

आयकर अपीलीय अधिकरण
कोलकाता 'सी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

डॉ. मनीष बोराड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before

**DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 129/Kol/2023
Assessment Year: 2020-21**

***M/s. Koninklijke Philips N.V.....Appellant
[PAN: AACCK 0806 B]***

Vs.

***ACIT (International Taxation), Circle-1(2),
Kolkata.....Respondent***

Appearances:

Assessee represented by: Sh. Ketan K. Ved, A/R.

Department represented by: Sh. Sunil Kr. Agarwala, CIT (D/R).

Date of concluding the hearing : August 23rd, 2023

Date of pronouncing the order : September 25th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short 'AY') 2020-21 is directed against the order passed u/s 143(3) read with Section 144C(13) of the Income

Tax Act, 1961 (in short the 'Act') by ld. ACIT (International Taxation), Circle-1(2), Kolkata dated 21.12.2022.

2. The assessee is in appeal before the Tribunal raising the following grounds:

"1. Taxability of interest income on refund received under section 244A of the Act from the Income Tax Department is bad in law and on facts

1.1 That on the facts and in the circumstances of the case, the learned Assessing Officer ('Ld. AO') has erred in taxing the receipt of Rs. 21,12,54,080 pertaining to interest income on refund received under section 244A of the Act from the Income Tax Department as income of the appellant without following the directions of the Hon'ble Dispute Resolution Panel ('DRP') to verify whether any favorable order was passed by any court in the assessee's own case allowing the claim of the non-taxability of interest income.

1.2 That on the facts and in the circumstances of the case, the Ld. AO has erred in taxing the said receipt of Rs. 21,12,54,080 pertaining to interest income as income of the appellant without appreciating the favorable order of Hon'ble Kolkata Tribunal in the assessee's own case (ITA No. 437 to 441 of 2021 dated 02 September 2022 for AY 2008-09 to AY 2012-13) wherein in the context of taxability of interest income, applicability of MFN Clause in the protocol to the India-Netherlands DTAA was allowed and it was held as not taxable in India.

1.3 That on the facts and in the circumstances of the case, the Ld. AO has erred in taxing, and the Hon'ble DRP has further erred in confirming such taxation of, the receipt of Rs. 21,12,54,080 pertaining to interest income on refund received under section 244A of the Act from the Income Tax Department as 'Interest income' under Article 11 of the Double Taxation Avoidance Agreement between India and the Netherlands ('India-Netherlands DTAA') without appreciating the application of the Most Favoured Nation (MFN) Clause contained in India- Netherlands DTAA read with the restricted scope of taxation of 'Interest' under Article 12 of the India-Italy DTAA.

1.4 That on the facts and in the circumstances of the case, the Ld. AO has erred in taxing, and the Hon'ble DRP has further erred in confirming such taxation of, the interest income receipt of Rs.

21,12,54,080 without appreciating the fact that refund of tax payable to assessee was a debt claim payable by the Revenue and, consequently, interest on such refund was income from debt claim payable by the Revenue.

1.5 That on the facts and in the circumstances of the case, the Ld. AO has erred in taxing, and the Hon'ble DRP has further erred in confirming such taxation of, the interest income receipt of Rs. 21,12,54,080 without appreciating the fact that CBDT Circular No. 3 of 2022 dated 03 February 2022 is not applicable in the instant case as there is a favorable IT AT order in the assessee's own case for earlier years.

1.6 That on the facts and in the circumstances of the case, the Ld. AO has erred in misinterpreting, and the Hon'ble DRP has further erred in confirming such misinterpretation of, the provisions of the agreement and thereby holding that the amounts received thereunder was assessable to tax.

2. Without prejudice to Ground No. 1, Levy of tax at higher rate of 40%

2.1 That on the facts and in the circumstances of the case and in law and without prejudice to ground no. 1, the Ld. AO erred in charging the tax on addition of interest income on refund received under section 244A of the Act from the Income Tax Department amounting to Rs. 21,12,54,080 at a rate of 40% instead of the flat tax rate of 10% as per Article 11 to the India-Netherlands DTAA.

3. Without prejudice to Ground No. 1, Erroneous levy of Surcharge and Education Cess

3.1 That on the facts and in the circumstances of the case and in law and without prejudice to ground no. 1, the Ld. AO erred in levying the surcharge of Rs. 16,90,033 and education cess of Rs. 34,47,667 on the assessed tax without appreciating the fact that income received by the Company is taxed at the flat rate as per the India-Netherlands DTAA and no surcharge or education cess shall be applicable on it.

4. Erroneous levy of Interest under section 234A

4.1 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234A of the Act amounting to Rs. 20,23,347 without appreciating the fact that the company has filed its ROI on 08 February 2021 i.e. within the due

date of 15 February 2021 and there would not arise any consequential interest under section 234A of the Act.

5. Erroneous levy of Interest under section 234B

5.1 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Act amounting to Rs. 2,22,56,817.

6. Erroneous addition of refund already issued

6.1 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in adding refund already issued amounting to Rs. 9,23,283 to the demand arising to the Company without considering the fact that no such refund was granted to th^ Company.

7. Initiation of penalty proceedings

7.1 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 270A of the Act for under-reporting/mis-reporting of income.

The Appellant desires leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of objections, at any time before or during the hearing of the Appeal.

The Appellant submits that the above grounds are independent and without prejudice to one another.”

3. We will first take up ground nos. 1, 2 & 3 raised by the assessee wherein the issue is that whether Ld. AO erred in taxing the interest on income tax refund received u/s 244A of the Act disregarding that the assessee is foreign company and in view of the MFN clause in the protocol to the India-Netherland DTAA the interest received u/s 244A of the Act is not taxable.

4. At the outset, ld. Counsel for the assessee submitted that this issue has been decided in favour of the assessee by this Tribunal in its own case in ITA Nos. 437 to 441/KOL/2021 for AY 2008-09 to AY 2012-13 order dated 02.09.2022 and therefore, the interest received u/s 244A(1) of the Act from the Govt. of India is not

taxable. Ld. Counsel for the assessee also took us through various facts and observations made by this Tribunal in the order dated 02.09.2022 and indicated that the facts remained the same. Reference was also made to the Article 12 of the India-Netherland treaty, Protocol 4(2) to the India-Netherland tax treaty and Article 4 of India-Italy DTAA.

5. On the other hand, ld. D/R vehemently argued supporting the orders of both the lower authorities but failed to controvert this fact that the issue raised in the instant appeal has been dealt by this Tribunal in assessee's own case for AY 2008-09 to AY 2012-13 and the Department has challenged the finding of this Tribunal before the Hon'ble Jurisdictional High Court.

6. We have heard rival contentions and perused the records placed before us. We notice that the assessee is a foreign company based at Netherland. It received interest u/s 244A of the Act i.e. interest on income tax refund. Tax at source was deducted by the Revenue authorities. During the course of assessment proceedings, the assessee claimed it not to be taxable based on the finding of this Tribunal in ITA Nos. 437 to 441/KOL/2021 dated 02.09.2022. The issue of interest on income tax refund held to be not taxable in the hands of the assessee has been dealt by this Tribunal reads as follows:

“19. We have heard the rival contentions and perused the material available on record. Admittedly, it is a fact on record that assessee is covered by the India-Netherlands DTAA. It is also a fact undisputed that by virtue of Protocol IV(2) which is a part of the India-Netherlands Treaty gives benefits of Most Favoured Nation clause to the assessee. On the perusal of the said Protocol, it is evident that if the provisions of a tax treaty entered into by India after signing of India-Netherlands

DTAA i.e. after 21.01.1989 with another OECD member country is more beneficial either in terms of its scope and coverage or tax rate vis-a-vis the India-Netherlands DTAA then the said provisions shall also apply into the India-Netherlands DTAA. Factually, it is noted that India Italy DTAA came into force on 23.11.1995 i.e. post 21.01.1989 and hence, the beneficial provisions available to the assessee under the India-Italy Treaty on the aspect of taxability of interest as in the present case will get force of attraction and becomes available into the India-Netherlands DTAA by virtue of MFN clause under the said Protocol. Thus, by harmonious reading of the two treaties it follows that the beneficial provision of the India-Italy DTAA will be imported into the reading of India-Netherlands DTAA resulting into accrual of benefit to the assessee.

19.1. Provisions of Article 12(3) (a) of India-Italy DTAA specifies that interest earned by a resident of Italy will not be taxable in India where the payer of such interest is Government of India. Under the treaty negotiations with Italy, India has agreed to a restrictive scope of taxation of interest and thus applying the provisions of India-Italy Treaty read with Protocol of the India-Netherlands treaty the restricted scope of taxability of interest becomes applicable in the present case.

19.2. We note that it is an undisputed fact that Ld. CIT(A) has agreed and found favour with the contention of the assessee on this aspect, however, has dismissed the ground of the assessee by bringing into his observation on the aspect of 'deeming provision' to negate the treatment of interest on income tax refund as a 'debt claim' payable by revenue and making it covered for deduction of tax at source. In our considered understanding, we do not ascribe to the view taken by the Ld. CIT(A) on his observation of bringing in the aspect of 'deeming provision' so as to make the interest on income tax refund subject to deduction of tax at source.

19.3. We note that protocol to a treaty is an integral part of the treaty under consideration and carries the same binding force as the MFN clause therein. The DTAA are the agreements between the two jurisdictions at a country level which are based on negotiations which are real between the two countries for reciprocity and mutual benefits. By bringing the MFN Clause in the Protocol to the India-Netherlands Treaty, the two countries have negotiated between themselves for more restrictive scope of taxation on certain incomes including interest. Thus, it is based on this negotiated terms that

Netherlands has accepted to restrict its rights of taxation on the interest components among other things vis-a-vis its treaty with India.

19.4. Section 90 of the Act provides that where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax or as the case may be, for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to the assessee. Thus, in the conspectus of the MFN clause by virtue of Protocol to India-Netherlands Treaty, the more beneficial provisions of India-Italy Treaty becomes available to the assessee to which even the Ld. CIT(A) has not disputed. In our considered view, there is nothing which has been deemed under the Treaty provisions and the provisions of section 90 of the Act, which are all based on the negotiated terms between the countries to arrive at the double taxation avoidance agreement between themselves. We further note that Hon'ble High Court of Delhi in the case of Steria (India) Ltd. Vs. CIT in W.P.(C) 4793/2014 and CM Appl. 9551/2014 dated 28.07.2016 observed that in terms of the Protocol there can be a benefit to the assessee either of a lower rate or a more restricted scope and one does not mean to exclude the other.

“15. The Court finds no warrant for the above restrictive interpretation placed on Clause 7 of the Protocol. The words 'a rate lower or a scope more restricted' occurring therein envisages that there could be a benefit on either score i.e. a lower rate or more restricted scope. One does not exclude the other. The other expression used is 'if under any Convention/ Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD'. This also indicates that the benefit could accrue in terms of lower rate or a more restrictive scope under more than one Convention which may be signed after 1st September 1989 between India and a State which is an OCED member. The purpose of Clause 7 of the Protocol is to afford to a party to the Indo-France Convention the most beneficial of the provisions that may be available in another Convention between India and another OCED country.”

19.5. Hon'ble High Court of Madras in the case of Ansaldo Energio SPA Vs. CIT (IT) (supra) has held that the interest on income tax refund is a 'debt claim' payable by the Revenue in terms of Article 12(3)(a) of the India-Italy Treaty and thus such interest is not taxable and no TDS ought to be done by the AO. We note that Ld. CIT(A) has wrongly

interpreted this finding of the Hon'ble Madras High Court as application of 'deeming provisions' and, therefore, we set aside the finding of the Ld. CIT(A) on this aspect. Accordingly, we direct the Ld. AO to refund the TDS done on the interest paid to the assessee on the Income Tax refund under section 244A(1) of the Act. To sum up, we hold that in the present case of the assessee, the beneficial provision restricting the scope of taxability of interest in terms of Article 12(3)(a) of the India-Italy DTAA namely, non-taxability of interest on income tax refund by virtue of it being a 'debt claim' from the Government of India as held by the Hon'ble Madras High Court (supra) would be applicable in view of the Protocol to the India-Netherlands DTAA and, therefore, the interest in question received by the assessee u/s. 244A(1) from the Government of India will not be taxable. Consequently, no tax was required to be deducted thereon by the Ld. AO while remitting the said interest to the assessee and thus AO is directed to grant the refund of the TDS so done. This ground of appeal for all the five years is allowed."

7. The above finding of this Tribunal is squarely applicable on the facts of the instant case of the assessee for the year under appeal, as the issue also relates to taxability of the interest on income tax refund. Therefore, since the assessee is benefitted with the protocol to the India-Netherland treaty dated 21.01.1989 and the favorable provisions of India-Italy tax treaty are applicable on the assessee company because Netherland and Italy both are members of the Organization for Economic Cooperation and Development (OECD) and as per provisions of Article 12(3)(a) of India-Italy DTAA interest earned from Govt. of India by a resident of Italy is not taxable in India, a similar analogy has been applied to the assessee company which is a resident of Netherland. Thus, taking a consistent view, we set aside the finding of ld. AO and decide the issue in favour of the assessee holding that interest received u/s 244A of the Act by the assessee company based at

Netherland from Govt. of India is not taxable. Thus, ground no. 1 raised by the assessee is allowed.

8. Ground no. 2 is alternate in nature and the same becomes infructuous.

9. Ground no. 3 is consequential in nature which led to levy of surcharge and education cess. Thus, ground nos. 1, 2 & 3 are allowed.

10. Ground no. 4 relates to erroneous levy of interest u/s 234A of the Act. We observe that the assessee has filed the return on 08.02.2021 which was within the due date i.e. 15.02.2021. Considering these facts that the return of income has not been filed after the due date interest u/s 234A of the Act cannot be levied. Since the fact that assessee has filed return of income on 08.02.2021 is appearing in the assessment order and since the due date of filing the return was 15.02.2021 there is no delay in filing the return and therefore, interest cannot be levied u/s 234A of the Act. Thus, ground no. 4 raised by the assessee is allowed.

11. Ground no. 5 is regarding levy of interest u/s 234B of the Act. The same being consequential in nature needs no adjudication.

12. Ground no. 6 relates to erroneous addition amounting to Rs. 9,23,283/- towards refund already issued it is stated that no such refund was granted to the company. This fact needs to be verified at the end of the AO to which necessary opportunity of being heard to be provided to the assessee. Thus, ground no. 6 raised by the assessee is allowed for statistical purposes.

13. Ground no. 7 relates to initiation of penalty proceedings and the same is premature and thus, needs no adjudication at this stage.

14. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Kolkata, the 25th September, 2023

Sd/-

[Sonjoy Sarma]
Judicial Member

Sd/-

[Manish Borad]
Accountant Member

Dated: 25.09.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. M/s. Koninklijke Philips N.V., C/o Deloitte Haskins & Sells LLP, Bengal Intelligent Park, Building Omega, 13th & 14th Floor, Block EP & GP, Sector V, Salt Lake Electronic Complex, Kolkata-700 091**
- 2. ACIT (International Taxation), Circle-1(2), Kolkata.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata