

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER  
&  
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

I.T.As. No.201, 202, 203, 204 & 205/DEL/2015  
Assessment Years: 2007-08, 2008-09, 2009-10, 2010-2011 &  
2011-12

M/s. Uniparts India Limited, Block-5, C-6 &7, Gripwell House LSC, Vasant Kunj, New Delhi.	vs.	CIT, Circle-18(1), New Delhi.
TAN/PAN: AAACU 0545D		
(Appellant)		(Respondent)

Appellant by:	Shri R.S. Singhvi & Shri Satyajeet Goyal, C.A.		
Respondent by:	Shri Amit Jain, Sr.D.R.		
Date of hearing:	03	04	2018
Date of pronouncement:	02	07	2018

**ORDER**

**PER AMIT SHUKLA, J.M.:**

The aforesaid appeals have been filed by the assessee against the impugned order of even date, date 10.11.2014, passed by Id. CIT (Appeals)-XXI, New Delhi, in relation to the order passed u/s.154 for the Assessment Years 2007-08 to 2011-12. Since same issue is involved in all the appeals, arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order. In appeal for the Assessment Year 2007-08, the assessee has taken following grounds:-

1. *That the order of the Ld. Appellate Authority is arbitrary, unjustified, unlawful and against the law and facts of the case.*
2. *That the Ld. Appellate Authority, without appreciating the facts of the case, has disallowed the claim of the assessee Company for credit of withholding tax amounting to Rs. 26,99,165/- deducted by M/s Uniparts USA Ltd., USA on interest paid to the assessee Company.*
3. *That the Ld. Appellate Authority has failed to appreciate the fact that the assessee Company had to suffer double tax on interest income earned from Uniparts USA Ltd. as a sum of Rs. 26,99,165/- has been deducted by Uniparts USA Ltd., USA as "With-holding Tax, the credit of which has not been allowed to the assessee Company and the assessee Company had also paid income tax on interest earned from Uniparts USA Ltd. in India as per the provisions of Income Tax Act, 1961.*
4. *That Ld. Appellate Authority has not considered the fact that the assessee Company is resident in India since its registered office and the manufacturing units are situated in India and in accordance with the provisions of sec. 5(1) of the Income Tax Act, 1961 is liable to be taxed on all its income in India whether earned in India or outside India. Accordingly, interest income earned in USA is also liable to be taxed in India and thus eligible to take credit of "Withholding Tax" deducted on income earned in USA."*

Except for the variation in the figures for the amount of withholding tax, all the grounds are identically worded in the other assessment years impugned before us.

2. The facts in brief *qua* the issue are that assessee who is resident of India has a wholly owned subsidiary in USA named as M/s. Uniparts USA Ltd. The assessee has advanced

interest bearing fund to its wholly owned US subsidiary on which interest income has accrued to the assessee from such loan. The US subsidiary has remitted the interest to the assessee in India after withholding the tax @15% in view of the Article 11 of India US DTAA. The said interest income has been duly disclosed in the return of income filed by the assessee in the Assessment Years 2007-08 to 2011-12. The details of return of income, interest income earned from US subsidiary and TDS deducted by the US Company are as under:-

<b>Sl No.</b>	<b>A.Y</b>	<b>Return Income</b>	<b>Total Interest income</b>	<b>Interest from USA</b>	<b>TDS in USA</b>
1	2007-08	22,89,44,971/-	63,49,477/-	1,57,06,146/-	26,99,165/-
2	2008-09	28,02,32,440/-	2,81,79,606/-	1,71,85,174/-	31,61,892/-
3	2009-10	13,76,59,264/-	2,30,21,801/-	1,68,23,768/-	22,42,301/-
4	2010-11	(-) 20,26,91,934/-	2,73,84,015/-	1,94,48,930/-	11,48,784/-
5	2011-12	(-) 99,48,505/-	1,28,71,281/-	51,77,715/-	38,10,326/-
<b>Total</b>					<b>1,30,62,468/-</b>

3. The assessee in the return of income has claimed the credit of tax deducted at source in USA in terms of Article 25 of the Indo-US DTAA. Since the said credit was not allowed to the assessee in the intimation u/s. 143(1), the assessee filed an application u/s.154 seeking the credit against the tax withheld in USA for the Assessment Years 2007-08 to 2011-12. The assessee's contention before the Assessing Officer was

that the said interest income has been reflected by the assessee in its books of account as well as in the return of income and the tax deducted at source by the subsidiary company at the rate applicable in the DTAA before making the payments has to be given credit as per Article 25 of the DTAA. The Assessing Officer however noted that assessee itself has stated that this interest was not taxable in USA and therefore, he has not filed any return of income in USA. The Assessing Officer rejected the assessee's claim after observing and holding as under:-

*“a. DTAA envisages relief from tax payable on an income in the residence country, where tax is also payable on the same income in the source country, thus ensuring that same income is not subject to taxation in two countries. In other words where an assessee is taxable in respect of a particular income in one country and has paid tax thereon and filed its Return of Income in that country including that income and the same income is also taxable in India, then in such a situation the assessee can claim credit for tax paid in such other country by submitting a copy the Return of income filed in that country, wherein the said income & tax paid thereon is duly reflected.*

*b. There is no scheme in DTAA for the residence country to give credit to the tax withheld in the source country, even though the corresponding income is not taxable in such source country, chiefly because the said income has not suffered any double taxation. Here it is pertinent to state that TDS or withholding of tax is only a mode of collection of tax (as a precautionary measure) and is not the ultimate test of taxability of such income, in case of any TDS or Withholding of Tax which is not due from the assessee then such tax collecting authority is bound to return the same to the*

*assessee as the said income is not chargeable to tax at all.*

*c. In the Instant case, assessee has itself stated that it is not taxable in USA and ha.: not filed any Return of Income in USA. Its only contention is that tax has been with held in USA on the income which has been offered for taxation in India and hence credit for such tax withheld in USA should be given and be accordingly refunded in India. Thus, it is clear that in this case, the interest income is not taxable in USA but has only been withheld. In such a situation the assessee is eligible for a refund in respect of tax so withheld in USA., which was not due in the first place, as the assessee is not taxable in that country. Thus the procedure available with the assessee is to make a claim of refund in USA on tax withheld on an income, which is not at all taxable in USA.”*

4. Ld. CIT (A) too has confirmed the action of the Assessing Officer in the following manner:-

*“3.3 I have considered the order of the AO and the submissions of the assessee and I do not find any merit in the submissions of the assessee. The provisions of section 90 under the head Double Taxation Relief under Chapter-IX provides for relief from double taxation if the income of the assessee is taxable both in India and in the contracting state i.e. USA as per the DTAA with USA vide Article 25(2)(a). But in the present case the assessee has received the interest income which is taxable in India as the assessee is resident in India but the same interest income is not taxable in USA as the assessee is not a resident of USA. The interest income paid by the USA company i.e. Uniparts USA Ltd. is a deductor and payer of interest and is apparently an expenditure for that company and there is no question of the same being taxable in USA. It is not known as to under what circumstances the TDS was made by the deductor in USA when the same is not taxable in USA. It is*

*apparently a case of TDS made by the deductor in USA which is otherwise a wholly owned subsidiary of the assessee company. It is never argued or pleaded or proved that the interest income offered by the assessee for taxation in India is also taxable in USA as per the US Internal Revenue Code. So no case is made out by the assessee that the interest income has suffered double taxation both in India and in USA to claim any relief u/s 90(l)(a). After considering all the facts and circumstances of the case, I am of the view that the assessee is not eligible for any TDS credit in India or for any relief under the DTAA with USA and accordingly the appeal of the assessee is dismissed.”*

5. Before us, ld. counsel for the assessee, Shri R.S. Singhvi, submitted that, once TDS has been deducted by the US company while remitting the interest, and the same interest income has been declared as income assessable to tax in India in terms of Section 5, then credit of the tax has to be given as per Article 25 of the DTAA. The observation of the ld. CIT (A) that the assessee should have taken refund in US is not correct, because interest income was liable to be withholding tax in US as per Article 11 of DTAA and domestic laws of US and as such there was no occasion for the assessee to claim refund of the tax deducted. He also made reference to the Rule 128 which pertains to foreign tax credit which shall be allowed to the resident with the tax paid by him outside India. He further relied upon the judgment of **ITAT Ahmedabad Bench in the case of Bhavin A. Shah vs. ACIT (2017) 151 DTR (Ahd) (Trib) 97**. Thus, he submitted that Assessing Officer could not have denied the credit of tax

paid on US on the interest income which has been shown in the return of income in India.

6. On the other hand, learned Department Representative strongly relied upon the order of the Assessing Officer and Id. CIT (A) and submitted that onus was on the assessee to show that the tax which has been withheld by the US company was actually not subjected to tax as per the domestic law of US which has been noted by the Assessing Officer and therefore, both Assessing Officer and Id. CIT (A) has rightly denied the credit to the assessee.

7. We have heard the rival submissions and also perused the relevant findings given in the impugned order. Herein these cases, only issue involved in all the appeals is allowability of claim of withholding tax credit deducted by US based subsidiary of the assessee company in USA on payment of interest loan. It is not in dispute that interest income earned by the assessee from US Company is liable for tax in India as per Section 5. The US subsidiary company while remitting the interest payment for the impugned Assessment Year has withheld the tax in accordance with Articles 11 and 25 of Indo-US DTAA @ 15% of the gross amount which is the rate prescribed in paragraph 2 of Article 11. The said credit has been denied by the Revenue authorities on the ground that; *firstly*, assessee has not filed its return of income in US for claiming the refund of the withholding tax if the said amount is not taxable in US; *secondly*, there is no scheme

under the DTAA for the resident to give credit of the tax withheld in the source country if the same is not taxable in the source country, therefore, it is not a case of double taxation; *thirdly*, which is the ground taken by the Id. CIT(A) to deny the credit is that, interest paid by the US company who is a deductor is actually an expenditure for that company and therefore, there is no question of same being taxable in USA; and *lastly*, it has not been shown as to under which provision the TDS was made by the deductor in USA. First of all, the relevant clause of Article 11 (which is relevant for deciding the first appeal) reads 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 :*

*(a) 10 percent of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company) ; and*

*(b) 15 per cent of the gross amount of the interest in all other cases.”*

8. Ergo, paragraph 1 clearly states that if the interest is arising in a source state which is paid to the resident state then it may be taxed in the resident state. This inter alia

means that interest arising in a source state is liable to be taxed in the resident state. Paragraph 2 however lays down that such interest may also be taxed in the source state in which it arises and according to law of the source state but if the beneficial owner is the resident state then the tax was charged shall not exceed 10% as per clause (a) and 15% as per clause (b). Thus, interest can also be taxed in the source state in which it arises according to laws of the source state and then in that case the tax so charged shall not exceed 10% or 15%. It can be inferred that the taxability of the interest in the source state has to be in accordance with the laws of that state; and if such tax has been deducted, then Article 25 of the said treaty provides credit of such taxes which has to be given by the resident state which is clear from paragraph 2 of the Article 25. The relevant paragraphs 1 and 2 of Article 25 read as under:-

*ARTICLE 25*

*RELIEF FROM DOUBLE TAXATION*

*1. In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income—*

- (a) the income-tax paid to India by or on behalf of such citizen or resident; and*
- (b) in the case of a United States company owning at least 10 per cent of the voting stock of a company which is a resident of India and from which the United States company receives*

*dividends, the income- tax paid to India by or on behalf of the distributing company with respect to the profits out of which the dividends are paid.*

*For the purposes of this paragraph, the taxes referred to in paragraphs 1(b) and 2 of Article 2 (Taxes Covered) shall be considered as income taxes.*

*2. (a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax in the United States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States.”*

Thus, the paragraph 2 clearly provides that if the resident of India derives income which may be taxed in US, then India has to allow the deduction from the tax on the income of the resident on the amount equal to the tax paid in US with a deductee.

9. Here in this case it is not in dispute that tax has been deducted by the source state, i.e., USA on the interest income of the resident of India, however, it is not clear under which provision such amount of interest paid by the US Company to the Indian Company is liable for tax under the US laws. The TDS certificate perhaps will give the clarity in this regard, because there might be mention of provision or code under which the tax has been withheld. Thus, for the limited purpose the matter is remanded back to the Assessing Officer

to examine the TDS certificates which shall be submitted by the assessee; or assessee can provide any other documents to show that withholding of the tax by the US Company is in accordance with the law of the US State. If the TDS certificate is produced by the assessee, then such tax which has been withheld, Assessing Officer has to give credit of such withholding tax by the US Company which is the mandate of Article 25. Accordingly, with this direction the matter is restored back to the file of the Assessing Officer.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

**Order pronounced in the open Court on 2<sup>nd</sup> July, 2018.**

sd/-

**[J.S. REDDY]  
ACCOUNTANT MEMBER**

**[AMIT SHUKLA]  
JUDICIAL MEMBER**

DATED: 2<sup>nd</sup> July, 2018  
PKK:

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3. CIT(A)
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Assistant Registrar

		Date
1.	Date of dictation	.06.2018
2.	Date on which the typed draft is placed before the dictating member	.06.2018
3.	Date on which the typed draft is placed before the Other Member	
4.	Date on which the approved draft comes to the Sr.P.S./PS	
5.	Date on which the fair order is placed before the Dictating Member for pronouncement	
6.	Date on which the fair order comes back to the Sr.P.S./PS	
7.	Date on which the final order is uploaded on the website of ITAT	
8.	Date on which the file goes to the Bench Clerk	
9.	Date on which the file goes to the Head Clerk	
10.	The date on which the file goes to the Assistant Registrar for signature on the order	
11.	Date of dispatch of the order	