IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No.97 & 96/MUM/2023
Assessment Year: 2017-18 AND 2018-19

DCIT, Circle 3(3)(1) Mumbai	v.	M/s Total Energies Marketing India Pvt. Ltd. (Formerly Known as M/s Total Oil India Pvt. Ltd.) 3rd Floor, The Leela Galleria, Andheri, Kurla Road, Andheri (East), Mumbai
(Appellant)		**(Respondent)**

CO No. 30 & 29/MUM/2023
[In ITA No.97 & 96/MUM/2023]
Assessment Year: 2017-18 AND 2018-19

M/s Total Energies Marketing India Pvt. Ltd. (Formerly Known as M/s Total Oil India Pvt. Ltd.) 3rd Floor, The Leela Galleria, Andheri, Kurla Road, Andheri (East) Mumbai	v.	DCIT, Circle 3(3)(1) Mumbai
(Cross-Objector)		**(Respondent)**

PAN No.AAACE2175M

Assessee by:	Shri Ketan Ved
Revenue by:	Shri Biswanath Das, D.R.

Date of hearing : 2.11.2023
Date of pronouncement : 3.11.2023

O R D E R

PER BENCH:

01. The Dy. CIT, Circle 3(3) (1), Mumbai [the LD AO] for assessment year 2018-19 and 2017-18, files two appeals. The assessee has filed cross objections in both the assessment years. As commons issues are involved in the appeals and cross objections, those are being disposed of by this common order.

02. ITA No.97/MUM/2023 is filed by the Dy. CIT, Circle 3(3)(1), Mumbai for assessment year 2017-18 against the appellate order passed by the National Faceless Appeal Centre, New Delhi (Learned CIT-A) dated 18/11/2022 wherein the appeal filed by the assessee against the assessment order passed by the National e-Assessment Centre, Delhi (Learned Assessing Officer) under section 143(3) of the Income Tax Act, 1961(the Act), was partly allowed. The Learned Assessing Officer is aggrieved with the order of the Learned CIT-A deleting the disallowance of demurrage charges and reimbursement of salary paid to seconded employees on account of non-deduction of tax at source.

03. The assessee has filed cross objection for refund of the excess dividend distribution tax paid on account of dividend paid to non-resident shareholder, viz. Total Marketing Services, France and Total Holding Asie, France. The grievance of the assessee is that the dividend distribution tax in relation to the dividend paid to non-resident shareholders ought to have been paid @ 10% in terms of Article 11 of the India – France tax treaty which has been further reduced to 5% in view of Para 7 of the Protocol between India and France in view of benefit of 'Most Favoured Nation' clause read with tax treaty between India

and Slovenia is available against the rate of 20.36% specified under section 115-O of the Act. Thus, the assessee is asking for a refund of excess dividend distribution tax paid of Rs.11,68,82,865/-.

04. The brief facts of the case show that the assessee is engaged in importing and reselling Liquefied Petroleum Gas and certain solvents. It is also manufacturing and marketing industrial and automotive lubricants. It filed its return of income on 30/11/2017 at a total income of Rs.120,94,42,340/-. The assessee has also entered into several international transactions. The case of the assessee was selected for scrutiny on transfer pricing risk parameters. The TPO did not disturb the arm's length price of international transaction. The Learned Assessing Officer found that the assessee has paid demurrage charges of Rs. 2,48,16,533/- on which no tax is deducted at source. He further found that the assessee has reimbursed salary paid to its seconded employees, amounting to Rs.11,44,50,849/- on which no tax is deducted. Assessee did not submit any reply to query of the ld AO. The Learned Assessing Officer, therefore, held that tax is deductible on demurrage charges and on reimbursement of salary paid to seconded employees, as assessee has not deducted tax at sources, both these items were disallowed u/s 40(a) (ia) of the Act. Accordingly, total income was assessed at Rs.134,87,09,722/- by passing an order under section 143(3) read with sections 143(3A) and 143(3B) of the Act on 15/3/2021.

05. The assessment order was challenged before the Learned CIT-A, who held that

i. With respect to demurrage charges, the Coordinate Bench has decided the issue for assessment years 2010-11 to 2015-16 in favour of the assessee and therefore, he deleted the disallowance on demurrage charges.

ii. With respect to the reimbursement of salary cost, the Learned CIT-A noted that when for earlier years identical disallowance was made, which was deleted by the Learned CIT-A and the order of the Learned CIT-A was confirmed by the Tribunal, therefore, he also deleted the disallowance under this head.

iii. Before the Learned CIT-A, a ground was raised that assessee has paid dividend distribution tax for which credit is not given. The Learned CIT-A directed the Learned Assessing Officer to verify the claim and grant credit if available.

06. The assessee is aggrieved with the appellate order and has raised a ground in the cross objection. The Learned DR supported the order of the Learned Assessing Officer and submitted that on demurrage charges and reimbursement of cost of seconded employees are subject to tax deduction at source under section 195 of the Act and therefore, in the absence of any explanation by the assessee, the disallowance was correctly made. He submitted that the Learned CIT-A has merely followed the order of the Coordinate Bench without examining the facts in the present year.

07. The Learned AR submitted that the Coordinate Bench in the assessee's own case has already decided the disallowance of demurrage charges for non-deduction of tax for earlier years. He referred to ITA Nos.4300 & 4135/MUM/2016 for assessment year 2010-11 and subsequently for succeeding years various orders of the Tribunal till assessment year 2015-16 wherein the issue has been decided in favour of the assessee by deleting the disallowance of demurrage charges. Accordingly, he submitted that there is no requirement of deduction of tax at source on demurrage charges under section 195 of the Act and therefore, the disallowance is correctly deleted.

08. With respect to reimbursement of expenses of seconded employees, he submitted that this issue is also squarely covered in favour of the assessee by the decision of the Coordinate Bench in ITA No.1294/MUM/2017 filed by the Revenue for assessment year 2011-12, order dated 2/11/2019. He submitted that as per paragraph 12 of the above order, it was held by the Coordinate Bench that there is no income chargeable to tax in India. He further referred to identical issue in the case of the assessee in ITA No.4300/MUM/2016 while deciding issue No.1 at paragraph 15 of that order. He submits that identical set of agreement is in existence. Accordingly, both the issues are covered in favour of the assessee.

09. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also perused the orders of the Coordinate Bench in the

assessee's own case for earlier assessment years where identical issue arose and the issue is decided in favour of the assessee. We find that first time the issue arose in the case of the assessee with respect to reimbursement of demurrage charges in ITA No.4135/MUM/2016. While deciding the issue being ground No.2.1, at paragraphs 7 to 9 of the appeal, following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Dempo and Co. P. Ltd., 381 ITR 303. Further, for subsequent years also, the Coordinate Bench has followed this decision. The Learned DR could not show us any reason as to why the above decision should not be followed. Accordingly, respectfully following the decision of the Coordinate Bench in the assessee's own case, we confirm the order of the Learned CIT-A in deleting the disallowance of demurrage charges paid by the assessee of Rs.2,48,16,533/-. Accordingly, ground No.1 of the appeal is dismissed.

10. With respect to ground No.2 where the disallowance of reimbursement of salary paid to seconded employees on account of non-deduction of tax at source was deleted by the Learned CIT-A. We find that the issue first arose in the case of the assessee in ITA No.4300/MUM/2015 for assessment year 2010-11 where the Coordinate Bench has dealt with the issue in paragraphs 15 & 16 and deleted the addition. The Coordinate Bench for that year has relied upon the decision in the case of Burt Hill Design Pvt. Ltd. vs. DDIT (IT), 79 Taxmann.com 459. The Learned CIT-A has followed the decision of the Coordinate Bench in deleting the disallowance. Therefore, we do not find any

infirmity in the order of the Learned CIT-A. Accordingly, ground No.2 of the appeal of the Assessing Officer is dismissed, holding that no tax is required to be deducted on reimbursement of salary to seconded employees, amounting to Rs.11,44,50,849/-. Thus, the appeal of the Assessing Officer for assessment year 2017-18 in ITA No.97/MUM/2023 is dismissed.

11. Now the question arises for assessment year 2018-19. ITA No.96/MUM/2023 is filed by the Assessing Officer for assessment year 2018-19, raising the following grounds:

1. "Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A), erred in directing the A.O. to give credit for DDT after verification of the return and accompanying documents as per law while the matter agitated in the ground is not about giving credit but granting of refund of excess DDT in view of DTAA between India and Slovenia read with MFN clause of India-France DTAA?

2. Whether on the facts and in circumstances of the case and in law, the Ld. CIT (A), NFAC erred in adjudicating the ground to refund excess DDT and giving the directions without appreciating that the appeal is against the order u/s. 143(3) and not against any order u/s.237 of the Act?

3. Whether on the facts and in circumstances of the case and in law, the Ld. CIT (A), NFAC ought not to have allowed the ground of granting excess refund of DDT when the A.O. has not passed any order u/s. 237 denying the refund of excess DDT?

4. Whether the Ld. CIT (A), NFAC was right in allowing the ground of refunding excess DDT without dealing with the

claim of refund on the basis of contentions raised by the assessee?

5. Whether the Ld. CIT(A), NFAC erred in allowing the ground of refunding of excess DDT by not taking into cognizance the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. 328 ITR 81(Bombay) wherein it was held that when section 115-0 specifically states that the additional tax is on the profits distributed as dividend, there is no reason to hold that the additional income-tax is a tax on dividend?

6. Whether the Ld. CIT(A), NFAC erred in allowing the ground of refunding of excess DDT by not appreciating that this is the matter against which in appellant's own case, the ITAT Mumbai, 'I' Bench constituted special bench while dealing with the similar claim in A. Y. 2016-17 and the matter is sub-judice ?"

12. The assessee has filed cross object vide CO No.30/MUM/2023 for assessment year 2018-19 raising the following grounds:

1. Refund of excess Dividend Distribution Tax ["DDT"] paid;

1.1 On the facts and circumstances of the case and the provisions of the law, the Assessing Officer ("AO") has erred in not granting refund of excess DDT paid of Rs. 11,24,99,757/- in respect of dividend paid to non- resident shareholders viz. Total Marketing Services, France and Total Holding Asie, France and the Commissioner of Income-tax (Appeals) ['CIT(A)'] has erred in directing the AO to decide the issue.

1.2 The AO/CIT(A) has erred in not appreciating that the DDT in relation to the dividend paid to non-resident shareholders ought to have been paid at the

rate of 10% in terms of Article 11 of the India-France tax treaty which has been further reduced to 5% in view of para 7 of the Protocol between India and France in view of which the benefit of 'Most Favoured Nation' clause read with tax treaty between India and Slovenia is available as against the rate of 20.36% specified u/s. 115-0 of the Income-tax Act, 1961.

1.3 The AO/CIT(A) has erred in not granting refund of excess DDT paid of Rs. 11,24,99,757/- to the Respondent since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

13. CO No.29/MUM/2023 for assessment year 2017-18 filed by the assessee is also on identical grounds.

14. For AY 2018-19 , brief facts of the case shows that the assessee filed its return of income on 30/11/2018 at an income of Rs.186,37,54,609/-. The case of the assessee was selected for scrutiny resulting into assessment under section 143 of the Act at the same income, by order dated 30/9/2021. Despite there being no addition, the assessee preferred an appeal before the Learned CIT-A which was entertained. The only claim of the assessee before the Learned CIT-A was with respect to refund of excess dividend distribution tax and deduction of education cess along with interest under section 234C of the Act. The claim of the assessee is that dividend under consideration is taxable @ 5% only. The facts show that the assessee has declared a dividend of Rs.73,25,32,504/-. The assessee has two shareholders who are resident of France. The dividend distribution tax was worked out under section 115 of the

Act @ 20.361% at Rs.14,91,26,382/-. The claim before the Learned CIT-A was that such dividend is chargeable to tax @5% as per double taxation avoidance agreement between India and Slovenia read with 'Most Favoured Nation' clause between India, France and Slovenia. Therefore, the excess tax paid by the assessee @ 20.361% - 5% is refundable.

15. The Learned CIT-A decided this issue and for statistical purposes allowed the ground raised by the assessee. He directed the Learned Assessing Officer to give credit for dividend distribution tax after verification of the return of income. In case the claim of the assessee is not allowable, a speaking order should be passed.

16. Therefore, the Assessing Officer as well as the assessee, both are aggrieved with the above order. The assessee is aggrieved for the reason that the Learned CIT-A should have directed for refund of the tax on the merits of the case. The Assessing Officer is aggrieved against the arguments of the assessee about such claim.

17. After hearing both the parties, we find that the issue is squarely covered by the decision of the Special Bench in the case of the assessee [2023] 149 taxmann.com 332 (Mumbai - Trib.) (SB) where in it has been held that DTAA does not get triggered at all when a domestic company pays DDT under section 115-O; where contracting states to a tax treaty intend to extend treaty protection to domestic company paying dividend distribution tax, only then, domestic company can claim benefit of DTAA, if any. Further latest decision of the Hon'ble Supreme Court in Nestle SA [2023] 155 taxmann.com 384 (SC) [19-10-2023] .

Claim of the assessee is based on Concentrix Services Netherlands B.V. v. Income-tax Officer (TDS) [2021] 127 taxmann.com 43 (Delhi) and Steria (India) Ltd. v. CIT [2016] 72 taxmann.com 1 (Delhi) both these decisions are set aside by honourable Supreme court.

18. Accordingly, as the issue is squarely decided against the assessee by both the above decisions, we dismiss the cross objections of the assessee for both the years and allow the appeal of the Assessing Officer for assessment year 2018-19.

19. Accordingly, the appeals of the Assessing Officer and the cross objections of assessee are disposed of as indicated above.

Order pronounced in the open Court on 03.11.2023

Sd/-	Sd/-
[SANDEEP SINGH KARHAIL]	[PRASHANT MAHARISHI]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

DATED: 03.11.2023

JJ:

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. DR

By order

Assistant Registrar