of reassessment are part of the submissions

made by the assessee during the first round of reassessment [refer para (a) to (f) of reasons recorded in page 343 & 344 of PB]. In assessee's case the 2nd reassessment notice dated 31.03.2021 is issued beyond four years and therefore there is merit in the contention of ld AR that the Proviso to section 147 which reads as under is applicable in assessee's case –

> ***Income escaping assessment.***
>
> *147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
>
> *Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year,* ***unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year****:*
>
> *(emphasis supplied)*

11. From the plain reading of the above proviso it is clear that in cases where the assessment is completed under section 143(3), the assessing officer cannot reopen the assessment unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. Keeping in mind this position of law, we will now look at the facts in assessee's case. The CIT(A) has given a clear finding while allowing

the appeal on the contentions raised by the assessee with regard to AO for initiating the reassessment for the 2nd time having relied on the same documents as used in the first round of reassessment The relevant findings of the CIT(A) in this regard are extracted below:

> *"6.2.4 The AO has taken the decision regarding beneficial interest in respect of the appellant company in the first re-opening of the assessment after detailed reasons given in the assessment order u/s. 147 dated 17.09.2019. The AO came to the conclusion on the basis of evidence submitted by the appellant that the appellant was not having beneficial interest in respect of interest from CCD. Again in the present re-opening of assessment order dated 27.05.2022, the AO came to the same conclusion that the appellant was not beneficial owner of the interest income received from Indian company and, therefore, the benefits of Article 11 of the India-Cyprus DTAA was not available to the appellant. The finding of the AO in the first re-assessment order and the second re-assessment order is identical. It is a repetition of decision already taken in the first re-assessment, therefore, it is not a case of change of opinion by the AO. Therefore, this argument of the appellant is rejected.*
>
> *6.2.5 Even though there was no change of opinion by AO in the second re-opening of assessment, the AO was not in possession of any new tangible material in his possession on which he could form a belief and had reason to believe that income has escaped assessment for AY. 2013-14. Therefore, notice u/s.148 and consequent order u/s. 147 is quashed and set aside."*

12. It is an undisputed fact the AO has reopened the assessment, both times for the same reason that the assessee not being a beneficial owner has incorrectly availed the benefit low rate of tax under the treaty provisions. From the perusal of the reasons recorded, we notice that the AO for the purpose of reopening the assessment for the 2nd time the AO has relied on the same material submitted by the assessee during the first round of reassessment. We notice that the CIT(A) has given a categorical finding that the AO has come to the same conclusion in both the reassessment proceedings based on the same set of materials. Further it is settled law that where the assessment is sought to be reopened after the expiry of a

period of four years from the end of the relevant year, the proviso to section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. In the given case, the assessment is sought to be reopened after a period of four years and the proviso to section 147 is applicable. The Hon'ble Supreme Court in the case of Kelvinator of India Ltd [2010] 320 ITR 561 (SC) has laid down that the AO has no power to review but only to reassess based on any new material that has come to his possession. We also notice that the Hon'ble Delhi High Court in the case of ESS Advertising (Mauritius) S.N.C.Et Compagnie (supra) has considered a similar issue and held that

> *vi. Sixthly, (re) assessment proceedings can only be initiated if the AO has reasons to believe that certain income has escaped assessment albeit based on the emergence of new facts/information. Section 147 of the Act does not confer on the AO the power to arrive at a different conclusion by reviewing material that is already on record. Since no fresh material/information was brought on record, the AO did not have the power to reopen the assessment proceedings. [See: CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312/320 ITR 561 (SC), CIT v. Orient Craft Ltd. [2013] 29 taxmann.com 392/215 Taxman 28/354 ITR 536 (Delhi), and BPTP Ltd. v. Pr.CIT [2020] 113 taxmann.com 587/421 ITR 59 (Delhi)].*
>
> ****
>
> ***13**. Having heard learned counsel for the parties, and perused the record, what has emerged and qua which there is no rebuttal is that, before the draft assessment orders dated 23-12-2016 for the AY in issue, te, 2013- 14 were passed, there was in place the order of the DRP dated 26-12-2014, concerning the assessees [i.e. petitioners in the instant cases), which was confirmed by this Court via order dated 23-3-2016 (related to AY 2010-2011), which noted that the petitioners were not eligible assesses within the meaning of Section 144C(15)(6) of the Act. Pertinently, the petitioners' declared status, even then, was, a non-resident foreign partnership firm.*
>
> *13.1 Therefore, at the relevant time, the AO could not have taken recourse to the procedure for assessment provided under section 144C. It needs to be*

emphasized that Section 144C falls in Chapter XIV which is titled "Procedure for Assessment"

13.2 Notably, for two AYs, Le., AY 2011-2012 and 2012-2013, recourse was taken for passing final assessment orders qua the petitioners to the provisions of Section 143(3) of the Act. These orders were passed on 27-3-2015 (AY 2011-2012) and 10-3-2016 (AY 2012-2013).

13.3 Therefore, there was no good reason, according to us, for the AO to resort to the procedure for assessment provided under section 144C of the Act when such orders [i.e., the aforementioned orders] had already been passed and there was no change in the status of the petitioners in the AY in issue, i.e., AY 2013- 2014. The petitioners' status in AY 2013-2014, as in the above referred years, continued as a non-resident foreign partnership firm. The AO, however, as noticed above, took the aid of the assessment regime prescribed under section 144C of the Act despite the TPO having passed two separate but similar orders dated 5-9-2016, which concluded that no action was called for qua the petitioners though, their associated enterprise, i.e. SSIPL was being subjected to TP Audit.

