

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1686/MUM/2021
Assessment Year: 2015-16

Van Oord India Pvt Ltd
201, 2nd Floor, Central
Plaza, 166 CST Road,
Kalina, Mumbai- 400098

Vs.

ACIT Circle 5(3)(2)
Aaykar Bhavan, MK Road,
Mumbai- 400020

PAN No. AAACH 5430 J
Appellant

Respondent

Assessee by : Shri. Divesh Chawla
Revenue by : Shri. Ajay Kumar Sharma & Anil Sant

Date of Hearing : 16/10/2023
Date of pronouncement : 09/11/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 1608.2021 passed by the Ld. Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre, Delhi (in short Ld. CIT(A)) for assessment year 2015-16, raising following grounds:-

On the facts and in the circumstances of the case and in law, Van Oord India Private Limited (hereinafter referred to as the Appellant) craves leave to prefer an appeal against the order passed by the Commissioner of Income-tax (Appeals) (National Faceless Assessment Center) (hereinafter referred to as CIT-A) under section 250 of the Income-tax Act 1961 (hereinafter



referred to as the Act') on the following grounds, each of which are without prejudice to one another:-

Refund of excess Dividend Distribution Tax (DDT) paid on dividend received by the Appellant

On the facts and in the circumstances of the case and in law the learned CIT-A:

- 1. erred in passing the impugned order without giving adequate opportunity of being heard to the Appellant*
- 2. erred in rejecting the additional objections raised by the Appellant relating to refund of excess DDT paid on dividend income and in not following the favorable ruling of the Income-Tax Appellate Tribunal in the Appellant's own case*
- 3. erred in not appreciating that the DDT rate on dividend income received by the Appellant should have been restricted to 5 percent under Article 10 read with Article IV of the Protocol to the India Netherlands DTAA and Article 10 of India Slovenia*
- 4. without prejudice, erred in not appreciating that in any case, the DDT rate should have been restricted to a maximum of 10 percent under India - Netherlands DTAA.*
- 5. erred in not granting refund of excess DDT paid of Rs 8,38,44,980 on the dividend income received by the appellant*

2. Briefly stated facts of the case are that the assessee company is incorporated in India. It is a subsidiary of "Van Oord Dredging and Marine Contractors BV, Netherlands". During the year under consideration, the assessee was engaged in business of executing dredging contracts in India. For the year under consideration, the assessee filed its return of income on 26.09.2015 declaring total income at Rs. 2,92,53,940/-. During the year under consideration, the assessee declared and paid dividend of Rs. 69,89,99,421/- to its parent company and paid dividend distribution tax (DDT) of Rs. 11,87,94,952/- at the rate of 16.995% u/s 115-O of the Income-tax Act, 1961 (in short the 'Act'). The scrutiny assessment was completed by the accepting the return of income declared by the



assessee. Before the Ld. CIT(A) the assessee raised an additional ground that the dividend distribution tax should be subjected to the Double Taxation avoidance agreement (DTAA) between India and Netherlands and dividend received by the parent company should be accordingly subjected to at rate of 10% in the hands of the assessee as provided under DTAA between India and Netherlands and excess dividend distribution tax paid by the assessee should be refunded. The Ld. CIT(A) rejected the contention observing as under:-

7.3 Appellant's submissions were carefully considered. Appellant had paid the Dividend Distribution Tax at the rate of 16.995 % on its own volition. In the assessment order the Assessing Officer has accepted the return of income. The Assessing Officer had not mentioned anything about accepting or not accepting the request made by the appellant for reducing the rate of DDT. Since the issue does not arise from the assessment order, the same will not form part of the subject matter of the assessment order. When the issue is not the subject matter of assessment, the same would not be eligible for appeal. The only recourse available to the appellant was to approach the Assessing Officer for rectification under Section 154 of the Act.

7.4 Reliance is placed on the decision in the case of [2013] 35 taxmann.com 201 (Mumbai - Trib.) IN THE ITAT MUMBAI BENCH 'F' Vijay D. Mehta vs Assistant Commissioner of Income-tax, Central Circle -35. The honourable Tribunal, observed as under:

"4. We have heard the representatives of the parties and also gone through the material on record. A perusal of the assessment order dated 26.11.2009 reveals that the Assessing Officer did not make any reference or applied his mind relating to the applications dated 23.5.2008 and 20.8.2009 moved by the assessee to the Assessing Officer for appropriation of seized cash. Since, no decision was taken by the Assessing Officer either allowing application of the assessee or rejecting the application of the assessee, hence assessee in our view, rightly



moved an application u/s. 154 of the Act to the Assessing Officer for rectification."

7.5 In the present case also, it can be observed that the appellant on its own volition paid the dividend distribution tax at the rate of 16.995%. The appellant failed to approach the Assessing Officer to rectify the mistake apparent from record. The issue raised by the appellant is not a subject matter of the assessment. In such circumstances, no appeal lies on the assessment order.

7.7 The decisions relied upon by the appellant, with respect to admissibility of additional grounds were studied. The facts of the cases involved in such decisions were different from that of the appellant's case. In all those cases, additional grounds raised before the appellate authorities on the issues which were dealt by the Assessing Officer in the assessment order. In the appellant's case, the issue was not raised before the Assessing Officer and the Assessing Officer had not dealt with it in the assessment order. In the appellant's own case for the Assessment Year 2010-11, the Honourable Tribunal admitted the additional ground on the basis that appellant was prevented by a reasonable cause, for not raising the issue before the Assessing Officer. Appellant claimed that the Honble Supreme Court's decision in the Case of 'Union of India vs Tata Tea Co Ltd was not available when the assessment order was passed. Hence the Tribunal allowed the additional ground. The Tribunal's observations are as under:

"27. Now, turning to the additional ground, for admission thereof, it has been contended by the ld, Counsel for the assessee that the additional ground could not be raised either at the time of filing of the return of income on 15th October, 2010, or during proceedings before the lower authorities (which culminated in passing of the Final Assessment order on 29th December, 2014), because during that period the law that tax under section 115-0 was a tax on the distributed profits of the company and not on dividend, as laid down by the Hon'ble Bombay High Court in the case of 'Godrej & Boyce Mfg Co. Ltd vs DCIT, 328 ITR 281 (Bom.) vide Judgment dated 12th August, 2010; that it was only when the Supreme Court on 20th September, 2017 in the case of 'Union



of *India vs. Tata Tea Co Ltd.*, 85 taxmann.com 346 (SC), decided that the tax under section 115-0 is a tax on dividend, that the occasion to raise the additional ground arose; that the Hon'ble Supreme Court, in the aforesaid case, was hearing appeals challenging the constitutional validity of section 115-0; that the challenge was that by taxing, under section 115-0, the distributed profits of a company engaged in agricultural activities, the Central Government sought to levy tax on the agricultural income earned by the company, that since the taxability of agricultural income fell within the State List, the Central Government did not have the power to tax the same; that the Hon'ble Supreme Court rejected this argument by holding that the tax was not on the profits/income of the companies, but on the dividend income and taxing of dividend income was within IT(TP)A No.720/MUM/2015 Page 25 of 29 the purview of Entry 82 of the List I, i.e., the list of subjects for which the Central Government had the power to enact laws; that the same view, as in the case of *'Union of India vs Tata Tea Co. Ltd.(supra)*, was also taken by the Hon'ble Supreme Court in the case of *'Godrej & Boyce Mfg. CoLtd. vs DCIT'*, 81 taxmann.com 111; that the assessee was under a bona fide belief that it was prevented from raising the aforesaid issue owing to the law laid down as per the jurisdictional High Court in the case of *Godrej & Boyce Mfg. Co. Ltd. vs. DCIT (supra)*; that the reasonableness of the reasons explaining its belief of inability, is to be looked at liberally, as held by the Hon'ble Bombay High Court in the case of *'CIT vs Pruthvi Brokers & Shareholders'* 23 taxmann.com 23 (Bom.); and that therefore, the additional ground may be admitted."

"28. Opposing the admission of the additional ground, the Id. D.R. has contended that since the additional ground raised does not arise from the orders of the lower authorities, the same should not be admitted; that Article 10(6) of the DTAA provides that if the non-resident has a Permanent Establishment in India and if the dividend income is effectively connected with



the PE in India, then the benefit of Article 10(2) is not available and since in the present case, the fact regarding the existence or nonexistence of the PE is not on record, the additional ground is not maintainable; and that the procedure for making a claim, as provided in Article 10(3) of Indo-Netherland Treaty, is also not on record herein."

"29. Insofar as regards the argument of the Id. DR that since the additional ground raised does not arise from the orders of the lower authorities, the same cannot be admitted, this argument deserves to be rejected in view of the decisions of the Hon'ble IT(TP)A No.720/MUM/2015 Page 26 of 29 Supreme Court in the cases of 'National Thermal Power Co. Ltd. v CIT, 229 ITR 383 (SC) and 'Jute Corporation of India Ltd. Vs. CIT, 187 ITR 688 (SC), and the Full Bench decision of the Hon'ble Bombay High Court in the case of 'Ahmedabad Electricity Co Ltd. Vs. CIT, 199 ITR 351 (Bom.)In fact, as rightly submitted on behalf of the assessee, this is the settled position of law as has been held by the Hon'ble Bombay High Court in the case of 'Ultratech Cement Ltd. Vs ACIT, 81 taxmann.com 74. It remains undisputed that this issue could not be raised either at the time of filing of the return of income on 15th October, 2010 or during proceedings before the lower authorities (which culminated in passing of the Final Assessment order on 29th December, 2014) because during that period, the law as laid down by the Hon'ble Bombay High Court in the case of 'Godrej & Boyce Mfg Co Ltd. vs DCIT' (supra), held the filed. It is only by virtue of the Supreme Court order dated 20th September, 2017 passed in the case of 'Union of India vs Tata Tea Co Ltd.' (supra), that the law now is that the tax under section 115-0 is a tax on dividend. The impugned order was passed by the Assessing Officer on 29/12/2014, when 'Godrej & Boyce Mfg Co Ltd vs DCIT' (supra) was the governing law. It cannot be gainsaid that it is a legal adage that the Hon'ble Supreme Court declares the law as it always was. Therefore, the position settled by the Hon'ble Supreme Court in the case of 'Union of India vs. Tata Tea Co Ltd' (supra) is



applicable, with full force, as on the date of passing of the judgment in that case, i.e., on 20/9/2017, and is deemed to be the law as it was as on the date of passing of the impugned order, i.e., on 5/12/2014. Hence, it is the supervening Supreme Court decision which has prompted the assessee to raise the additional ground. It has not been disputed IT(TP)A No.720/MUM/2015 Page 27 of 29 that the Supreme Court decision, on facts, to be determined, permitting, entitles the assessee to stake the claim made in the additional ground. So the mere fact that the additional ground does not arise out of the impugned order, is in no way detrimental to the of the additional ground. OME TAX DEPARTMquest for admission "31. With respect to the submission of the Id. DR that the procedure for making a claim, as prescribed in Article 10(3) of the DTAA, is not on record and hence, it requires factual investigation, we are of the view that the same does not, in any manner, relate to the assessee, or VODMC BV, or the project IT(TP)A No720/MUM/2015 Page 28 of 29 office, and hence, it cannot be regarded as a fact that needs to be examined for the purposes of admission and/or adjudication of the assessee's claim. In any case, as dwelt upon hereinabove, the assessee was prevented from raising the additional ground before the lower authorities, due to a reason beyond the control of the assessee, as considered above. This fact by itself, is, in our opinion, sufficient to allow it to be raised at this stage. So, even if, arguendo, the objections of the Department were to be acceded to, the assessee's request for admission of the additional ground merits acceptance."

"32. In view of the above, the additional ground is admitted"

However, in the present case, the decision was already available when the assessment order was passed. There was no reasonable cause, which was beyond the control of the appellant which prevented the appellant from raising the issue before the Assessing Officer. Further, appellant had opportunity to raise the issue before the Assessing Officer through an



application for a rectification under Section 154 of the Act Appellant failed to do so.

7.8 For the foregoing reasons mentioned in the earlier paragraphs, appellant's claim for reduction of the rate of the Dividend Distribution Tax, does not arise from the assessment order. The issue raised by the appellant was not the subject matter of the assessment order Hence no adjudication can be made on this issue. In view of the above, the appeal on this ground is dismissed

3. We have heard rival submission of the parties and perused the relevant material on record. We find that identical issue in the case of the assessee in ITA No. 792/Mum/2014 for assessment year 2009-10 has been decided against the assessee. The relevant finding of the Tribunal (supra) is reproduced as under:-

17. We heard the parties and perused the material on record. Before proceeding further we will look at the relevant clauses pertaining to Dividends in the DTAA between India and Netherlands and in the DTAA between India and Hungary.

India and Netherlands ARTICLE 10 DIVIDENDS

1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.]

3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.

4. The provisions of paragraph 2 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.



5. The term "dividend" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights participating in profits, as well as income from debt-claims participating in profits and income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of one of the States, carries on business in the other State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

7. Where a company which is a resident of one of the States derives profits or income from the other State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Protocol

IV. Ad Articles 10, 11 and 12

1. ***

2. If after the signature of this convention under any Convention or Agreement between India and a third



State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.

India and Hungary

Protocol

With reference to Article

10 When the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend.

18. The contention of the ld AR is that as per the MFN clause of India Netherlands DTAA as reproduced above, the protocol reference to Article 10 of India Hungary DTAA should be read into India Netherlands DTAA. From the plain reading of Protocol with reference to Article 10 of India Hungary DTAA it is clear that the taxability of dividend is more restrictive whereby the dividend paid by the Indian company shall be taxable in the hands of the shareholders at the rate of 10% of gross dividend. It is relevant here to note that it is no longer res integra that the protocol is an indispensable part of the treaty with the same binding force as the main clauses therein and therefore the protocol with reference to Article 10 of India Hungary DTAA is to be considered as part of the Treaty. It is also relevant to note that both Hungary and Netherlands are members of the OECD and as per the MFN protocol the restrictive conditions in subsequent DTAA applicable to one OECD nation would apply to the other OECD member nation even though the DTAA comes into effect earlier in time. From the perusal of effective dates as mentioned in the earlier part of this order, it is noted that the India Hungary DTAA came into effect after the India Netherlands DTAA. The combined examination of these facts leads us to the conclusion that as per the MFN protocol of India Netherlands



DTAA as extracted above, the protocol with reference to Article 10 of India Hungary DTAA, with regard to taxation of dividend should be applicable to taxation of dividend as per India Netherlands DTAA.

20. Given this the crucial point that needs to be examined for the purpose of issue under consideration is whether by virtue of this clause, the benefit of DTAA can be extended to domestic company. If we look at the wordings in the India Hungary DTAA, what it provides is that the tax on the profits distributed by an Indian company is taxable at the rate of 10% in the hands of the shareholders. The treaty does not contain anything whereby the domestic company is protected by the DTAA and that the rate mentioned therein shall be considered by domestic company distributing the profit for the purpose of DDT. The clause only specifies that the distributed profits will be taxable in the hands of the shareholders who are residents of Hungary/Netherlands at the rate of 10% which otherwise be subject to tax in accordance with Article 10 of the Treaty. If the tax laws of recipient shareholder country so provides, they can take the benefit of tax credit. The argument of the ld AR is that the Tribunal in the case of Total Oil India (P.) Ltd (supra) has laid down the ratio that as per the India Hungary DTAA the treaty protection is extended to domestic companies. However we are unable to agree with this contention of the ld AR, on perusal of the order it is not coming out that the Special Bench has held that as per the India Hungary DTAA the domestic companies are covered under the Treaty. In conclusion the Special Bench has observed that –

Conclusion:

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income-tax (Tax on Distributed Profits) referred to in sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in section 115-O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic



companies paying dividend distribution tax through the mechanism of DTAA's. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly. (Emphasis supplied)

21. Thus the Tribunal only held that it is the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAA's whereas in the instant case the DTAA's referred to by the ld AR nowhere suggests that domestic companies are allowed to enter the arena of DTAA. Therefore, in our considered view, the Protocol with reference to Article 10 as per India Hungary DTAA on taxability of distributed profits cannot be interpreted so as to say that it covers the domestic companies, since there is no specific clause in the Treaty to that effect. Consequently assessee's claim of refund of DDT in respect of shareholders covered under India Netherlands DTAA is rejected.

4. We note that the Tribunal (supra) while deciding the issue has followed the decision of the Special Bench of Tribunal in the Case of DCIT Vs. Total Oil India Pvt Ltd (supra) and thus, respectively following the finding of the Tribunal (supra) in the case of the assessee itself, the Grounds of appeal of the assessee are dismissed.

5. In the result, appeal of the assessee is dismissed.

Order pronounced in the open Court on 09/11/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 09/11/2023
Shubham P. Lohar



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

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BY ORDER,
(Assistant Registrar)
ITAT, Mumbai