IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.5869/Mum/2018 & 5870/Mum/2018
(**Assessment Year :2014-15 & 2015-16**)

M/s. ITD Cementation India Ltd., National Plastic Building A-Subhash Road, Paranjape B Scheme, Vile Parle (E) Mumbai -400057	Vs.	DCIT-14(2)(1) Mumbai
PAN/GIR No. AAACT1426A		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Anuj Kisnadwala
Revenue by	Ms. Shreekala Pardeshi
Date of Hearing	**24/02/2021**
Date of Pronouncement	**21/04/2021**

आदेश / O R D E R

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

These appeals in ITA Nos.5869/Mum/2018 & 5870/Mum/2018 for A.Y.2014-15 & 2015-16 respectively arise out of the order by the ld. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal No.CIT(A)22/Mumbai/10753/2016-17 & CIT(A)22/Mumbai/10097/2017-18 dated 03/07/2018 & 04/07/2018 respectively (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2016 & 28/06/2017

respectively by the ld. Dy. Commissioner of Income Tax-14(2)(1), Mumbai (hereinafter referred to as ld. AO).

Identical issues are involved in both the appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. The Ground Nos. 1 & 5 raised by the assessee in both the appeals are general in nature and does not require any specific adjudication.

3. The Ground No.4 raised by the assessee for both the years was stated to be not pressed by the ld. AR at the time of hearing before us for which necessary endorsement was made by him in our files. Accordingly, the Ground No.4 is dismissed as not pressed for both the years.

4. The Ground Nos. 2 and 3 raised by the assessee are with regard to disallowance made u/s.14A of the Act r.w.r. 8D(2)(iii) of the Rules for both the years. In this regard the appeal for the A.Y.2014-15 has taken as the lead year as far as this ground is concerned and the decision rendered thereon would apply with equal force for A.Y.2015-16 also in view of identical facts except with variance in figures.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of cement, mining, marine and specialist engineering and construction activities. The assessee undertakes constructions of dams, bridges, ports, airports, highway constructions, billing works etc., These contracts also include Government contracts through tenders. During the course of assessment proceedings, the ld. AO observed that assessee had shown

exempt income in the form of share of profits from joint ventures (JVs) in respect of which investment of Rs.4641.75 lakhs was made. We find that the ld. AO had invoked the computation mechanism provided in Rule 8D(2)(iii) of the Rules and arrived at the disallowance of Rs.23,60,000/-. The assessee pleaded that there was absolutely no expenses incurred by the assessee for earning exempt income in the form of share of profit from joint ventures. It was further pleaded that all expenses relatable thereof were already debited in the books of joint ventures and assessee had merely earned share of profit from joint ventures after the said joint ventures had duly suffered new taxes in its hands. It was also specifically pleaded that the investments figure reflected in the balance sheet in the sum of Rs.4641.73 lakhs was not the physical investment made by the assessee in the joint ventures and such the same merely represents share of profits / losses (net) accumulated over all the years from joint ventures. In other words, it was pleaded that the figures reflected under the head 'investments' in the balance sheet is nothing but the share of profits or loss from joint ventures over all the years and not the physical investment made by the assessee in joint venture so as to apply the provisions of Rule 8D(2)(iii) of the Rules. This reply was not found satisfactory by the ld AO and we find that the ld. CIT(A) also upheld the disallowance made by the ld. AO.

4.2. We have gone through the details of share of profits and losses arising from investment in joint ventures in the balance sheet which is tabulated as under:-

<u>Inverstment in ITD Cem Ind JV-Date of Formation - 15.06.2005</u>	
Profits during the following years-	**INR (in lakhs)**
FY 2005-06	22.56
FY 2006-07	111.13
FY 2007-08	(56.32)
FY 2008-09	(57.91)
FY 2009-10	(50.53)
FY 2010-11	(73.63)
FY 2011-12	(384.70)
FY 2012-13	(38.67)
FY 2013-14	202.27
Total	**(325.80)**

<u>Inverstment in ITD Cem India JV-Date of Formation - 05.09.2005</u>	
Profits during the following years-	**INR (in lakhs)**
FY 2006-07	(0.47)
FY 2007-08	362.69
FY 2008-09	830.54
FY 2009-10	717.45
FY 2010-11	689.33
FY 2011-12	251.67
FY 2012-13	687.45
FY 2013-14	484.92
Total	**4023.58**

<u>Inverstment in ITD Cem Ind JV-Date of Formation - 11.10.2008</u>	
Profits during the following years-	**INR (in lakhs)**
FY 2008-09	119.58
FY 2009-10	656.85
FY 2010-11	578.56
FY 2011-12	403.87
FY 2012-13	12.31
FY 2013-14	(1,111.83)
Total	**658.34**

<u>Inverstment in MAYTAS CONSORTIUM JV-Date of Formation - 09.09.2008</u>	
Profits during the following years-	**INR (in lakhs)**
FY 2012-13	11.51
FY 2013-14	269.02
Total	**280.53**

4.3. From the above table, it could be seen that assessee had not made any physical investment in joint ventures and the figures represent in the investment schedule is nothing but the share of profit from joint ventures over all the years and hence, the entire computation mechanism provided in Rule 8D(2) of the Rules fails as the substance of the transaction would prevail over its form. Though the assessee had shown that the accumulated share of profits from joint ventures under the head 'investment', it is effectively a current account transaction or loans given to the joint ventures by the assessee and the same does not partake the character of actual investments, if any, made by the assessee in the joint venture. Hence, we hold that the entire computation mechanism of Rule 8D(2) of the Rules fails and hence, there could not be any disallowance u/s.14A of the Act that could be made in the facts and circumstances of the instant case. Accordingly, Ground Nos. 2 & 3 raised by the assessee for both the years are allowed.

5. We find that assessee has raised an additional ground of appeal for A.Y.2014-15 as under:-

> *"On the facts and under the circumstances of the case and in law, the Hon'ble CIT(A) ought to have restricted the levy of the dividend distribution tax on the dividend distributed / paid to Italian Thai Development Public Company Limited, Thailand to 15% in terms of Article 10 -Dividends of the Double Taxation Avoidance Agreement (DTAA) between India and Thailand instead of 16.995% levied in terms of section 115-O of the Act."*

5.1 We have heard rival submissions and perused the materials available on record. We find that assessee had declared and paid dividend to its subsidiary company in Thailand. The rate of dividend distribution tax paid by the assessee is 16.995%. The assessee pleaded before us that as

per Article 10 of the Double Taxation Avoidance Agreement (DTAA) between India and Thailand, the rate of dividend distribution tax to be applied is 15%. Accordingly, the ld. AR pleaded that the excess dividend distribution tax paid by the assessee 1.995% (16.995% – 15%) may kindly be directed to be refunded to the assessee. As this aspect is purely a legal issue going to the root of the matter and does not involve verification of any facts, we are inclined to admit this additional ground and take up the same for adjudication in the light of the decision of NTPC Ltd., reported in 229 ITR 383. We find that the main grievance of the assessee is that the dividend distribution tax to be applied should be 15% in accordance with Article 10 of DTAA between India and Thailand, whereas the assessee had applied and paid 16.995% to the Government. We find that the ld. AR had placed reliance on the Co-ordinate Bench decision of this Tribunal in the case of Van Oord India Pvt. Ltd., vs. DCIT in IT(TP)A No.720/Mum/2015 dated 11/11/2019 for A.Y.2010-11 wherein similar issue was sought to be addressed in the context of DTAA between India-Netherlands. The additional ground was raised in that case also before the Tribunal. We find that this Tribunal had indeed admitted the said additional ground by understanding the justification given by the assessee that the additional ground was raised in the light of decision of the Hon'ble Supreme Court in the case of Union of India vs. Tata Tea Company Ltd., reported in 85 Taxmann.com 346 on 20/09/2017 wherein it was decided that the tax u/s.115 O of the Act is a tax on dividend. The operative portion of the said decision of the Co-ordinate Bench of this Tribunal in IT(TP)A No.720/Mum/2012 dated 11/11/2019 is reproduced hereunder:-

> *"27. Now, turning to the additional ground, for admission thereof, it has been contended by the ld. Counsel for the assessee that the additional ground could not be raised either at the time of filing of the return of income on 15th October, 2010, or during proceedings before the lower*

authorities (which culminated in passing of the Final Assessment order on 29th December, 2014), because during that period, the law that tax under section 115-O was a tax on the distributed profits of the company and not on dividend, as laid down by the Hon'ble Bombay High Court in the case of 'Godrej & Boyce Mfg. Co. Ltd. vs DCIT', 328 ITR 81 (Bom.), vide Judgment dated 12th August, 2010; that it was only when the Supreme Court, on 20th September, 2017 in the case of 'Union of India vs. Tata Tea Co. Ltd.', 85 taxmann.com 346 (SC), decided that the tax under section 115-O is a tax on dividend, that the occasion to raise the additional ground arose; that the Hon'ble Supreme Court, in the aforesaid case, was hearing appeals challenging the constitutional validity of section 115-O; that the challenge was that by taxing, under section 115-O, the distributed profits of a company engaged in agricultural activities, the Central Government sought to levy tax on the agricultural income earned by the company; that since the taxability of agricultural income fell within the State List, the Central Government did not have the power to tax the same; that the Hon'ble Supreme Court rejected this argument by holding that the tax was not on the profits/income of the companies, but on the dividend income and taxing of dividend income was the purview of Entry 82 of the List I, i.e., the list of subjects for which the Central Government had the power to enact laws; that the same view, as in the case of 'Union of India vs. Tata Tea Co. Ltd.' (supra), was also taken by the Hon'ble Supreme Court in the case of 'Godrej & Boyce Mfg. Co. Ltd. vs DCIT', 81 taxmann.com 111; that the assessee was under a bona fide belief that it was prevented from raising the aforesaid issue owing to the law laid down as per the jurisdictional High Court in the case of 'Godrej & Boyce Mfg. Co. Ltd. vs. DCIT' (supra); that the reasonableness of the reasons explaining its belief of inability, is to be looked at liberally, as held by the Hon'ble Bombay High Court in the case of 'CIT vs. Pruthvi Brokers & Shareholders', 23 taxmann.com 23 (Bom.); and that therefore, the additional ground may be admitted.

28. Opposing the admission of the additional ground, the ld. D.R. has contended that since the additional ground raised does not arise from the orders of the lower authorities, the same should not be admitted; that Article 10(6) of the DTAA provides that if the non-resident has a Permanent Establishment in India and if the dividend income is effectively connected with the PE in India, then the benefit of Article 10(2) is not available and since in the present case, the fact regarding the existence or non- existence of the PE is not on record, the additional ground is not maintainable; and that the procedure for making a claim, as provided in Article 10(3) of Indo-Netherland Treaty, is also not on record herein.

29. Insofar as regards the argument of the ld. DR that since the additional ground raised does not arise from the orders of the lower authorities, the same cannot be admitted, this argument deserves to be rejected in view of the decisions of the Hon'ble Supreme Court in the cases of 'National

Thermal Power Co. Ltd. v. CIT', 229 ITR 383 (SC) and 'Jute Corporation of India Ltd. Vs. CIT', 187 ITR 688 (SC), and the Full Bench decision of the Hon'ble Bombay High Court in the case of 'Ahmedabad Electricity Co. Ltd. Vs. CIT', 199 ITR 351 (Bom.). In fact, as rightly submitted on behalf of the assessee, this is the settled position of law, as has been held by the Hon'ble Bombay High Court in the case of 'Ultratech Cement Ltd. Vs. ACIT', 81 taxmann.com 74. It remains undisputed that this issue could not be raised either at the time of filing of the return of income on 15 th October, 2010, or during proceedings before the lower authorities (which culminated in passing of the Final Assessment order on 29 th December, 2014), because during that period, the law as laid down by the Hon'ble Bombay High Court in the case of 'Godrej & Boyce Mfg. Co. Ltd. vs DCIT' (supra), held the filed. It is only by virtue of the Supreme Court order dated 20 th September, 2017 passed in the case of 'Union of India vs. Tata Tea Co. Ltd.' (supra), that the law now is that the tax under section 115-O is a tax on dividend. The impugned order was passed by the Assessing Officer on 29/12/2014, when 'Godrej & Boyce Mfg. Co. Ltd. vs DCIT' (supra) was the governing law. It cannot be gainsaid that it is a legal adage that the Hon'ble Supreme Court declares the law as it always was. Therefore, the position settled by the Hon'ble Supreme Court in the case of 'Union of India vs. Tata Tea Co. Ltd.' (supra), is applicable, with full force, as on the date of passing of the judgment in that case, i.e., on 20/9/2017, and is deemed to be the law as it was as on the date of passing of the impugned order, i.e., on 5/12/2014. Hence, it is the supervening Supreme Court decision which has prompted the assessee to raise the additional ground. It has not been disputed that the Supreme Court decision, on facts, to be determined, permitting, entitles the assessee to stake the claim made in the additional ground. So, the mere fact that the additional ground does not arise out of the impugned order, is in no way detrimental to the request for admission of the additional ground.

30. The ld. D.R.'s next objection is that in the present case, the factum of expenses, or otherwise, of PE is not on record. Would that it were so! The contention on behalf of the assessee, that the assessee's holding company has a PE in the form of a project office in India is on the records of the lower authorities, remains undisputed before us. Therefore, the argument of the DR, that the fact regarding existence of the PE of VODMC BV is not on record, is factually incorrect. Further, it also remains unchallenged that the fact that the shares are not effectively connected to the PE, i.e., the project office of VODMC BV, is also on record. Be that as it may, whether the PE exists in India or not, rightly, is not relevant to decide the admissibility of the additional ground, as these facts are required for the adjudication of the merits of the claim made by the assessee, and are not necessary to decide the admissibility of the same. Further, proving the compliance of the provisions of Article 10(6) of the Treaty, by which Article, the claim of the assessee under Article 10(2) can be denied by the Revenue, is not necessary to decide the admissibility of the additional ground raised by the assessee.

31. With respect to the submission of the ld. DR that the procedure for making a claim, as prescribed in Article 10(3) of the DTAA, is not on record and hence, it requires factual investigation, we are of the view that the same does not, in any manner, relate to the assessee, or VODMC BV, or the project office, and hence, it cannot be regarded as a fact that needs to be examined for the purposes of admission and/or adjudication of the assessee's claim. In any case, as dwelt upon hereinabove, the assessee was prevented from raising the additional ground before the lower authorities, due to a reason beyond the control of the assessee, as considered above. This fact, by itself, is, in our opinion, sufficient to allow it to be raised at this stage. So, even if, arguendo, the objections of the Department were to be acceded to, the assessee's request for admission of the additional ground merits acceptance.

32. In view of the above, the additional ground is admitted.

33. On the merits of the additional ground raised by the assessee, the ld. Counsel for the assessee submitted that the Dividend Distribution Tax (DDT) under section 115-O of the Income Tax Act, on the dividends declared and paid by the assessee, to its foreign shareholder, Van Oord Dredging & Marine Contractors bv., who is a tax resident of the Netherlands, is in excess of the rate provided under Article 10 read with the Most Favoured Nation clause under Article IV of the Protocol to the Double Taxation Avoidance Agreement between India and the Netherlands. In this regard, he relied on the decisions of the Hon'ble Supreme Court in the cases of 'Union of India vs. Tata Tea Co. Ltd. (SC) (supra) and 'Godrej & Boyce Manufacturing Company Ltd. vs. DCIT', (SC) (supra), wherein the Hon'ble Apex Court has held that the dividend distribution tax under section 115-O of the Act is a tax on 'dividend income' paid by the company.

34. The ld. D.R., on the other hand, has submitted that Article 10(6) of the DTAA provides that if the non-resident has a permanent establishment in India and if the dividend income is effectively connected with the PE in India, then the benefit of Article 10(2) is not available; and that as provided in Article 10(3) of the DTAA, the procedure for making a claim requires factual investigation."

5.2. We find same is the issue before us in the instant case. Hence, respectfully following the aforesaid judgment, we deem it fit to set aside this additional ground to the file of the ld. AO to examine the same in the light of judgment of the Hon'ble Supreme Court in the case of M/s. Tata Tea Company Ltd., and Godrej and Boyce Manufacturing Company Ltd.,

by the Hon'ble Bombay High Court. Needless to mention that assessee be given a reasonable opportunity of being heard. The assessee is at liberty to furnish fresh evidences, if any in support of its contentions. Accordingly, the additional ground raised by the assessee for A.Y.2014-15 is allowed for statistical purposes.

6. In the result, appeal of the assessee in ITA No.5869/Mum/2018 for A.Y.2014-15 is partly allowed for statistical purposes and the appeal of the assessee in ITA No.5870/Mum/2018 for A.Y.2015-16 is partly allowed.

Order pronounced on 21/04/2021 by way of proper mentioning in the notice board.

Sd/-	Sd/-
(RAVISH SOOD)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 21/04/2021
KARUNA, *sr.ps*

<u>Copy of the Order forwarded to</u> :

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