13.4 Therefore, it is difficult to fathom, why the AO would continue to embark on a route that would lead, figuratively speaking, to perdition.

13.5 It is when the DRP, via its orders dated 11-9-2017, ruled once again, that the petitioners were not eligible assessees within the meaning of Section 144C(15)(8) of the Act, as neither the TPO had proposed a variation in their returned income and nor were they a foreign company, did the AO take recourse to the impugned proceedings. It is pertinent to note, as noticed above, that the DRP had concluded that it did not have jurisdiction in the matter, and therefore, was not inclined to issue any directions in the case. The proceedings qua the petitioners were, accordingly, dismissed.

13.6 What is important, though, is that the draft assessment orders concerning the petitioners, [which were passed vis-à-vis the AY in issue, Le. AY 2013-2014]-have been passed under section 144C(1)/143(3) of the Act. More importantly, in both the draft assessment orders, which are dated 23-12-2016, there is a detailed discussion made as to why the income of the petitioners is attributable to PE in India and in particular, vas va ESSD, as to why the income received from subscriptions took the character of royalty. Furthermore, the variation in the taxable income proposed, both in the case of ESSA and ESSD, i.e., Rs. 85,68,23,883/- and Rs. 490,07,43,680/- is the exact sum, which the respondent says, has escaped assessment. This is

evident upon a perusal of the two notes containing reasons, which are dated 20-3-2018.

13.7 The only reason given in the said notes, for triggering the impugned proceedings, is that since the draft assessment orders dated 23-12-2016 were not taken to their "logical conclusion" on account of the orders passed by the DRP on 11-9-2017, there was no "regular assessment" made and hence, the impugned action was in order. In support of this plea, reference is made to Explanation 2 to Section 147 of the Act and the judgment of this Court Honda Cars India Lad v. Dy CIT (2016) 67 taxmann.com 29/240 Taxman 7072. As would be evident, from the date of the judgment rendered in the Honda Cars Case (supra) despite the view of this Court that assessment procedure provided under section 144C was only available against eligible assessees, the AO chose to ignore the dicta, although the AO knew, as noticed above, that the TPO had not ordered any variation in income and that the status of the petitioners [i.e., that they were non-resident foreign partnership firm was not in doubt.

13.8 As is clear from the facts, which have emerged in this case, once a scrutiny notice was issued under section 143(2) of the Act, the route open, if at all, to the AO for framing an assessment order was the one provided under section 143(3) of the Act, as was done in AYs 2011-2012 and 2012-2013, vide order dated 27- 3-2015 and 10-3-2016

***14.** The AO, however, chose to assess the petitioners, by resorting to the procedure provided under section 144C of the Act despite the record concerning the previous AYs showing that such attempts had failed and there was (in the AY in issue, Le, AY 2013-2014) no change in circumstances/status of the petitioners.*

14.1 As noticed above, the draft assessment orders for AY 2013-2014 have not only been passed under section 144C but also Section 143(3) of the Act. It almost appears that the AO had made up its mind that, if the DRP were to hold once again that the petitioners were not eligible assessees, the draft assessment orders would be sustained under section 143(3) of the Act. The DRP, instead, dismissed the proceedings vide order dated 11-9- 2017.

14.2 The question, therefore, which arises for consideration is: whether the respondent can continue with the impugned proceedings based on the same material which was examined and qua which opinion was rendered by the AO while passing the draft assessment orders?

14.3 There can be no dispute that the material that has been used for triggering the impugned proceedings is the same material that was available to the AO while passing the draft assessment orders. The notes which contained reasons for initiating the impugned proceedings make no bones about the fact that the same material has been used. The only argument advanced is that the exercise did not culminate in the passing of the orders under section 143(3) of the Act. Clearly, the respondent took recourse to Section 147/148 of the Act as she found that she did not have any room to vary the taxable income declared by the petitioners, as proposed, under the provisions of Section 143(3) of the Act."

13. Similar view is held by the Hon'ble Bombay High Court in the case of Ananta Landmark (P.) Ltd. vs DCIT ([2021] 131 taxmann.com 52 (Bombay)). In assessee's case the AO has reopened the assessment for the second time without bringing any new material on record and the reason for reopening is also the same as in first round of reassessment based on the same set of materials. Considering the facts of the present case and the ratio laid down by the Hon'ble Supreme Court and High Court, we see no reason to interfere with the order of CIT(A). The appeal of the revenue is dismissed.

14. The ld AR during the course hearing presented arguments to submit that the notice dated 31.03.2021 is actually issued on 01.04.2021 and that the procedure laid down by the Hon'ble Supreme Court in the case of Union of India vs. Ashish Agrawal in Civil Appeal No. 3005/2022 has not been followed. Since we have already dismissed the appeal of the revenue on the ground that 2nd reopening is done without bringing any new material on record, the above arguments of the ld AR have become academic and we are not expressing any view on the same.

15. In view of our decision with regard to the appeal filed by the Revenue, the C.O. of the assessee contending that the reopening is barred by limitation has become infructuous and dismissed accordingly

16. In result the appeal of the Revenue (**ITA.No. 3041& 3040/Mum/2024)** and the C.O.(**ITA.No. 168 138/Mum/2024)** of the assessee for AY 2013-14 and 2015-16 are dismissed.

Order pronounced in the open court on 07-01-2025.

Sd/-	***Sd/-***
(SAKTIJIT DEY)	**(PADMAVATHY S)**
Vice President	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai