

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

**BEFORE SHRI KULDIP SINGH, JM &
SHRI AMARJIT SINGH, AM**

1. आयकरअपील सं./ I.T.A. No. 7582/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2013-14)
2. आयकरअपील सं./ I.T.A. No. 4773/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2014-15)

Owens-Corning Inc. C/o- Owens-Corning (India) Pvt. Ltd. 7 th floor, Alpha Building, Hiranandani Gardens, Powai, Mumbai-400 076	बनाम/ Vs.	DCIT (Intl. Taxation), Range-3(20)(2), 16 th floor, Air India Building, Nariman Point, Mumbai-400 021
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACO-3242-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Sandeep Bhalla, AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Milind Chavan, Ld. DR

सुनवाईकीतारीख/ Date of Hearing	:	01.12.2021
घोषणाकीतारीख / Date of Pronouncement	:	10.12.2021

आदेश / ORDER

PER KULDIP SINGH (JUDICIAL MEMBER):

Aforesaid appeals bearing common question of law and facts are being disposed by way of composite order to avoid repetition of discussion.

2. The Dy. Commissioner of Income Tax (Intl. Taxation), Range-3(2)(2), Mumbai [hereinafter referred to as the revenue] by filing of aforesaid appeals sought to set aside impugned orders dated 21.11.16 and 31.05.17 passed by AO u/s 143(3)/144C(13) of the Income Tax Act, 1962 (for short 'Act') for AY 2013-14 & 2014-15 respectively on identically worded grounds interalia that:-

1: 0 Re.: Amounts received for lease of alloys treated as 'Royalty';

1:1 The Assessing officer has erred in taxing the amount of Rs. 2,55,24,560/- and 2,67,60,800/- respectively received / by the Appellant for leasing of an alloy as 'Royalty' in terms of section 9(1)(vi) of the Income-tax Act, 1961 as well as under Article 12 of the Double Taxation Avoidance Agreement entered into and subsisting between India and the United States of America ("India-US DTAA").

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the lease rentals in question received by the Appellant do not fall within the purview of the term 'Royalty' and the stand taken by the Assessing Officer in this regard is misconceived, illegal, erroneous and incorrect.

1:3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs. 2,55,24,560/- and 2,67,60,800/- respectively so made by him and to re-compute its total income and tax thereon accordingly.

2:0 Re.: General:

2:1 The Appellant craves leave to add, alter, amend, substitute and / or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

3. Briefly stated facts necessary for adjudication of the controversy at hand are: The Assessee is a company formed and incorporated in USA. Owens-Corning (India) Pvt. Ltd. (OCIPL) and Owen Corning Industries (India) Pvt. Ltd. (OCIPL) are Indian companies engaged in manufacturing glass fiber in India.

4. During the year under consideration, assessee had leased out alloy comprising Rhodium and Platinum to Owens-Corning (India) Pvt. Ltd. (OCIPL) and Owen Corning Industries (India) Pvt. Ltd. (OCIPL) and received lease rentals in respect thereof. Assessee company in its return of income has not treated lease rental as taxable in India which was made in terms of the lease agreement dated 1st April 2012 and 1st November 2012 respectively.

5. AO called upon the assessee to show cause as to why lease rental receipts should not be brought to tax as “royalty” as offered by the assessee company for AY 2007-08. Declining the contention raised by the assessee, AO reached the conclusion that the receipts of the assessee on account of lease rental are actual

Royalty as they are earned out of leasing out the license to use the intellectual rights of the economic beneficial rights of the drawing and design of the bushings and are taxable u/s 115A of the Act r.w. Article 12(3) of the DTAA between India and USA and thereby proposed to assess the total income at Rs. 2,55,24,560/- (Rs. 2,28,21,961 + 27,02,596) and 267,60,800 for A.Y 2013-14 and 2014-15 respectively, by treating the lease rental as Royalty in case of OCIPL and OCIPL respectively by passing draft assessment order.

6. Assessee carried out matter before Ld. DRP by way of challenging impugned draft assessment order passed by AO by filing objections who has upheld the draft assessment order by dismissing the same.

7. We have perused the order passed by Ld. DRP who has thrashed the facts in the light of the law applicable thereto. Undisputedly in the process of manufacturing of Glass fiber bushings are used by OCIPL and OCIPL. It is also not in dispute that bushings are made of precious metals viz. platinum and rhodium. Bushings are electrically heated crucibles containing numerous tiny holes (orifices) through which the molten glass is drawn at a very high speed into extremely fine glass filaments, which are simultaneously cooled. The average life of bushing is around 250 days approximately, however premature failures are common in the manufacturing process/ operations. It is also not in dispute that OCIPL and OCIPL, sent the bushings to Owens Corning (Singapore) Pvt. Ltd. (OCSPL) for refabrication.

OCSPL carries out the process in relation to bushing received by it from OCIPL as under:-

- Cutting the bushing/s into smaller pieces
- Melting the pieces to form ingots and to separate the metal/metals from other impurities.
- Rolling the ingots into sheet stock
- Cutting the sheet stock as per specifications
- Punching the sheet to form the components of the final bushings viz. end plates, ears, rails, gussets, screens, etc.

8. It is also not in dispute that additional alloy is owned by the assessee and is provided on lease to OCIPL and OCIIPL and sent to OCSPL as and when required for re-fabrication of the bushings. It is also not in dispute that this is not in the form, etc. for use during the process of re-fabrication. Assessee brought on record picture of the bushings nomenclature as appendix A-1 and invoice form at page no. 3 & 4 of the paper book respectively.

9. At the very outset, Ld. AR for the assessee contended that identical issues has already been decided by the Coordinate Bench of Tribunal in assessee's own case for AY 2012-13 passed in ITA No. 2050/Mum/2016 dated 14.10.21.

10. We have perused the order (supra) passed by Coordinate Bench of Tribunal in assessee's own case, which is on the identical issue in the identical facts. The operative part of which is extracted for ready perusal as under:-

6. We have heard the rival submissions and perused the material on record. The undistinguished facts are that the assessee is a US resident company and taxed resident of USA and its income in India and its

taxability is governed by the provisions of Income tax Act, 1961 as well as the India US DTAA. The assessee is engaged in the business of leasing of alloys comprising of Rhodium and Platinum, which are used in manufacture of glass fibres. The Indian subsidiary of the assessee OCIPL is engaged in the business of glass fibres in India by using bushings that are made of precious metals like Platinum and Rhodium. Another company OC NL Invest Cooperatief (OCNLIC) a company incorporated in the Netherlands has the rights to grant licenses in respect of technology/intellectual property used in making of glass fibre using bushings. OCNLIC has by Technology License agreement dated 27.01.2011 granted OCIPL, a license to manufacture glass fibres, which includes the intellectual property in the bushing and specially provides that OCIPL will purchase all precious metals required in order to maintain the bushing from OCNLIC or its affiliates including the assessee. During the year the assessee has received an amount of Rs 2,72,37,701/- from OCIPL and OCIPL towards lease rentals of alloys. The AO treated the said receipts as royalty in terms of Article 12(3) of the DTAA between India and USA and as per section 9(1)(vii) read with Explanation 5 of the Income-tax Act and brought it to tax accordingly. The assessee, on the other hand, maintains that the said income is lease rental and not taxable in India. We note that the alloy provided by the assessee to OCIPL and OCIPL are used in re-fabrication of bushings used by these companies in the process of manufacture of glass fibres. We note that the agreement to acquire these materials is as per the Technology License agreement dated 27.01.2011, whereby OCIPL is granted license to manufacture glass fibre and also stipulated that OCIPL will purchase all precious metals required in order to maintain the bushing from OCNLIC or its affiliates, which includes the assessee also. Thus, the assessee has provided only alloy to these companies and charged lease rentals based on the weight of the

alloy metal leased. Thus, it is clear that royalty for design of bushing is not paid by OCIPL to OCNLIC and payment to assessee is only towards lease rentals i.e. bushings made of alloys comprising Platinum and Rhodium. We note that the assessee has not provided any services to OCIPL and OCIPL in connection with intellectual property related to bushing and, since, the intellectual property right with regard to the bushings is with OCNLIC and assessee is merely providing alloys of Platinum and Rhodium, consideration for alloys cannot be treated as royalty. The case is covered by the decision of Hon'ble Madras High Court in the case of CIT vs. Neyveli Lignite Corpn. Ltd. [243 ITR 459], wherein it has been held that payment to be constituted as royalty should be the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing. Similarly, the case is also covered by the decision of the Delhi Bench of the Tribunal in the case of Bharti Airtel Ltd. Vs. ITO (47 ITR 418), wherein it has been held that in order to receive a royalty in respect of allowing the usage or right to use any property including an intellectual property, the owner thereof must have an exclusive right over such property. We note that the technology for manufacture of glass fibre including the use of bushing has been provided by OCNLIC a Dutch Company and royalty has been paid to that Dutch Company and, therefore, the amount of lease rental on alloy which are used to refurbish the bushing cannot be again treated and taxed as royalty in the hands of the assessee by invoking the India US DTAA and provisions of section 9(1)(vii) read with Explanation 5 of the Income-tax Act.

In view of these facts, we are not in agreement with the conclusion drawn by the DRP on this issue and, accordingly, set aside the directions of the DRP and direct the AO to delete the addition.

11. Following the aforesaid order passed by Coordinate bench of ITAT in assessee's own case for AY 2012-13 which is applicable to the case under consideration as there is no change of business model as to sending bushing to OCSPL for refabrication and as such the question to be decided is as to whether lease rental of an alloy in question received by the assessee falls within the purview of term "Royalty".

12. Coordinate Bench of Tribunal decided the issue by following the decision rendered by Hon'ble Madras High Court in the case of CIT vs. Neyveli Lignite Corpn. Ltd. [243 ITR 459] and Delhi Bench of the Tribunal in the case of Bharti Airtel Ltd. Vs. ITO (47 ITR 418), which are applicable to the facts and circumstances of this case. Since the technical know how for manufacturing of glass fiber including use of bushing has been provided by OCNLIC, a Dutch company, the royalty has been paid to said Dutch company and such the amount of lease rental on alloy which are used to refurbish the bushing cannot be again treated to tax as royalty u/s 9(1)(vii) r.w Explanation-5 of the IT. Act as well as under article 12 of the DTAA entered into between India and USA.

13. In view of what has been discussed above, we are of the considered view that AO /DRP have erred in taxing the amount of Rs. 2,55,24,560/- and 2,67,60,800/- for AY 2013-14 and 2014-15 respectively received by the assessee for leasing of alloy as "Royalty", hence, ordered to be deleted.

13. Resultantly, both the appeals filed by the assessee are hereby allowed.

Order pronounced in the open court on 10th December 2021.

Sd/-
(Amarjit Singh)
Accountant Member

Sd/-
(Kuldip Singh)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 10.12.2021
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai