

आयकर अपीलीय अधिकरण
मुंबई पीठ "आई "
श्री प्रमोद कुमार, उपाध्यक्ष एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " I", MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE-PRESIDENT &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 1004/मुं/2022(नि.व.2016-17)
ITA NO.1004/MUM/2022(A.Y. 2016-17)

Aker Solutions India SDN BHD
Level 16 Integra Towers The Landmark
348, Jalan Tun Razak, Kaula Lumpur,
Malaysia - 50400

PAN: AAICA-1114-G

..... अपीलार्थी /Appellant

बनाम Vs.

Dy. Commissioner of Income Tax(International
Taxation), Circle 1(1)(1),
5th Floor, Air India Building, Nariman Point,
Mumbai – 400 021.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Hemen Chandariya and
Anish Thacker

प्रतिवादी द्वारा/Respondent by : Shri Soumendu Kumar

सुनवाई की तिथि/ Date of hearing : 11/08/2022

घोषणा की तिथि/ Date of pronouncement : 07/11/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-55, Mumbai [in short 'the CIT(A)'] dated 16/03/2022 for the assessment year 2016-17.

2. The assessee in appeal has assailed the order of CIT(A) in upholding the assessment order taxing the interest on income tax refund as business income under

Article-7 of the India- Malaysia Double Taxation Avoidance Agreement (DTAA) @40% + surcharge @ 5% + cess @ 3%.

3. Shri Hemen Chandariya appearing on behalf of the assessee submitted that the assessee had received interest under section 244A of the Income Tax Act, 1961 [in short 'the Act'] amounting to Rs.1,77,55,030/- during the previous year. The assessee claimed that the aforesaid interest is taxable @10% under Article 11(2) of India- Malaysia DTAA. The Assessing Officer following the decision rendered by Hon'ble Uttarakhand High Court in the case BJ Services Company Middle East Ltd. applied provisions of Article -7 of DTAA and taxed interest on refund of Income Tax at a higher rate. The assessee remained unsuccessful before the CIT(A), hence, the present appeal.

3.1 The Id. Authorized Representative of the assessee submits that the Authorities below have erred in not appreciating the fact that interest on income tax refund is not effectively connected with assessee's PE in India. He placed reliance on the decision of Special Bench Delhi in the case of ACIT vs. Clough Engineering Ltd., 130 ITD 137 to contend that interest on income tax refund is taxable under Article -11 of the DTAA. The Id. Authorized Representative of the assessee further placed reliance on the decision of Hon'ble Bombay High Court in the case of DIT vs. Credit Agricole Indosuez 377 ITR 102 to contend that interest on income tax refund is not connected with the PE and hence, rate of tax is to determined on the basis of relevant clause of Interest in DTAA.

4. Per contra, Shri Soumendu Kumar representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee.

5. Both sides heard, orders of authorities below examined. In ground No.1 to 3 of appeal, the assessee has assailed taxability of interest on income tax refund at

higher rate under Article -7 of DTAA. The contention of the assessee is that such interest is taxable under Article -11(2) of the DTAA @10%.

6. We find that issue of taxability of interest on income tax refund was considered by the Special Bench in the case of Clough Engineering Ltd. (supra). The Special Bench held that interest on income tax refund would be taxable under Article-11 and not as business profits connected with the PE of assessee. The relevant extract of the findings of Special Bench reads as under:-

“11.4 Thus, we are again left with the fundamental question as to whether the debt-claim in this case can be said to be effectively connected with the PE. We have already held that the claim is connected with the PE in the sense that it has arisen on account of tax deduction at source from the receipts of the PE. However, it is also a fact that payment of tax is the responsibility of the foreign company. The same is determined after computation of its income and the tax forms not an expenditure for earning the income but an item of appropriation of profit. Therefore, even if the debt is connected with the receipts of the PE, it cannot be said to be effectively connected with such receipts because the responsibility to pay the tax lies on the shoulders of the assessee-company from the final profit ascertained as on the last date of the previous year and on closing the books of account. It is for the company to pay the tax from any source available with it. It so happened in this case that the tax got automatically deducted from the receipts of the PE by operation of law. Such collection of tax by force of law would not establish effective connection of the indebtedness with the PE as ultimately it is only the appropriation of profit of the assessee company. However, we may add that we do not venture to say that the interest income has to be necessarily business income in nature for establishing the effective connection with the PE because that would render provision contained in paragraph 4 of Article XI redundant. Thus, there may be cases where interest may be taxable under the Act under the residuary head and yet be effectively connected with the PE. The bank interest in this case is an example of effective connection between the PE and the income as the indebtedness is closely connected with the funds of the PE. However, the same cannot be said in respect of interest on income-tax refund. Such interest is not effectively connected with PE either on the basis of asset-test or activity-test. Accordingly, it is held that this part of interest is taxable under paragraph No. 2 of Article XI. Thus, the ground referred to the Special Bench is partly allowed. The Division Bench shall dispose off the appeal in conformity with this order.”

[Emphasized by us]

7. One of the question of law for consideration before Hon'ble Bombay High Court in the case of DIT vs. Credit Agricole Indosuez (supra) was :

“(4) Whether, on the facts and in the circumstances of the case and in law, the ITAT has erred in directing the A.O. to tax the interest received u/s 244A at the rate prescribed in Article 12 of DTAA between India and France?”

The Hon’ble High Court referred to the decision of Special Bench in the case of ACIT vs. Clough Engineering Ltd. (supra) and decided the question against the Department by observing as under:

“6.Regarding Question 4 :

- (a) The Tribunal by the impugned order restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the Act to the Assessing Officer to be decided in the light of Indo-France DTAA and the decision of the Special Bench of the Tribunal in the matter of Asstt. CIT v. Clough Engg. Ltd. [2011] 130 ITD 137/11 Taxman 70 (Delhi).*
- (b) The grievance of the Revenue is with the impugned order following the decision of the Special bench in Clough Engg. Ltd. (supra).*
- (c) However we find that the decision in Clough Engg. Ltd. (supra) of the Special Bench had been followed by the Tribunal in DHL Operations B.V. v. Dy. DIT [IT Appeal No. 183 (Mum.) of 2010]. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Therefore, taxable under the Article 11(2) of Indo-Netherlands tax treaty. The Revenue carried the aforesaid decision of DHL Operations B.V. (supra) in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17 July 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing officer to determine/adopt the rate of tax on refund in the light of the relevant clauses of Indo-France DTAA and the decision of Special Bench in Clough Engg. Ltd. (supra). Accordingly, question 4 does not raise any substantial question of law so as to be entertained.”*

8. In light of the decision of Hon'ble Jurisdictional High Court and the decision rendered by the Special Bench we find merit in ground No.1 to 3 of appeal by the assessee. Accordingly, the Assessing Officer is directed to tax interest on income tax refund under Article 11(2) of India- Malaysia DTAA. Consequently, ground no.1 to 3 of appeal are allowed.

9. The assessee in ground No.4 of appeal has assailed initiation of penalty proceedings under section. 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, hence, ground No.4 of the appeal is dismissed as such.

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

Order pronounced in the open court on Monday the 07th day of November, 2022.

Sd/-

(PRAMOD KUMAR)

उपाध्यक्ष/VICE PRESIDENT

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 07/11/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)/
Sr.Private Secretary
ITAT, Mumbai