IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.741/Mum./2021
(Assessment Year : 2017–18)

Owens Corning Inc.
C/o Owens Corning (India) Pvt. Ltd.
7th Floor, Alpha Building ……. Appellant
Hiranandani Gardens, Powai
Mumbai 400 076 PAN – AAAC03242R

v/s

The Dy. Commissioner of Income Tax
Circle–3(2)(2), Mumbai ……. Respondent

Assessee by : Shri Sandeep Bhalla a/w
Ms. Megha Shah
Revenue by : Shri Milind Chavan, Sr. DR

Date of Hearing – 06.04.2022	Date of Order – 04/07/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the final assessment order dated 05/03/2021 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ("*the Act*"), for the assessment year 2017–18.

2. The assessee, in the present appeal, has raised following grounds:–

Re.: Treating lease rentals received as 'Royalty':

1. *The Assessing Officer (AO') I Dispute Resolution Panel ('DRP') has erred in taxing the lease rentals received by the appellant of Rs. 2,86,00,164 during the year under consideration by treating the same as 'royalty' as per section 9(1)(vii) of the Income-tax Act, 1961 ('the Act') as well as Article 12 of the Double Taxation Avoidance Agreement entered between India and USA ('India-USA Tax Treaty').*

2. *The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the lease rentals received by it are not 'royalty' either under the Act or under the provisions of the India-USA Tax Treaty. The stand taken by the AO/ DRP in this regard is erroneous, misconceived and not in accordance with the law.*

3. *The Appellant submits that the AO be directed to delete the addition of Rs. 2,86,00,164 so made and to re-compute its total income accordingly.*

Re.: Addition of amount received as reimbursement of ESOP expenses:

1. *The AO/ DRP has erred in taxing the amount of Rs. 23,51,162 received by the appellant from Owens Corning (India) Private Limited ('OCIPL') on account of reimbursement of Employee Stock Ownership Plan ('ESOP') cost for the employees of OCIPL by treating the same as 'royalty' under the Act.*

2. *The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the reimbursement of expenses received by the Appellant are not taxable either under the Act or under the provisions of the India-USA Tax Treaty and the stand taken by the AO I DRP in this regard is erroneous, misconceived and not in accordance with the law.*

3. *The Appellant submits that the AO be directed to delete the addition of Rs. 23,51,162 so made and to recompute its total income accordingly.*

Re.: Addition of interest on income tax refund:

1. *The AO / DRP has erred in taxing the amount of Rs. 4,70,881 on account of interest on income tax refund under section 9(1) of the Act which has not been received by the appellant.*

2. *The Appellant submits that considering the facts and circumstances of the case and the law prevailing or the subject, the interest on income tax refund is not taxable as the same is not received by the appellant*

3. *The Appellant submits that the AO be directed to delete the addition of Rs. 4,70,881 so made and to recompute its total income accordingly.*

Re.: Short grant of credit for tax deducted at source:

1. *The AO has erred in short granting credit for tax deducted at source of Rs. 1 94,003 while calculating the tax liability of the appellant.*

2. *The appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the credit of Rs. 1,94,003 being tax deducted at source on the interest received by the appellant on the Income-tax refund should be provided while calculating the tax liability.*

3. *The appellant submits that the AO be directed to provide the tax credit of Rs. 1,94,003 and to re-compute its total liability accordingly*

Re.: Levy of interest under section 234B of the Income-tax Act, 1961:

1. *The AO has erred in levying interest under section 234B of the Income-tax Act, 1961.*

2. *The appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, no interest under section 234B is leviable and the stand taken by the AO in this regard is misconceived, incorrect, erroneous and illegal.*

3. *The appellant submits that the AO be directed to delete the interest under section 234B so levied on it and to re-compute its tax liability accordingly.*

Re.: General

1. *The appellant has not received the order under section 143(3) read with section 1440(13) over email. While browsing through the online portal on 15 April 2021, the said order has come to the attention of the appellant.*

2. *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. The first issue arising in assessee's appeal is pertaining to taxation of lease rentals received by the assessee as Royalty under section 9(1)(vi) of the Act as well as Article 12 of India USA Double Taxation Avoidance Agreement ('*DTAA*').

4. The brief facts of the case pertaining to this issue, as emanating from record are: The assessee is a company formed and incorporated in accordance with the corporate laws of United States of America and a tax resident thereof. For the year under consideration, assessee e-filed its return of income on 28/11/2017 declaring total income of Rs. Nil. The assessee has leased out an alloy comprising of rhodium and platinum to its Indian Associated Enterprises, viz., Owens Corning (India) Private Limited ('OCIPL') and Owen Corning Industries (India) Private Limited ('OCIIPL'), during the year under consideration, and has received lease rentals charges of Rs. 2,54,99,828 and Rs. 31,00,336 from the said entities. The said amount totalling to Rs. 2,86,00,164 was claimed as not taxable by the assessee. The Assessing Officer vide draft assessment order dated 18/12/2019 passed under section 144C of the Act, after noting that similar issue was discussed in detail in assessment order of earlier years, treated the lease rentals received by the assessee as Royalty income as per section 9(1)(vi) of the Act as well as Article 12(4) of the DTAA.

5. The assessee filed detailed objections before the learned Dispute Resolution Panel ("*learned DRP*"). Vide directions dated 24/02/2021 issued under section 144C(5) of the Act, learned DRP, following its directions in the case of assessee for assessment year 2012–13, rejected the objections filed by the assessee on this issue. The Assessing Officer, inter-alia, passed the final assessment order dated 05/03/2021 in

conformity with the directions issued by learned DRP. Being aggrieved, assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative ("*learned AR*") submitted that similar issue has been decided in favour of the assessee in the preceding assessment years by the Co-ordinate Bench of Tribunal.

7. On the other hand, learned Departmental Representative ("*learned DR*") submitted that the transaction between assessee and its Indian associated enterprises is not of lease of alloy and rather it is transfer of technology by the assessee. Learned DR, further, by referring to the agreements, forming part of the paper book, submitted that entire transaction is colourable in nature as bushings were provided by the assessee, however, for refurbishment the bushings were sent to sister concern in Singapore.

8. We have considered the rival submissions and perused the material available on record. In the present case, assessee is resident of United States of America and is a leading manufacturer of glass fibre. In India, its 2 subsidiaries i.e. OCIPL and OCIIPL are engaged in the business of manufacture and sale of glass fibres. In the process of manufacturing of glass fibres, bushings are used by OCIPL and OCIIPL. These bushings are made of precious metals, namely 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. Due to continuous drawing of filaments at high temperature, the orifices of the bushings get enlarged and required diameter/texture of the filaments get affected and at times glass leakage takes place due to a crack/cracks in the bushing. As per the assessee, the average life of the bushing is around 250 days approximately, however, premature failures are common in the manufacturing process/operation. Therefore, the bushings are required to be refurbished/fabricated after a specified period (i.e. approximately after 250 days). Hence, OCIPL and OCIIPL send the bushings to Owens Corning (Singapore) PTE Ltd. for the re-fabrication by air. In the process of re-fabrication, the existing bushing is melted and additional alloy is added to the extent required to form altogether new bushing of the desired specification. The alloy required for the re-fabrication is owned by the assessee and is provided to Owens Corning (Singapore) PTE Ltd as and when required and to the extent required for re-fabrication of bushings for OCIPL and OCIIPL. As per the assessee Owens Corning (Singapore) PTE Ltd receives the alloy required to be added from the assessee in the form of ingots, powder form etc. for usage during the process of re-fabrication. For supply of alloys, OCIPL and OCIIPL have entered into Lease Agreement dated 01/04/2012 and Master Lease Agreement dated 01/11/2012 with the assessee, in terms of which OCIPL and OCIIPL makes payment of lease rent to the assessee. Further,

the fabrication/refurbishment charges received by Owens Corning (Singapore) PTE Ltd were taxed in its hands under the head 'Fees for Included Services'.

9. OCIPL also entered into Technology License Agreement dated 27/01/2011 with OC NL invest Cooperatief, a company incorporated in the Netherland, whereby OCIPL was granted license in respect of technology/intellectual property used in making of glass fibre using bushings. The agreement further provided that OCIPL shall purchase all precious metal equipment and alloy services from Netherland entity or its affiliates. In consideration for the licence granted, OCIPL pays royalty to the Netherland entity.

10. It is the claim of the assessee that the bushings sent to OCIPL and OCIIPL after re-fabrication loses the individuality or distinctiveness. Further, the alloys which are leased by the assessee are not equipments, hence are not covered under definition of Royalty as per Article 12 (3) of the DTAA. Further, there is also no right to use any industrial, scientific or commercial equipment.

11. We find that similar issue arose in the case of assessee in preceding assessment years. The Co-ordinate Bench of Tribunal in assessee's own case in Owens Corning Inc vs DCIT, in ITA No. 2050/MUM/2016, vide order dated 04/10/2021, for assessment year 2012–13, while deciding the issue in favour of assessee, observed 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 OCIIPL 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 OCIIPL 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 knot 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 OCIIPL 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 thng. 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 property including an intellectual property, the owner thereof must have an 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 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 A.O. to delete the addition."

12. Similarly, another Co-ordinate Bench of Tribunal in assessee's own case in Owens Corning Inc vs DCIT, in ITA No. 7582/Mum/2016 etc., vide order dated 10/12/2021, for assessment years 2013–14 and 2014–15, decided similar issue in favour of assessee, by observing as under:

"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. The learned Departmental Representative could not show us any reason to deviate from the aforesaid orders and no change in facts and

law was alleged in the relevant assessment year. The issue arising in the present appeal is recurring nature and has been decided in favour of the assessee by Co-ordinate Bench of Tribunal for preceding assessment years. Thus, respectfully following the orders passed by the Co-ordinate Bench of Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and delete the impugned addition in respect of lease rentals received by the assessee. As a result, grounds raised in assessee's appeal pertaining to this issue are allowed.

14. The next issue arising in present appeal is pertaining to addition of amount received as reimbursement of ESOP expenses.

15. The brief facts of the case pertaining to this issue, as emanating from the record are: During the year under consideration, assessee received Rs. 23,51,162 on account of reimbursement of expenses from OCIPL, which was claimed as exempt from taxation. During the assessment proceedings, the assessee was asked to furnish the details of the same and also was asked to show cause as to why this amount be not added to the total income of the assessee. In reply, assessee submitted that the amount received is only reimbursement of expenses towards ESOP, which was issued by assessee to the employees of OCIPL, which is now reimbursed by OCIPL. In the absence of any details in support of the claim, Assessing Officer vide draft assessment order added the amount of Rs. 23,51,162 to the total income of the assessee. Learned DRP vide

directions issued under section 144C(5) of the Act rejected the objections filed by the assessee on this issue for want of details and necessary evidence. In conformity with the directions issued by learned DRP, the Assessing Officer, inter-alia, passed final assessment order.

16. During the course of hearing, the learned AR submitted that vide submission dated 24/12/2020 details pertaining to reimbursement of ESOP expenses were furnished by the assessee before the learned DRP. However, the same were not considered while rejecting assessee's objections.

17. On the other hand, the learned DR vehemently relied upon the orders passed by the lower authorities on this issue.

18. We have considered the rival submissions and perused the material available on record. It is the case of the assessee that shares of the assessee were issued to the employees of OCIPL as ESOP and OCIPL has reimbursed the expenditure to the assessee, which is derived by considering the market price of the shares on the date the shares got vested. As the details pertaining to assessee's claim, now referred during hearing before us, has not been examined by any of the lower authorities, therefore, we deem it appropriate to remand this issue to the file of Assessing Officer for *de novo* adjudication after consideration/verification of details filed by the assessee. As a result, grounds raised in assessee's appeal pertaining to this issue are allowed for statistical purpose.

19. The next issue arising in assessee's appeal is pertaining to taxability of interest on income tax refund.

20. The brief facts of the case pertaining to this issue, as emanating from record are: During the assessment proceedings, assessee was asked to show cause as to why interest income of Rs. 4,70,881 under section 244A of the Act received on income tax refund be not brought to tax, as it was not offered in the income tax return. In reply, assessee submitted that the interest amount was not received during the year and hence was not offered for taxation. The Assessing Officer vide draft assessment order rejected the assessee's claim and added the interest income to the total income of the assessee. Learned DRP directed the Assessing Officer to verify the claim of the assessee company from record and delete the interest income if it is not verifiable from record. The Assessing Officer vide final assessment order held that the refund of Rs. 4,70,879 is clearly reflected in the ITD systems as refund determined to the assessee by order under section 143(1) dated 14/02/2017 for assessment year 2015–16 and issued to the assessee in financial year 2016–17. Further, the Assessing Officer noted that the said refund has been adjusted against the demand of assessment year 2004–05, which was raised in financial year the 2009–10 and hence the same amount is reflected in Form 26 AS.

21. During the course of hearing, learned AR submitted that interest on income tax refund has been taxed at 40% instead of 15% as per

provisions of Article 11 of DTAA. As the assessee is tax resident of USA and provisions of the DTAA are applicable to the assessee, we direct the Assessing Officer to tax interest received on income tax refund @ 15%, as per the provisions of India USA DTAA. As a result, grounds raised in assessee's appeal pertaining to this issue are allowed.

22. Further, as regards grounds pertaining to short grant of TDS credit, the Assessing Officer is directed to verify the details and grant the same in accordance with law. As a result, grounds pertaining to same in assessee's appeal are allowed for statistical purpose.

23. The levy of interest under section 234B of the Act is consequential in nature. Accordingly, grounds pertaining to same in assessee's appeal are allowed for statistical purpose.

24. In the result, appeal by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 04/07/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 04/07/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai