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

BEFORE SMT KAVITHA RAJAGOPAL, JM &
MS PADMAVATHY S, AM

I.T.A. No. 4627/Mum/2023
(Assessment Year: 2021-22)

Owens Corning c/o Owens Corning (India) Pvt. Ltd. 7th Floor, Alpha Building, Hiranandani Gardens, Powai Maharashtra-400076. **PAN : AAACO3242R**	Vs.	**The DCIT (International Tax), Circle-3(2)(2)** 16th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent**)

Appellant/Assessee by	:	Shri Sandeep Bhalla a/w Ms. Kinjal Mehta, CA
Revenue/Respondent by	:	Shri Anil Sant, Sr. DR
Date of Hearing	:	21.05.2024
Date of Pronouncement	:	27.05.2024

O R D E R

Per Padmavathy S, AM:

This appeal is against the final order of assessment passed by the Deputy Commissioner of Income Tax (International Tax), Circle-3(2)(2), Mumbai [for short 'the AO'] dated 31.10.2023 for the AY 2021-22. The assessee raised the following grounds of appeal:

"1.0 ***Re: Treating lease rentals received as 'Royalty':***

1.1 The Assessing Officer ('AO')/ Dispute Resolution Panel ('DRP') has erred in taxing the lease rentals received by the Appellant of Rs 28,49,43,136 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)

1.2 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 or 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.

1.3 The Appellant submits that the AO be directed to delete the addition of Rs 28,49,43,136 so made and to re-compute its total income accordingly.

2.0 ***Re.: General***

2.1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

2. The assessee is a company incorporated in USA and the flagship company of Owens Corning Group of Company USA a leading manufacturer of glass fibre. The assessee is a tax resident of USA. Owens Corning India Pvt. Ltd. (OCIPL) and Owens Corning Industries India Pvt. Ltd. (OCIIPL) are Indian Associate Company engaged in manufacture of glass fibre in India. The assessee filed the return of income for AY 2021-22 on 02.03.2022 declaring a total income of Rs. 8,58,82,885/-. The case was selected for scrutiny under CASS and the statutory notices were duly served on the assessee. During the year under consideration the assessee has claimed the receipt of Lease Rental Charges of Rs. 28,49,43,136/- from its Indian Associate Enterprise OCIPL as non-taxable. The assessee in the return of income has claimed the exemption by stating that the Lease Rental from OCIPL are receive towards lease of metal alloys and that alloy being not an equipment the income derived from the lease thereof cannot be taxed as royalty defined in Article-12 of the Double Tax Avoidance Agreement (DTAA) entered into between India and USA. The assessee has further stated that the assessee does

not have any permanent establishment (PE) in India as defined by Article-5 of the DTAA and therefore, the said income is also not taxable as business profits in terms of Article-7 of the DTAA. The Assessing Officer (AO) however treated the lease rental as royalty for the reason that assessee himself has offered the income as "Royalty" in AY 2007-08 and that the entire arrangement of the lease transaction is a colourable device done by the assessee to avoid tax. Accordingly the AO proceeded to make an addition of Rs. 28,49,43,136/- treating the entire lease payment as "Royalty". On further objections filed by the assessee the DRP confirmed the addition made by the AO. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

3. The ld. AR submitted that the issue of treating the receipts towards lease rental as Royalty is a recurring issue and that the co-ordinate bench in assessee's own case has deleted the addition made by the AO in AY 2012-13 to 2014-15, 2017-18 to 2019-20. The ld. AR further submitted that the lease rental income received by the assessee for the year under consideration is under the same agreement as applicable in the above AYs and therefore the issue is covered by the decision of the Co-ordinate Bench.

4. The ld. DR on the other hand submitted a written note in support of the order of the AO and the finding of the DRP.

5. We have heard the parties and perused the material available on record. We noticed that the co-ordinate bench has considered the similar issue in assessee's own case for AY 2019-20 (ITA No. 2042/Mum/2022 dated 15.02.2022) where it has been held that

"6. We have heard the rival contentions and perused the record. As submitted by the learned AR, we noticed that this is a recurring issue and the Coordinate Bench of the Tribunal has examined this issue in assessee's own case in ITA No. 2050/Mum/2016 relating to A.Y. 2012-13. The coordinate bench of Tribunal, vide its order dated 4.10.2021, has held that the lease rental income received by the assessee on leasing of alloys cannot be treated as royalty in the hands of the assessee in terms of India-USA DTAA and also under provisions of section 9(1)(vi) of the I.T. Act. For the sake of convenience we extract below the operative portion of the order passed by the Tribunal in A.Y. 2012-13 (referred supra) :

> *"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 perthe 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 assesse 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 OCIIPL 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."

7. We noticed that the decision rendered in A.Y. 2012-13 by the Coordinate Bench has been followed in assessee's own case in A.Y. 2013-14, 2014-15, 2017-18, & 2018-19. Accordingly, consistent with the view taken by the Tribunal in the earlier years on an identical issue, we hold that the lease rental income earned by the assessee cannot be treated as royalty income, both under provisions of DTAA and Income Tax Act. Accordingly we direct the Assessing Officer to delete the assessment of Rs. 10.31 crores made in the hands of the assessee as royalty income."

6. During the course of hearing the ld. AR submitted the copy of lease agreement under which the impugned payments are made. From the perusal of the said agreement, we notice that the lease payments made during the year are identical to the payments made during the earlier year under the said agreement.

Therefore, respectfully following the decision of the Co-ordinate Bench in assessee;'s own case for earlier AY, we hold that the lease rental income earned by the assessee cannot be treated as "Royalty" under the provisions of DTAA as well as the provisions of the Act. Accordingly the addition of Rs. 28,49,43,136/- made by the AO is hereby deleted.

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

Order pronounced in the open court on 27-05-2024.

Sd/-	***Sd/-***
(KAVITHA RAJAGOPAL)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai