

आयकर अपीलिय अधिकरण, कोलकाता पीठ “बी”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्यके समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 392/Kol/2022
Assessment Year: 2020-21

Emerald Family Trust (PAN: AAATE 7833 P)	Vs.	ACIT, CPC, Bangalore
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	23.01.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	23.02.2023
For the Appellant/ निर्धारिती की ओर से	Shri Sandip Khemka, A.R
For the Respondent/ राजस्व की ओर से	Smt. Ranu Biswas, Addl. CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)”) dated 02.06.2022 for the AY 2020-21.

2. The only effective issue raised by the assessee in ground no. 3 is against the confirmation of denial of exemption of Rs. 10,00,000/- by Ld. CIT(A) as made by the AO u/s 115BBDA read with Section 10(34) of the Act whereas the ground nos. 1 and 2 are only in support of ground no. 3.

3. Facts in brief are that the assessee is a private discretionary trust and during the year filed return of income on 21.12.2020 in ITR-5 u/s 139(1) of the Act by declaring an income of Rs. 6,97,22,590/-. The return of assessee was processed u/s 143(1) and intimation was issued on 24.12.2021 vide NO.CPC/2121/A5/191594785 assessing total income of Rs. 7,07,22,590/- by denying exemption claimed by the assessee in respect of dividend of Rs. 10,00,000/- u/s 115BBDA read with Section 10(34) of the Act. The assessee was not carrying out any business and is deriving income by way of dividend on shares/securities and capital gain. During the year, the assessee earned dividend income of Rs. 7,05,84,022/- after claiming deduction of Rs. 10,00,000/- u/s 115BBDA of the Act and remaining dividend after claiming exemption of Rs. 10,00,000/- of Rs. 6,95,84,022/- was offered to tax. While processing return of income CPC-Bangalore treated the said dividend income as income from business and profession into by ignoring the exemption claimed by the assessee u/s 115BBDA of the Act.

4. The Ld. CIT(A) simply affirmed the order of AO by holding and observing as under:

“6. The ground of appeal, submission of the appellant have been carefully considered. The appellant is a private discretionary trust and during the relevant previous, year the trust has in the return of income declared dividend income amounting to Rs. 70584022/- in Part A-Profit and Loss account for the financial year 2019-20. Subsequently the amount has been shown in the schedule for business profit and it is indicated that the amount is taxable under the head other sources. Thereafter in the Schedule-OS, it is noticed that the amount is shown as chargeable to tax at special rates and therein the amount mentioned is Rs. 69584022/- and the description is 115BBDA Dividend Income from domestic company exceeding 10Lakh. Thereafter total income from other sources is stated to be RS.69584022/-. In the details of accrual of income given quarterwise also the data is given for Rs. 69584022/- In the intimation the total income is worked out as under:

Name : EMERALD FAMILY TRUST				
PAN : AAATE7833P AY : 2020-21 DIN : CPC/2021/A5/191594785 Ack. No. : 978605670311220				
Sl.No	Particulars	Reporting Heads	Amount in ₹	
			As provided by Taxpayer	As Computed u/s 143(1)
01	HEADS OF INCOME	Income from house property	0	
02		Income from business or profession	0	10,00,000
03		Income from capital gains	1,38,565	1,38,561
04		Income from other sources	6,95,84,022	6,95,84,021
05		Intra head adjustments of current year losses	0	
06		Total (after intra head adjustments) [6+(1+2+3+4-5)]	6,97,22,587	7,07,22,587
07		Losses of current year set off against 6	0	
08		Balance after set off current year losses [8-(6-7)]	6,97,22,587	7,07,22,587
09		Brought forward losses set off against 8	0	
10		Gross total income (including special income) [10-(8-9)]	6,97,22,587	7,07,22,587
11	SPECIAL INCOME	(i) Income chargeable to tax at special rate u/s 115BBE	0	
		(ii) Income chargeable to tax at special rate other than section 115BBE	6,95,84,022	6,95,84,021
12	DEDUCTIONS UNDER CHAPTER VIA	(a) Part-B of Chapter VI-A	0	
		(b) Part-C of Chapter VI-A	0	

On going through the return and intimation it is seen that the total income is determined at Rs.70722587/-as against Rs.697,22,587/- shown by the appellant in the return of income. The difference has arisen because the appellant has declared dividend of Rs. 70584022/- in Part A- Profit and Loss account for the financial year 2019-20, however in the Schedule OS rather than declaring this total income the appellant has suo-moto reduced Rs.10 lakhs and only shown Rs. 69584022/- and the description is 115BBDA - Dividend Income from domestic company exceeding 10 Lakh. Furthermore for calculation of tax, the details have to be given for receipt or accrual quarterwise therein also the dividend amount is shown as Rs. 69584022/-. In this regard, reference to the relevant provisions of tax show that proviso to Sec 10(34) states that exemption for dividend income u/s 10(34) would not apply 'to any income by way of dividend chargeable to tax in accordance with the provisions of section 115BBDA.' Thus the entire dividend income is taxable and that no exemption u/s 10 is available to dividend income. Under the circumstances the entire dividend income should have been declared in the Schedule OS without suo-moto reducing the amount by Rs. 10 lakhs. Section 115BBDA provides for the rate and manner of taxation of such income viz. at 10% on the income by way of such dividends in aggregate exceeding ten lakh rupees in addition to tax on remaining income. Thus section 115BBDA provides for the rate and manner of calculation of tax on the dividend income .

Thus, in the given case as no exemption is available in case of dividend income, the appellant should have shown the entire amount of dividend income in the Schedule OS, ie. Rs. 70584022/- and in the schedule for accrual or receipt of income also the entire amount

should have been shown. There is apparent error in understanding of the appellant and hence the ITR was filled in incorrectly, and dividend was reported at Rs. 69584022/- in Schedule for Other Sources, which led to remaining Rs.10 lakhs being considered as business income. There is no ambiguity in the provisions, section 10 provides for income exempt from tax and section 115BBDA provides for the special rates at which certain income is taxable. For the relevant year, entire dividend income is taxable by virtue of provision to section 10(34) of the Act. It may be noted Section 115BBDA does not provide for exemption of amounts from total income, as done by the appellant, rather it provides for the manner and rate at which tax on specified income is to be computed. Therefore, considering the above facts and circumstances the A.O. is directed to consider the entire dividend income as income from other sources and correctly determine tax under Sec 115BBDA that provides for taxation at 10% on the income by way of such dividends in aggregate exceeding ten lakh rupees in addition to tax on remaining income, and consequent interest etc in accordance with provisions of law. Adequate opportunity must be given to the appellant to furnish any further details, if required in the matter. The grounds of appeal are treated as partly allowed.

7. *For statistical purposes, the appeal is treated as partly allowed.”*

5. The Ld. A.R vehemently argued before the Bench that the order of Ld. CIT(A) is against the provisions of the Act as enshrined in Section 115BBDA read with Section 10(34) of the Act which provides that mechanism for computing tax on the total income of the assessee who is resident in India and has received dividend exceeding ten lakh rupees declared or distributed or paid by domestic companies on or before 31.03.2020. The Clause (a) of sub-section (i) of Section 115BBDA of the Act provides that the said income the tax was to be calculated @ 10% on the amount of dividend exceeding ten lakh rupees meaning thereby no dividend is available to be taxed if the dividend is ten lakh rupees. The Ld. A.R. also pointed out that the AO is wrong in holding that the Explanation to section 115BBDA , Clause (b), Subclause (iii), a trust or institution as registered u/s 12AA or 12AB is not applicable to the assessee as the assessee is not a trust or institution registered under this section but is a private discretionary trust. The Ld. A.R in defense of his arguments relied on the decision of Hon’ble Delhi High Court in the case of Rajan Bhatia vs. Central Board of Direct Taxes [2019] 101 taxmann.com 328 (Delhi) and submitted that issue is decided by the Hon’ble Court in favour of the assessee. The Ld. A.R. therefore prayed that the issue may kindly be decided by setting aside the order of Ld. CIT(A) in favour of the assessee by allowing the appeal of the assessee.

6. The Ld. D.R on the other hand relied on the order of authorities below and also stated that the provisions of Section 115BBDA of the Act are applicable to the assessee as provided in explanation to this section clause (b)(iii) as the assessee is a trust.

