

आयकर अपीलीय अधिकरण  
मंबई पीठ "आर्ड "   
श्री विकास अवस्थी. न्यायिक सदस्य एवं  
श्री गगन गोयल, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH " I ", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
आअसं. 459/मुं/ 2022 (नि.व. 2018-19)  
ITA NO. 459/MUM/2022(A.Y.2018-19)

Owens-Corning Inc.  
C/o.Owens Corning (India) Pvt. Ltd.  
7<sup>th</sup> Floor, Alpha Building,  
Hiranandani Gardens, Powai,  
Mumbai – 400 076.  
PAN:AAACO-3242-R

..... अपीलार्थी /Appellant

बनाम Vs.

The Deputy Commissioner of Income-tax  
(International Tax), Circle – 3(2)(2) Mumbai,  
Room No.X. 16<sup>th</sup> Floor, Air India Bldg.,  
Nariman Point, Mumbai – 400 021

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Sandeep Bhalla & Ms. Megha Shah  
प्रतिवादी द्वारा/Respondent by : Shri Soumendu Kumar Dash

सुनवाई की तिथि/ Date of hearing : 06/09/2022

घोषणा की तिथि/ Date of pronouncement : 02/12/2022

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the assessment order dated 23/02/2022 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act']for the Assessment Year 2018-19.

2. The assessee in appeal has raised solitary issue by way of following grounds of appeal:

*“1. The Assessing Officer ('AO') / Dispute Resolution Panel ('DRP') has erred in taxing the lease rentals received by the appellant of Rs.5,31,93,808 during the year under consideration by treating the same as 'royalty' as per section 9(1)(vi) 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 nor 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. Shri Sandeep Bhalla appearing on behalf of the assessee submits at the outset that the only issue assailed by assessee in appeal is that the lease rentals received by assessee have been treated as royalty. The Id. Authorized Representative for the assessee submits that the issue is squarely covered by the decision of the Tribunal in ITA NO.2050/Mum/2016 for Assessment Year 2012-13, wherein lease rentals were held to be royalty on identical set of facts. The Tribunal deleted the addition. In subsequent Assessment Years similar addition was made by Assessing Officer. The matter travelled to the Tribunal. The Tribunal following the decision rendered in ITA NO.2050/Mum/2016(supra) deleted the addition. The Id. Authorized Representative for the assessee furnished copy of the Tribunal orders for the preceding Assessment Years where the same issue was adjudicated in assessee's appeal:

ITA No.	Assessment Year	Decided on
2050/Mum/2016	2012-13	04/10/2021
7582/Mum/2016 4773/Mum/2017	2013-14 & 2014-15	10/12/2021
741/Mum/2021	2017-18	04/07/2022

4. Shri Soumendu Kumar Dash representing the Department vehemently defended the impugned assessment order. However, he fairly admitted that the issue raised in the appeal has been considered by the Tribunal in assessee's own case in the preceding Assessment Years.

5. Both sides heard orders of authorities below examined. The assessee company is incorporated in Singapore and engaged in manufacturing of glass fibres. The assessee is a flagship company of Owens Corning group of Companies USA and a tax resident of USA. The assessee has two Indian Associates i.e. Owens Corning (India) Pvt. Ltd. (OCIPL) and Owens Corning Industries (India) Pvt. Ltd. (OCIPL) engaged in manufacturing of glass fibres in India. The assessee in the computation of income had shown receipts of lease rental charges Rs.62,44,716/- and Rs.4,69,49,092/- from its India AEs and claimed the aforesaid income as exempt being covered under Article -7 of the Double Taxation Avoidance Agreement(DTAA). Further, the assessee has claimed that the assessee does not have Permanent Establishment (PE) in India as per Article -5 of India-US - DTAA.

6. A perusal of the DRP directions reveal that OCIPL and OCIPL have entered into a lease agreement dated 01/04/2012 and master lease agreement dated 01/11/2012 with assessee. An extension of the lease agreement have been entered into effective from 01/04/2017. During the period relevant to the assessment year under appeal, the assessee has received lease rentals aggregating to Rs.5,31,93,808/- as under from its Indian Associates:

- |      |       |                     |
|------|-------|---------------------|
| (i)  | OCIPL | : Rs. 62,44,716/-   |
| (ii) | OCIPL | : Rs. 4,69,49,092/- |

The DRP in para 5.3 of the directions has observed that the facts of the case during the year under consideration are same as are in Assessment Year 2012-13 to 2017-18. The DRP in para 5.3.16 taking note of the decision of the Tribunal concluded that, “ *the DRP is of the considered opinion that the issue of taxability of “Royalty” has to be kept alive in order to protect the interest of revenue.....*” Thus, the objection raised was rejected by the DRP merely to keep the issue alive. On merits the DRP had nothing on record to distinguish the decision of Tribunal.

7. We find that in ITA No.2050/Mum/2016 (supra) the Co-ordinate Bench after considering the facts of the case held 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 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."

[Emphasized by us]

No contrary material has been brought to the notice of Bench by the Revenue. Hence, following the decision of Tribunal in assessee's own case for preceding Assessment Years, ground No.1 and 2 of the appeal are allowed in similar terms.

8. In the result, appeal by the assessee is allowed.

Order pronounced in the open court on Friday the 02<sup>nd</sup> day of December, 2022.

Sd/-

( GAGAN GOYAL )

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 02/12/2022

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**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.

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BY ORDER,

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