IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" DELHI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI SUDHIR KUMAR, JUDICIAL MEMBER

ITAs No.1136, 1137, 1338, 1139, 1140, 1141 & 1142/Del/2023
Assessment Years 2005-06, 2006-07, 2009-10, 2011-12, 2013-14, 2014-15 & 2015-16

Pernod Ricard India Private Limited Atelier, No.10, Level-1, Worldmark - 2, Aerocity, New Delhi.	Vs.	**ACIT, Circle-31** New Delhi
TAN/PAN: AAACS4781P		
(Appellant)		(Respondent)

Applicant by:	Ms. Priya Tandon, Adv. Shri Anmol Anand, Adv.		
Respondent by:	Shri P.N. Barnwal, CIT-DR		
Date of hearing:	30	04	2024
Date of pronouncement:	19	07	2024

O R D E R

PER PRADIP KUMAR KEDIA - A.M.:

The captioned Appeals have been preferred by the assessee against the respective orders passed by the CIT(A) for captioned assessment years as tabulated below:

Sr. No.	***ITA/CO Nos.***	***Appeal by***	***A.Y.***	***Pr.CIT Order dated***	***Assessment Order dated***	***Remarks***
1.	*ITA No.1136/Del/2023*	*Assessee*	*2005-06*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*
2	*ITA No.1137/Del/2023*	*Assessee*	*2006-07*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*
3.	*ITA No.1138/Del/2023*	*Assessee*	*2009-10*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*
4.	*ITA No.1139/Del/2023*	*Assessee*	*2011-12*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*

5.	*ITA No.1140/Del/2023*	*Assessee*	*2013-14*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*
6.	*ITA No.1141/Del/2023*	*Assessee*	*2014-15*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*
7.	*ITA No.1142/Del/2023*	*Assessee*	*2015-16*	*CIT(A)-30, New Delhi order dated 20.02.2023*	*Assessment order dated 26.11.2021*	*Assessment Order under section 237 of the Income Tax Act, 1961.*

2. Briefly stated, the assessee-company is a private limited company incorporated in India. The Assessee is primarily engaged in the business of manufacture and sale of alcoholic beverages in India. The assessee-company is a wholly owned subsidiary of Peri Mauritius, Mauritius. Statedly, the holding company i.e. Peri Mauritius is a Tax Resident of Mauritius and is eligible to claim benefits under the Double Taxation Avoidance Agreement (DTAA) entered into between India and Mauritius.

2.1 During the Financial Year 2004-05 relevant to A.Y. 2005-06, the assessee-company has paid dividend of ₹50,02,48,000/- to its holding co. Peri Mauritius on which Dividend Distribution Tax (DDT) liability of ₹7,01,60,000/- was paid by the assessee-company in terms of provisions of Section 115O of the Act. Similar payments by way of DDT were paid by the assessee company on distribution of dividend for different assessment years under captioned appeals.

2.2 The assessee moved an application dated 18.02.2019 under Section 237 of the Act before the AO seeking refund due to excess payment of DDT for all such years. To contend excess tax paid by way of DDT, the assessee pointed out before the AO that while the DDT has to be paid as per the rates [12.5% plus surcharge etc. which was enhanced to 15% + surcharge etc from AY 2007-08] prescribed under Section 115-O of the Act, the Article-10 of Indo-Mauritius Treaty provides for taxation on dividend distribution at a lower rate of 5% *qua* the rate prescribed under Section 115-O of the Act. As a corollary, the assessee-company has paid DDT in excess of what was actually liable to be paid in terms of treaty.

Hence, in terms of Section 237 of the Act, the assessee is eligible for a refund of excess DDT of varied amounts for all such years detailed herein.

In INR crores

A.Y	*Dividend paid*	*DDT paid*	*DDT @ 5%*	*Claim for refund*
		(A)	*(B)*	*(A-B)*
2005-06	*50.02*	*7.02*	*2.51*	*4.51*
2006-07	*26.01*	*3.65*	*1.30*	*2.35*
2009-10	*126.07*	*21.43*	*6.31*	*15.12*
2011-12	*497.29*	*82.59*	*24.86*	*57.73*
2013-14	*476.30*	*77.27*	*23.81*	*53.45*
2014-15	*740.37*	*125.83*	*37.02*	*88.81*
2015-16	*467.07*	*79.38*	*23.35*	*56.03*

3. The AO however refused to entertain the claim of refund on account of excess DDT paid on two counts (i) the Finance Act, 1997 changed the system of taxation and made dividend chargeable in the hands of the payer-company. The claim towards excess payment towards tax on distributed profits , if any, can be examined only where it is made by the shareholder and not by the company. The dividend in question is not recorded as income of the captioned assessee and therefore, the applicant-assessee is not entitled to claim refund due to purported excess payment of tax on dividend distribution (ii) the DDT refund claim was not made by the assessee in the Return of Income (ROI) and consequently in terms of *Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC)*, the assessee cannot claim refund in the absence of any revised return filed in this regard. The application moved under Section 237 was thus rejected.

4. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) also declined to interfere with the action of the AO for varied reasons. The relevant operative paragraph of the order of the CIT(A) is reproduced hereunder:

"7.3 On careful perusal of the facts on records and the legal position, it is observed:-

(a) The dividend is an income in the hands of the shareholders not in the hands of the appellant.

(b) Provisions of Section 115-O were included in the statute to collect the taxes at the time of declaration/distribution of dividend by the domestic companies for the administrative convenience. It did not change the character of the dividend income and it remains the income of shareholders.

(c) The benefit of DTAA is available to the eligible non-resident not to the domestic companies. In case of excessive withholdings/payment of taxes on behalf of non-resident, the benefit of such excessive payment shall arise only to the beneficiary non-resident not to the domestic deductor.

(d) Without commenting on the applicability of India-Mauritius treaty in the case of M/s. Peri Mauritius as it is not a matter in this appeal, it is observed that even if M/s. Peri Mauritius is the beneficiary of the treaty, the refund of excess payment cannot be claimed by the appellant-company as payment of any such refund will not be benefitting the non-resident shareholders but the company.

7.4 In view of the above observations, I find that the decision of Ld. Assessing Officer in this case is correct as per law and is accordingly, sustained. The appeal filed by the appellant is dismissed."

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. The ld. counsel for the assessee, at the outset, adverted to Section 237 of the Act and submitted that such provision entitles the assessee to claim refund of excess tax paid by it owing to inadvertence or mistake committed. In the present case, the assessee-company while making distribution / remittance of dividend to its non-resident shareholder (a tax resident of Mauritius) has paid DDT at applicable rates ranging between 12.5% to 15% + surcharge + cess under Section 115-O of the Act instead of 5% applicable to residents of Mauritius in terms of Article 10(2)(a) of Indo-Mauritius DTAA on dividend payment. The ld. counsel submitted that shareholder M/s. Peri Mauritius being a tax resident of Mauritius, the tax liability on dividend stands @ 5% only as per India-Mauritius DTAA. The excess tax paid by the assessee while making the distribution of dividend under Section 115-O of the Act is thus liable to refund under Section 237 of the Act. The ld. counsel adverted to provisions of Section 237 of the Act, Section 115-O of the Act and

Article 10 of DTAA to contend that the revenue authorities were not justified in law in retaining the excess distribution tax paid by the assessee-company over and above the beneficial tax rate of 5% applicable in terms of Article-10 of DTAA. The ld. counsel thus urged for a direction to the AO to refund the DTT paid in excess of 5% by the assessee-company for different assessment years.

7. The ld. CIT-DR, on the other hand, relied upon the order passed by the AO under Section 237 of the Act and the first appellate order passed thereon. In furtherance, the ld. CIT-DR submitted that a plain reading of Section 237 would reveal that claim of refund of alleged excess tax, if any, is plausible only where the amount is chargeable in the hands of the assessee seeking refund. In the instant case, the dividend is not chargeable to tax in the hands of the assessee payer *per se*. The dividend income has not been included as taxable income. The tax has been paid by the assessee in terms of Section 115-O of the Act classified as 'special provision' relating to 'Tax in Distribution Profits of Domestic Companies'. As per the overriding provisions of Section 115-O, an obligation has been shifted upon the domestic company proposing to declare, distribute or pay amounts by way of dividend to its shareholders in departure to normal rule of taxation of dividends in the hands of recipients. Section 115-O has merely caused an additional burden upon the company declaring / distributing dividend towards payment of DDT which shall be regarded as additional income tax on distributed profits. Thus, the assessee in the instant case has paid distribution tax at specified rate as provided under Section 115-O owing to special provision. There is no legal obligation to pay tax upon the shareholder who is recipient of the dividend income in view of Section 115-O of the Act notwithstanding default, if committed, in payment of DDT by the Domestic Company distributing dividend. The payment of DDT thus is not on behalf of the shareholder but owing to obligation squarely placed upon the domestic company distributing profits by way of dividend. The payment of tax is to be regarded as additional income tax on account of

distribution of profits in distinction to vicarious liability of payment of tax on behalf of shareholder. Hence, the benefit of Article-10 is not available to the domestic company. In the absence of any obligation towards payment of taxation upon the beneficial owner of the dividend, the benefit of treaty in terms of provisions of Article-10 is not triggered at all. The Ld CIT-DR also pleaded that the issue is no longer res integra. The issue has been duly examined by the special bench in the case of DCIT vs. Total Oil India (P) Ltd (2023) 149 taxmann.com 332 (Mum-SB) wherein the issue was decided in favour of the revenue. The CIT-DR thus contended that the view of the lower authorities are in accordance with law and cannot be faulted. Hence no interference with the appellate order under challenge is called for.

8. We have carefully considered the rival submissions and perused the material available on record.

9. It is the case of the assessee that while the assessee has paid DDT under Section 115-O of the Act at applicable rate under the Act which is 12.5% + surcharge + cess for A.Ys. 2005-06 and 2006-07 and 15% + surcharge + cess for remaining years in appeal, the assessee in terms of Article 10(2)(a) of DTAA between India and Mauritius is liable to pay lower rate of tax, i.e. 5% on dividend payable to the shareholder (tax resident of Mauritius) and consequently assessee is entitled to refund of excess tax collected by the revenue on dividend distributed and paid to the Holding company (a tax resident of Mauritius). The assessee has thus alleged that the Revenue Authorities have wrongfully retained excess tax paid on remittance of dividend and thus wrongfully denied the benefit of treaty available to the assessee.

10. We straightaway take note of the special bench decision in the case of Total Oil (supra). In that case, the assessee M/s Total Oil India Private Ltd., an Indian Co., declared/paid dividend for AY 2016-17. One of the shareholders to whom dividend was to be paid was a Non Resident (Tax

resident of France). Similar plea was raised in that case that the rate at which tax under 115-O of the Act had to be paid could not be more than the rate at which dividend could be taxed in the hands of the Non Resident shareholder in India under the DTAA between India and France as the rate of tax prescribed in the DTAA is generally less than the rate prescribed in section 115-O. On nuanced analysis, the Special bench formed a view that dividend declared by a domestic company to a non resident should be taxed at the rate given under section 115-O and not the beneficial rates given under DTAA for Non Residents unless the contracting state to which the treaty intends to extend the treaty protection to the domestic company. It thus observed that 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. No such protection has been shown to be extended in the instant case.

11. The issue is thus squarely covered in favour of the revenue and against the assessee. In the instant case, the treaty benefit is thus not available in relation to provisions of 115-O of the Act. The provisions of section 237 is thus of no avail.

12. As a result, all the captioned appeals of the Assessee are thus dismissed.

Order pronounced in the open Court on 19 July, 2024.

Sd/-
[SUDHIR KUMAR]
JUDICIAL MEMBER

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: July**, 2024**
Prabhat