7. After hearing the rival contentions of the parties and perusing the material on record including the decision cited before us by the Ld. Counsel for the assessee and after perusing the provisions of Section 115BBDA of the Act, we observe that the section clearly provides for the mechanism as to how to compute the tax where the aggregate dividend received by the assessee from Indian companies after 31.03.2020 . Clause (a) of Section 115BBDA(1) provides that where the dividend income received from Indian companies exceeds ten lakh rupees , tax would be computed @ 10% on the dividend exceeding ten lakh rupees whereas the Ld. CIT(A) has dismissed the appeal of the assessee on the ground that the assessee has himself mis-reported the amount of dividend which has resulted into the addition of ten lakh rupees under the head income from the business and profession without correctly deciphering the provisions of the Act. We have also perused the decision of Hon'ble Delhi High Court in the case of Rajan Bhatia (supra) wherein the Hon'ble Court has held as under:

4. Challenge to the constitutional validity of the aforesaid provisions is primarily on two grounds. The first ground is that Section 115BBDA of the Act does not have any 'base', an argument we shall elaborate subsequently. The second ground is that the provision makes hostile discrimination between a resident assessee and a non-resident assessee, as the provision only applies to a resident assessee. It is also pointed-out that the provision excludes from its ambit any domestic company. Prior to 14.09.2018, the provision was not applicable to association of persons.

5. The contention that the provision lacks 'base' is founded on a misrepresentation and misreading of clause (a) of the sub-section (1) of Section 115 BBDA of the Act. The argument proceeds on the premise that clause (a) of sub-section (1) of Section 115 BBDA is ambiguous and vague, as the provision lacks certainty and does not specify whether tax at the rate of 10% would be applicable on the entire dividend income, if it exceeds Rs. 10 lacs or would be applicable only to the dividend over and above i.e. in excess of Rs. 10 lacs.

6. We do not find any merit in the said contention as, according to us, clause (a) of sub-section (1) of Section 115BBDA of the Act is clear and categorical. It stipulates that where a specified assessee, who is resident of India, has income in aggregate exceeding Rs. 10 lacs by way of dividends declared, distributed or paid by a domestic company or companies, then he/she would be liable to pay tax @ of 10% on such dividend income i.e. dividend income

exceeding Rs.10 lacs. The respondents have in fact relied upon and explained the legal position in the memorandum in the form of Explanatory Notes to the provisions of the Finance Act, 2016 in which it was observed that:—

"14.1 The provisions contained in clause (34) of Section 10 of the Income-tax Act, before its amendment by the Act, provided that dividend which suffers dividend DDT under Section 115-0 is exempt in the hands of the shareholder. Section 115-0 specifies that dividends are taxed only at the rate of fifteen per cent, at the time of distribution in the hands of company declaring dividends. This created vertical inequity amongst the tax payers as those who have high dividend income are subjected to tax only at the rate of 15% whereas such income in their hands would have been chargeable to tax at the rate of 30%.

14.2 With a view to rationalise the tax treatment provided to income by way of dividend, Section 115BBDA has been inserted in the Income-tax Act to provide that any income by way of dividend in excess of ten lakh rupees shall be chargeable to tax in the case of an individual, HUF or a firm who is resident in India, at the rate of ten per cent. The taxation of dividend income shall be on gross basis and no deduction of any expenditure or allowance or set off of loss shall be allowed in computing said income.

14.3 The taxation of dividend income shall be on gross basis and no deduction for any expenditure or allowance or set off of loss shall be allowed in computing the income by way of dividend.

14.4 Applicability: This amendment takes effect from 1st of April, 2017 and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years."

7. In the context of clause (a) to Section 115 BBDA(l), we have no doubt in our mind that the legislation, as framed, stipulates that tax at the rate of 10% would only be payable in case the specified assessee has earned dividend income exceeding Rs. 10 lacs. Further, tax at the rate of 10% would be payable only on the dividend income beyond Rs. 10 lacs. In other words, dividend income upto Rs. 10 lacs is not to be charged to tax @ 10 % under Section 115 BBDA of the Act. Dividend income of less than Rs.10 lacs continues to remain exempt under Section 10(34) of the Act.

8. In view of the aforesaid interpretation, we need not refer to the argument of the petitioner that circular or explanatory notes cannot substitute the statutory provisions as we are of the firm view that the interpretation given above is the only reasonable and plausible interpretation to be given to clause (a) to sub-section (1) of Section 115 BBDA of the Act. On being questioned, in fact the petitioner had candidly accepted that while filing a return of income tax, he had paid tax only on the dividend income above and more than Rs. 10 lacs and not on the entire dividend income i.e., dividend income from Re. 1 to Rs. 10 lacs.

9. Plea of hostile discrimination is again without merit and is predicated on the wrong notion that in tax legislation in order to tax one group the legislation must tax all. In a taxation legislation, the Legislature and Executive have the right to identify the persons who have to be taxed. The concept of equality enshrined in Article 14 of the Constitution, as elucidated in *Pannalal Bansilal Pitti v. State of A.P* [1996] 2 SCC 498, does not require that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as varying needs of different classes of persons often

require separate treatment. It is inexpedient and incorrect to think that all laws are uniformly applicable to all people in one go. Earlier in State of W.B. v. Anwar Ali Sarkar AIR 1952 SC 75, it was observed that if the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.

10. *Contention of the petitioner that the companies have been left out would be an argument predicated on under-classification, i.e., certain classes which could have been included, have been excluded from taxation. This argument does not carry weight, since under-classification per se is not sufficient ground and justification to strike down a provision. In Amrendra Kumar Mohapatra v. State of Orissa [2014] 4 SCC 583, the question of 'under-inclusion' was decided by relying upon State of Gujarat v. Shri Ambica Mills Ltd. AIR 1974 SC 1300 wherein the Constitution Bench had dealt with the question of a classification that was under-inclusive and it was held that having regard to the real difficulties under which legislatures operate, the Courts have refused to strike down legislations on the ground that they are under-inclusive.*

11. *In taxation matters, the Government has the right to identify the persons who have to be taxed. Legislature and executive enjoy greater latitude in the field of tax and economic legislation because of the complexities involved as compared to laws touching civil rights such as freedom of speech, religion etc. Taxation invariably is a matter of policy and the court is not to examine and comment on the wisdom of such decisions. Further, there is a presumption in favour of constitutional validity of law made by the Parliament or State Legislature. Taxation statutes are normally not struck down on the ground of under-classification (see Sekhawan Ali v. State of Orissa. AIR 1955 SC 116, State of U.P. v. Deoman Upadhaya. AIR 1960 SC 1125, State of Jammu and Kashmir v. Trilok Nath Khosa [1974] 1 SCC 19. R.K. Garg v. Union of India [1981] 4 SCC 675, State of M.P v. Rakesh Kohli [2012] 21 taxmann.com 255/113 SCL 550 (SCI and Namit Sharma v. Union of India, [2013] 1 SCC 745).*

12. *Pertinently, we may note that companies have to pay dividend tax whenever they pay dividend to the shareholders. This would explain and justify the reason why companies have been left out from the purview of Section 115BBDA. If companies were liable to pay tax under this section, it would have led to cascading effect when dividend is finally paid to the shareholders, be it, an individual, HUF or a firm i.e. the 'specified assessee' who are liable to pay tax under Clause (a) to Section 115BBDA of the Act.*

13. *Similarly, the argument that non-residents have been left-out is an argument of under-classification. Non-residents who invest in India contribute and help in growth of industrialization, job creation and economic progress. Non-residents have options to invest in different countries. Consequently, the Legislature/Executive as a matter of policy decide how and in what manner non-residents should be taxed. Non-residents can be treated differently for the reason that they are residents of foreign states and not residents of India. Taxation at source principle may not be applied to non-residents. Non-residents are liable to pay tax in the country of their residence. Taxation regime applicable to non-residents need not be identical to that applicable to residents.*

14. *In view of the above, we do not find any merit in the present writ petition; and accordingly the same is dismissed."*

Considering the ratio laid down by the Hon'ble Delhi High Court and facts of the assessee's case, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition of Rs. 10,00,000/-.

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

Order is pronounced in the open court on 23rd February, 2023

Sd/-
(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-
(RajeshKumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 23rd February, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Emerald Family Trust, 31, Chowringhee Road, Graphite India Office, Park Street, Kolkata-700016
2. Respondent – ACIT, CPC, Bangalore
3. Ld. CIT(A)-NFAC, Delhi
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata