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

BEFORE SHRI M.BALAGANESH, AM
&
SHRI AMARJIT SINGH, JM

ITA No.4483/Mum/2018
(**Assessment Year :2006-07**)

M/s. Dorf Ketal Chemicals India Private Limited 3, Dorf Ketal Tower Ramchandra Lane Opp. IDBI Bank Kanchpada, Malad West Mumbai – 400 064	Vs.	Commissioner of Income Tax (Appeals) – 50 Room No.514, 5th Floor Earnest House Nariman Point Churchgate, Mumbai - 400021
PAN/GIR No. AAACD3819P		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Yogesh Thar / Ms. Niyanta Mehta
Revenue by	Shri Kailash Kanojiya
Date of Hearing	**15/10/2019**
Date of Pronouncement	**06/11/2019**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.4483/Mum/2018 for A.Y.2006-07 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-50 in appeal No.CIT(A)-50/IT-376/2010-11 dated 25/04/2018 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 153A of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/12/2010 by the ld. Dy. Commissioner of Income Tax, Central Circle - 45, Mumbai (hereinafter referred to as ld. AO).

2. The assessee has raised the following grounds of appeal:

"Based on the facts and in the circumstances of the case, Dorf Ketal Chemicals India Private Limited (The Appellant') respectfully submits that the Commissioner of Income Tax (Appeals) 50, Mumbai [Learned CIT(A)] has erred in passing order under section 251 of the Income-tax Act, 1961 ('Act') for case remanded back for adjudication of the matter by Honourable Income Tax Appellant Tribunal, Mumbai vide order dated 10th February 2017 bearing ITA No. 3736/Mum/2012 for AY 2006-07 on the following grounds:

Ground 1
The Learned CIT(A) erred in dismissing the appeal of the Appellant on the ground that in case of completed assessment, the assessment u/s 153A has to be made on originally assessed/declared income and no alteration to the total income can be made. The Learned CIT(A) failed to appreciate the facts of the matter in case of Appellant is different and Honourable Income Tax Appellant Tribunal, Mumbai vide order dated 10th February 2017 has already decided the matter on admissibility of claim of the Appellant that legally admissible claim could be entertained while framing the assessment u/s 153A of the Act.

Ground 2
The Learned CIT(A) has grossly erred in ignoring the direction given by Honourable ITAT, Mumbai while passing the Order. The Learned CIT(A) failed to apply the Principle of Judicial discipline that the Order of higher appellant authorities should be followed unreservedly by subordinate authorities. Therefore, Order passed by Learned CIT(A) is void and without proper jurisdiction.

Ground 3
The Learned CIT(A) has grossly erred in not adjudicating the matter on merits of the case and thereby rejecting the Appellant's bonafide claim of Rs.47,54,350/- of dividend received from its Brazilian Subsidiary which is claimed as exempt in India under the beneficial provisions of India-Brazil Double Taxation Avoidance Agreement (DTAA).

General
***All** above grounds are mutually exclusive and without prejudice to each other.*

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, so to enable the Hon'ble Commissioner of Income-tax (Appeals) to decide the appeal on merits and according to law."

3. We have heard the rival submissions and perused the materials available on record. We find that this is the second round of appellate proceedings before this Tribunal. It would be necessary to address primary facts involved in this case as under:-

a) The assessee had filed original return of income on 30.11.2006 for the captioned AY declaring a total income of Rs. 7,35,92,087/- and claiming exempt income of dividend amounting to Rs. 3,23,034/-.

b) The search was conducted u/s 132(1) of the Act on 30.05.2008 in the business premises of Dorf Ketal Group and the notice dated 14.11.2008 was issued u/s 153A of the Act. In response to the said notice, a return of income was filed u/s 153A of the Act along with the computation of income on 12.02.2009.

c) In the said return of income filed u/s 153A of the Act, following were the differences from the return filed originally:-

All amounts are in Rs.

Particulars	*Amount as per Original Return filed u/s139*	*Amount as per return filed u/s 153A*	*Difference*	*Reason*
Depreciation claimed under the Act	*2,57,49,565*	*2,55,05,403*	*(2,44,162)*	*On account of regrouping of assets into correct blocks*
Dividend Income (Exempt)	*3,23,034*	*50,77,384*	*47,54,350*	*Dividend received from Brazilian subsidiary claimed*

				as exempt by virtue of DTAA between India and Brazil
Research and ' Development Expenses	*40,84,079*	*1,14,34,101*	*73,50,022*	*Claimed by virtue of Section 35(1)(iv) of the Act*
Typographical error in Original Return of Income filed u/s 139(1)			*43,637*	
Total			*1,19,03,847*	

d) The aforesaid additional claims amounting to Rs. 1,19,03,847/- made by the assessee in the return filed u/s 153A of the Act was not allowed as per the assessment order dated 30.12.2010 passed u/s 143(3) r.w.s 153A of the Act by then Deputy Commissioner of Income-tax, Central Circle-45, Mumbai.

e) Against the aforesaid disallowances made by the then AO, the assessee filed an appeal before the erstwhile Commissioner of Income-tax (Appeals) - 38, Mumbai. The erstwhile CIT(A) vide order dated 29.02.2012 confirmed the addition merely on the technical ground that fresh claim cannot be made in return filed u/s 153A of the Act by placing reliance on decision of Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297.

f) The assessee then filed an appeal on 23.05.2012 before this tribunal against the said order passed by the erstwhile CIT(A). In the aforesaid appeal before tribunal, the assessee pressed the ground on addition confirmed by erstwhile CIT(A) of Rs.47,54,308/- on account of exempt dividend income earned during the captioned year.

g) The Tribunal vide its order dated 10.02.2017 has discussed at length the admissibility of a fresh claim made in return filed u/s 153A of the Act and also rebutted the applicability of case of Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297 by clearly bringing out the differences between the reassessment done u/s 147 of the Act and proceedings u/s 153A of the Act. Thus, the tribunal remanded the case back to file of CIT(A) for adjudication of claim of dividend received from its Brazilian subsidiary as exempt in India in view of beneficial provisions in DTAA between India and Brazil.

3.1. We find that this Tribunal had placed reliance on the Co-ordinate Bench of Nagpur Tribunal in the case of M/s Narendra Vegetable Products P Ltd (ITA No.118 to 124/Nag/2013) dated 03/06/2015. It would be relevant to reproduce the directions issued by the Tribunal in the first round of appeal in ITA No.3736/Mum/2012 dated 10/02/2017 as under:-

> *"7. Upon careful consideration we find that the above decision has very elaborately considered the issue and has come to the conclusion that legally admissible claim could be entertained while framing the assessment u/s.153A. u/s 153A, We find ourselves in agreement with the above proposition.*
>
> *8. As regards the decision relied upon the Ld. DR from the honourable Jurisdictional High court in the case of Continental Warehousing (Supra) we find that the same is not at all applicable on the facts of the case as the same decision was rendered in the context of addition made by the revenue de-horse any incriminating material found during search in cases where assessment had abated. The same decision can by no stretch of imagination be extended to any disclosure of income exempted or otherwise in the return pursuant to section 153 A. The simple analogy which can be considered in this respect can be a disclosure of additional income by the assessee in the return of income filed pursuant to notices under Section 153 A. The revenue cannot and will not choose to let the said offer of income go tax free by referring upon the said decision of honourable jurisdictional High Court. As regards the decision of Delhi*

ITAT in the case Charhit Aggarwal (Supra) it was rendered on a difference set of fact. In the said case assessee had tried to change the method of valuation. This was found by the Tribunal to be not bonafide. It was in this context it was held that assessee was not permitted to value the closing stock for concluded years in a different manner than the one accepted in earlier years and claim lower income. This decision was rendered on a different set of facts and is not applicable on the facts of present case.

9. Accordingly, in the present case on the anvil of aforesaid case laws including that from the Apex Court, we hold that a legally admissible claim could be entertaining while framing the assessment u/s 153 A of IT Act, Hence the present claim of exempt dividend income has to be entertained by the revenue. 10. Now, we come to the merits of the claim of the dividend income received by the assessee from its Brazilian subsidiary being exempt in India fn view of the beneficial provisions of DTAA. We find that Ld. CIT(A) has not at all adjudicated the merits of the claim, In this view of the matter we are of considered opinion that the matter needs to the remitted to the file of the Ld. CIT (A) to consider this claim of the assessee upon merits, Accordingly, the merits of the claim of the assessee regarding the dividend income being exempt Is remitted to the file of Ld. CIT (A). The Ld, CIT (A), is directed to consider this issue after giving the assessee proper opportunity of being heard.

In the result this appeal by the assessee stands allowed for statistical Purposes."

3.2. From the aforesaid directions, it could be safely concluded that the directions of this Tribunal, which are binding on the ld. CIT(A), are nothing but categorically directing the ld. CIT(A) to adjudicate claim of exemption in respect of dividend received from Brazilian subsidiary company by the assessee on merits. But, we find the ld. CIT(A) in the impugned appellate order dated 25/04/2018 had not considered the directions of this Tribunal and had merely proceeded to address the entire legal aspects of Section 153A assessments and had finally concluded as under:-

"12.33. To conclude, in the case of completed assessments, where no incriminating material is found during the course of search, the assessment u/s.153A has to be made on originally assessed / declared income and no alteration to the total income can be made de hors the incriminating evidences recovered during the course of search. The limitations which are put on the A.O. by the legislature, as per the provisions of Section 153A of the Act equally applies on the assessees, also.

12.34 In view of the above detailed discussion and the various judicial pronouncements, the issue is decided against the appellant and in favour of Revenue. Accordingly, the Ground of Appeal raised by the appellant company is dismissed."

3.3. We find that the ld. CIT(A) had not acted in accordance with the directions of this Tribunal. If the department was originally aggrieved against the order passed by this Tribunal in ITA No.3736/Mum/2012 dated 10/02/2017, nothing prevented the revenue from preferring the appeal to the Hon'ble High Court. In the instant case, the ld. DR submitted that no appeal was preferred by the revenue before the Hon'ble High Court against the original order of this Tribunal dated 10/02/2017. Once no appeal has been preferred by the revenue, then the directions given by this Tribunal to the ld. CIT(A) would certainly bind the ld. CIT(A) and we hold that the ld. CIT(A) cannot travel beyond the directions of this Tribunal. Since, this appeal pertains the AY 2006-07 and we are already in the second round of appellate proceedings, we do not deem it fit again to remand this appeal to the file of the ld. CIT(A) for adjudication on merits. Hence, we proceeded to decide the taxability of the dividend received by the Brazilian company by the assessee on merits. We find that the assessee had made a detailed submission before the ld. CIT(A) on 23/08/2017 which is also reproduced in pages 5-10 of his order explaining both the factual position as well as legal position.

3.4. We find that assessee had received dividend from Brazilian entity and is governed by Double Taxation Avoidance Agreement (DTAA) entered

into between India and Brazil. In the instant case, the assessee had availed the treaty benefit and in this regard, the following articles are relevant from India Brazil DTAA which are reproduced hereinbelow:-

Article 10 - Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is a company which is the beneficial owner of the dividends the tax so charged shall not exceed 15 per cent of gross *amount of the dividends.*

This paragraph shall not effect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "puissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, and the holding by virtue of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Where a resident of India has a permanent establishment in Brazil, this permanent establishment may be subject to a tax withheld at source in accordance with Brazilian law. However, such a tax cannot exceed 75 *per cent of the gross amount of the profits of that permanent establishment determined after the payment of the corporate tax related to such profits.*

6. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends arc paid to n resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 23 - Methods for elimination of double taxation

1. Subject to the provisions of paragraphs 3 and 4, where a resident of a Contracting State derives income which, in accordance with the provisions of this Convention may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State.

Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to the income which may be taxed in that other State.

2. For the deduction mentioned in paragraph 1, the tax paid in that other State shall always be deemed to have been paid at the rate of 25 per cent of the gross amount of interest referred to in paragraph 2 of Article 11 and of royalties referred to in paragraph 2(b) of Article 12, provided however, that the tax so deemed to have been paid shall not exceed the tax leviable on that income in the first-mentioned State.

3. Where a company which is a resident of a Contracting State derives dividends which, in accordance with the provisions of paragraph 2 of Article 10 may be taxed in the other Contracting State, the first-mentioned State shall exempt such dividends from tax.

4. Where a resident of India derives profits which, in accordance with the provisions of paragraph 5 *of Article 10 may be taxed in Brazil, India shall exempt such profits from tax.*

3.5. We find from the combined reading of Article 23(3) and Article 10(2) supra that if the dividend is paid by Brazilian company to Indian Company, the same may be taxed in Brazil as per their local laws which shall not exceed 15% of gross dividend and the said dividend shall be treated as exempt in India. We find that assessee had also enclosed certificate dated 04/04/2017 from DorfketalBrasilItda stating clearly that the dividends paid in the FY 2005-06 were related to the year 2004 and that it had paid taxes from its net profits after taxes at more than 15% and that there is no separate taxes on dividend in Brazil. The assessee had also submitted the financials of DorfketalBrasilItda for the A.Y.2005-06 together with the respective computation of total income to evidence the fact that the rate of taxes applied is more than 15% in both the years in which the actual distribution of dividend had taken place. The assessee had also furnished the financials of F.Y.2005-06 of DorfketalBrasilItda alongwith schedule of retained earnings evidencing the fact that only net profit after taxes is transferred to retained earnings and that dividends are distributed from that, which means that dividends are declared and distributed after paying due taxes in Brazil. Accordingly, we hold that the dividend received by the assessee is to be treated as exempt in India. We find that the ld. AR rightly placed reliance on the co-ordinate Bench decision of Kolkata Tribunal in the case of ITO vs. Besco Engineeing and Services Pvt. Ltd. in ITA No.727/Kol/2012 reported in 70 Taxmann.com 22 dated 04/05/2016 wherein it was held as under:-

> ***"4.*** *We find from Article 10 of DTAA between India and Brazil, dividend received by assessee company is taxable in Brazil at the rate of 15% of gross dividend. Where a resident of India has a permanent establishment in Brazil, this permanent establishment may be subject to tax withheld at source in accordance with Brazilian law. However, such tax cannot exceed 15% of gross amount of profits of that permanent establishment determined after the payment of corporate tax related to such profits.*
>
> ***5.*** *It would be relevant to reproduce certain facts of the case as under:—*

Besco Engineering & Services (P) Ltd (assessee herein), an Indian Company, had invested in 40% Equity Capital of a Brazilian Company named Millenium Investmentos Ltd., which is a Joint Venture Investment Company with remaining 60% Equity held by Citra do Brazil (a Brazilian Company), with the main object of making equity investment in industrial venture for making railway wagon under the Banner of Santa Fe Vagoes Ltd., a Brazilian Company. Millinium Investmentos Ltd had invested 60% Equity of Santa Fe Vagoes, Manufacturing Railway Wagon in Brazil, wherein, balance equity is held by another Brazilian Company. Santa Fe Vagoes Ltd. declared dividend and paid the dividend to Millinium Investmentos Ltd and similarly Millinium Investmentos Ltd. has paid dividend to its equity holders and one of the equity holders is Besco Engineering & Services (P) Ltd (assessee herein). The assessee submitted certificate issued by Santa Fe Vagoes Ltd. in the name of Millinium and the Annual Performance Report (APR) submitted by assessee to RBI by declaring dividend received along with the bank documents and also the Brazilian Audited Balance Sheet of Millinium along with the English translated version which confirm payment of dividend to the assessee after all the statutory compliance of that country. The Learned AR stated that M/s Millinium Investmentos Ltd. had already paid tax at the rate of 34% as per Brazilian Tax Rate and the post tax profits were only distributed as dividend to Besco Engineering & Services Pvt. Ltd (Assessee herein). The evidences in this regard were also produced before the lower authorities. The main grievance of the assessee seems to be that the Learned AO did not consider the provisions of DTAA while considering the taxability of dividend in India. According to Learned AR, Brazil has concluded double taxation treaty with India as Dividend paid by Brazilian companies on profit generated after 1.1.1996 are not subject to withholding tax. The law requires an annual payment of dividends with reference to the minimum portion established in the article of incorporation considering the minimum limit of 25% of the net profit of the year. According to him, in the instant case, the company has fulfilled this criteria also as below:—

Millinium Investmentors Ltd. has net profit before tax of	*2421,277.28 C*
Dividend distributed by the company during the year	*974376.01 D*
Hence % of dividend distributed from profit = 974376.01 / 2421277.28 × 100	*40.24%*

He argued that minimum limit set is 25% of the net profit for the year and hence Millinium Investmentos Ltd. is satisfying the criteria fully hence dividend should not be taxed in India as per Tax treaty.

6. *We find that the assessee had furnished fresh evidences regarding the dividend confirmation from Millinium Investmentors Ltd. in support of its contention and accordingly the same was forwarded by the Learned CIT(A) to the Learned AO on remand proceedings for his examination and verification. The Learned AO had sent the remand report on 15.2.2012 for which the assessee had filed a rejoinder before the Learned CIT(A). We find that the assessee had produced sufficient material evidence before the lower authorities to show that the dividend had been*

declared by the Brazilian company from its current profits and that tax had been paid on the same as per Brazilian tax laws. The Learned CIT(A) observed that there are two modes of granting relief under DTAA. One is (a) exemption method and other is (b) tax credit method. Under exemption method, a particular income is taxed in one of the two countries. Under tax credit method, an income is taxable in both the countries in accordance with their respective tax laws read with the DTAA. However, the country of residence of the tax payer allows him credit for the tax charged thereon in the country of source against the tax charged on such income in the country of residence. In India's DTAA, double taxation relief is provided by a combination of two modes. The effect of DTAA is as follows:—

a. *If no tax liability is imposed under the Act, the question of resorting to the agreement would not arise, no provision of the agreement can possibly fasten a tax liability where the liability is not imposed by the Act;*

b. *If a tax liability is imposed by the Act, an agreement may be resorted to for negotiating or reducing it;*

c. *In case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of the Act and can be enforced by the appellate authorities and the court.*

7. *It would also be relevant to reproduce Article 23 of DTAA between India and Brazil at this juncture -*

"ARTICLE 23: Methods for the elimination of double taxation - 1. Subject to the provisions of paragraphs 3 and 4, where a resident of a Contracting State derives income which, in accordance with the provisions of this Convention may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State.

Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to the income which may taxed in that other State.

2. *For the deduction mentioned in paragraph 1, the tax paid in that other State shall always be deemed to have been paid at the rate of 25 per cent of the gross amount of interest referred to in paragraph 2 of Article 11 and of royalties referred to in paragraph 2(b) of Article 12, provided however, that the tax so deemed to have been paid shall not exceed the tax leviable on that income in the first-mentioned State.*

3. *Where a company which is a resident of a Contracting State derives dividends which, in accordance with the provisions of paragraph 2 of Article] 10 may be taxed in the other Contracting State, the first-mentioned State shall exempt such dividends from tax.*

4. *Where a resident of India derives profits which, in accordance with the provisions of paragraph 5 of Article 10 may be taxed in Brazil, India shall exempt such profits from tax."*

We also find that the withholding tax rates for dividends is 0% as per Brazilian tax laws and also as per DTAA if dividend is paid to non-residents.

8. *From the perusal of DTAA between India and Brazil vide Article 10 paragraphs 1 and 2 as well as Article 23 Paragraph 3, since dividend is received from Brazil, wherein the same could have been taxed upto a rate not exceeding 15% as per DTAA but have been by Brazilian law declared to be not subject to income tax and the assessee is a resident company of India within the meaning of Article 23 paragraph 3 of DTAA, such dividends shall be exempt from Indian Income Tax. Hence we find no infirmity in the order of the Learned CIT(A) in this regard. Accordingly the ground no.1 raised by the revenue is dismissed.*

9. *In the result, the appeal of the revenue is dismissed."*

3.6. The assessee had also submitted before the ld. CIT(A) that similar claim of exemption in respect of dividend received from Brazilian Subsidiary had been allowed by the ld. AO for A.Y.2007-08, 2008-09 and 2009-10 and in support of this copy of the orders were also furnished thereon. In view of the aforesaid observations, applying principle of consistency and respectfully following the aforesaid decision of Kolkata Tribunal, we hold that dividend received from Brazilian subsidiary is exempt from tax . Accordingly, the grounds raised by the assessee are allowed.

4. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 06/11/2019

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 06/11/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai