।आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "C" :: PUNE

BEFORE DR.DIPAK P. RIPOTE, ACCOUNTANT MEMBER
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.868/PUN/2022

निर्धारण वर्ष / Assessment Year: 2015-16

Piaggio Vehicles Private Ltd., Sky One Corporate Park, Ground Floor, Survey No.239/02, near Pune Airport, Pune – 411032. PAN: AABCP1225G	V s	The Assistant Commissioner of Income Tax, Circle-4, Pune.
Appellant/ Assessee		Respondent / Revenue

Assessee by	Shri Siddhesh Chaugule – AR
Revenue by	Shri Vidya Ratan - DR
Date of hearing	18/12/2024
Date of pronouncement	23/12/2024

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the assessee against the order of ld.Commissioner of Income Tax(Appeals)-13, Pune for Assessment Year 2015-16 dated 06.10.2022 passed under section 250 of the Income tax Act, 1961. The Assessee has raised the following grounds of appeal :

"1. Refund of excess taxes paid on dividend distributed

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not granting the benefit of Article 11 of the India-Italy Double Taxation Avoidance Agreement (DTAA') in determining the Dividend Distribution Tax ('DDT') payable, without appreciating the fact that the dividend declared and paid by the Appellant to Piaggio & C. S.p.A., Italy, being tax on dividend income should be liable to tax at the rate prescribed in the India-Italy DTAA Consequently, the refund of excess tax (DDT) paid by the Appellant be granted.

The Appellant craves leave to add to, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

Submission of ld.AR :

2. Ld.AR for the Assessee submitted that the issue involved is covered against the assessee in assessee's own case by ITAT Order in ITA No.611/PUN/2024 for A.Y.2016-17, in which ITAT followed Special Bench Decision in the case of Total Oil India Private Limited, [2023] 104 ITR (T) 1 (Mumbai Trib) (SB). Ld.AR filed written submission. Relevant part of the written submission is reproduced as under :

"Appellant's rebuttals

a. As per section 3 read with section 4 of the Act, tax under the Act can be only levied on "income While section 115-0 is a

notwithstanding section, it cannot create a charge other than on income"

b. In the Tata Tea decision, the constitutional validity of section 115-0 of the Act was challenged by the assessee (which was in the business of cultivating and processing tea) before the Hon'ble Calcutta HC. While the Hon'ble HC upheld the constitutional validity of this provision, it held that the additional tax (i.e. the DDT) could be imposed only on 40% of the income (because 40% of the company's total income was attributable to the tea-processing activities and, hence, taxable) and not on the balance 60% of the income (because that income was attributable to the agricultural activities, and hence, regarded as "agricultural income" beyond the purview of the Act). The Revenue challenged this decision before the Hon'ble SC

c. The Hon'ble SC noted that the key issue was whether section 115-0 of the Act, which imposes additional tax on dividends paid by a domestic company, was within the fold of Entry 82 of the Constitution, which embraces the entire field of "tax on income"

d. Referring to section 2(24) of the Act, it noted that the definition of "income" includes "dividend" and hence, it held that imposition of additional tax on dividend was indeed, tax on income, and clearly covered by Entry 82 of List 1 to Seventh Schedule of the Constitution ("Entry 82").

e. While it is true that the question raised before the Hon'ble SC was relating to constitutional validity of DDT, it is imperative to note that, to decide on the matter of constitutional validity of DDT, it was essential to determine the characterization of DDT and whether the same is on 'income (to fall within Entry 82).

f. Thus, the Hon'ble SC in Tata Tea decision, has, in-fact decided on the exactly identical question under consideration i.e. regarding the characterization of DDT, and the Hon'ble SC has succinctly opined that DDT is a tax on 'dividend income (and hence, covered by Entry 82) and not on the income/profits of the company declaring dividend.

Correspondingly, the said ratio laid by the Hon'ble SC in Tata Tea decision is a binding principle in determining the nature/ characterization of DDT.

h. The Hon'ble SB has not considered the above aspects/ observations of the Hon'ble SC in Tata Tea decision in this context. Consequentially, the Hon'ble Special Bench appears to have inadvertently noted that Hon'ble SC was not dealing with the nature of DDT.

d. Additionally, the Hon'ble SB has missed to note the following important aspects:

The language of section 115-0 itself states that DDT is an "additional tax' on 'any amount declared, distributed or paid by such company by way of dividends'. Hence, it would not be appropriate to ignore the 'dividend income part and merely conclude that DDT is a "tax on profits of the domestic company

The aforesaid observation is contrary to the principle laid down by the Hon'ble SC in Tata Tea decision, wherein it is clearly laid down that DDT charged under section 115- O is not on the income/ profits of the company declaring dividend.

The above is, in-fact, contrary to the Hon'ble SB's own observation at para 52 of the aforesaid order, wherein the Hon'ble SB has noted that "If one says Dividend is share of profits declared as distributable among the shareholders, it does not mean that the character of the profits distributed by the company as dividend retain the same character when it reaches the hands of the shareholders"

The reliance placed by the Hon'ble SB on the G&B HC decision in this regard is misplaced. In this context, it is important to note that, the G&B HC decision has merely laid down the principle that DDT is a tax on the domestic company (which is undisputed). The said principle has also been upheld by in the G&B SC decision. However, the said decisions cannot be regarded as concluding that 'DDT is not a tax on dividend, since those cases pertained to the issue concerning disallowance of expenditure under section 14A of the Act. These

decisions, therefore, limited their observations to the applicability of section 14A of the Act on dividend income.

Also, the G&B HC decision and the G&B SC decision have not laid down any principle contrary to those laid down by the Hon'ble SC in Tata Tea decision and both the decisions operate in different fields. As discussed above, since the Tata Tea decision of Hon'ble SC specifically discusses regarding the characterization and validity of DDT under section 115-0, the said ruling is a binding in the present context."

Submission of ld.DR :

3. Ld.Departmental Representative(ld.DR) for the Revenue relied on the order of ITAT in assessee's own case forAssessment Year 2016-17.

Findings & Analysis :

4. We have heard both the parties and perused the records. In this case, assessment order under section 143(3) r.w.s. 144C(3) was passed on 31.01.2019. Aggrieved by the assessment order, assessee filed an appeal before ld.CIT(A) on 27.02.2019. Then, vide letter dated 15.06.2022, Assessee requested ld.CIT(A) to admit additional ground. The additional ground was as under :

"7. Refund of excess taxes paid on the dividend distributed

On facts and circumstances of the case and in law, as Dividend Distribution Tax (DDT) represents tax on dividend income, the Appellant should be granted the benefit of Article II of the India-Italy double Taxation Avoidance Agreement (DTAA"), that the dividend declared and paid by the Appellant to Piaggio & C. S.p.A., Italy,

being tax on dividend income should be liable to tax at the rate prescribed in the India-Italy DTAA. Consequently, excess tax (DDT) paid by the Appellant should be refunded."

4.1 The ld.CIT(A) called-for a Remand Report from the Assessing Officer regarding admission of additional ground. The Assessing Officer objected to the admission of additional ground. However, Assessing Officer without prejudice filed following submission before ld.CIT(A) as under :

Part of Remand Report :

04. The assessee has raised the additional ground before the CIT(A) that the rate of Dividend Distribution tax Paid on dividend paid to the Non-resident shareholders should be restricted as per the applicable Double Taxation Avoidance agreement (DTAA). In this regard, the provision of sub-section 4 of section 115-O restrict the assessee to any claim.

The relevant portion is reproduced as under:

"The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid."

In view of the above, the assessee company cannot claim any credit on tax on distributed profits. Hence, the additional ground raised by the assessee is not acceptable."

4.2 Ld.CIT(A) admitted the additional ground, however, ld.CIT(A) decided the additional ground against the assessee. Ld.CIT(A) observed that assessee has not furnished how dividend have been taxed both in India and Italy. Aggrieved by the order of the ld.CIT(A), assessee has filed appeal before this Tribunal.

5. It is observed that identical issue came for consideration in assessee's own case for A.Y.2016-17 in ITA No.611/PUN/2024. ITAT in ITA No.611/PUN/2024 has followed the decision of ITAT Special Bench in Total Oil India Private Limited, [2023] 104 ITR (T) 1 (Mumbai Trib) (SB). No contrary decision has been brought to our notice. One of us is signatory to the ITAT Order in ITA No.611/PUN/2024. The Special Bench of ITAT Mumbai in the case of Total Oil India Private Ltd(supra) has held as under :

> *"56. By the Finance Act, 1997, the Government introduced simplistic system by introduction of Chapter XII-D to the Act, comprising of Sec.115-O, 115-P and 115Q. The tax so paid was treated as the final tax on dividends and the dividends were exempt from any further incidence of tax in India in the hands of the shareholders. The Memorandum to the Finance Act, 1997, explaining the reasons for introduction of Sec.115O specifies two fold objectives (i) procedure for tax collection in the form of Tax Deduction at Source (TDS) was cumbersome and involves a lot of paper work and collection from the company would be much easier. (ii) Since there was no tax incidence in the hands of the shareholder that would encourage investment in the shares of domestic companies. Sec.115O so introduced in Chapter XII-D of the Act reads thus:*
>
> > *"115-O. (1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of June, 1997, whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of ten per cent.*

(1A) Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on distributed profits under sub-section (1) shall be payable by such company.

(2) The principal officer of the domestic company and the company shall be liable to pay the tax on distributed profits to the credit of the Central Government within fourteen days from the date of—

(a) declaration of any dividend; or

(b) distribution of any dividend; or

(c) payment of any dividend, whichever is earliest.

(3) The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid.

(4) No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been charged to tax under sub-section (1) or the tax thereon."

58. A plain reading of the provisions of Sec.115O shows that it creates a charge to additional income tax on any amount declared, distributed or paid by domestic company by way of dividend for any assessment year. The tax so charged is "in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year". The additional income tax is referred to as "tax on distributed profits" commonly referred to as "Dividend Distribution Tax". It is a tax on "distributed profits" and not a tax on "dividend distributed". The point of time at which the additional income tax is payable by the domestic company is laid down in Sec.115O, viz, within fourteen days from the date of—

(a) declaration of any dividend; or

(b) distribution of any dividend; or

(c) payment of any dividend,

> *Whichever is earliest. The person liable for payment of such additional tax is "principal officer of the domestic company and the company". The payment has to be made to the credit of the Central Government. Sec.115O is thus, a code by itself, in so far as levy and collection of tax on distributed profits. The non obstante clause in Sec. 115O "notwithstanding anything contained in this Act but subject to the provisions of this section (i.e., Sec.115O)" is an indication that the charge under the said section is independent and divorced from the concept of "total income" under the Act. The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid. No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been charged to tax under sub-section (1) of Section 115 O or the tax thereon. This scheme of Sec.115-O was abolished by the Finance Act of 2002. Section 115-O was reintroduced by Finance Act, 2003 reverting to the simplistic system. Ultimately, DDT was abolished by the Finance Act, 2020 and the Government reverted to the classical system of taxation of dividend.*

70. On behalf of the assessee, it was argued that Supreme Court has laid down the principle that DDT u/s.115-O is nothing but a tax in the hands of the shareholder because they have gone by the nature of income in the hands of the shareholder and not in the hands of the Domestic Company paying dividend. This argument in our view is devoid of any merit. As was submitted by the learned DR, the Supreme Court while dealing with the constitutional validity of Sec.115 O of the Act has held that under section 2(24)(ii) dividend is included in 'income' and is thus covered by Entry 82 of List I to Seventh Schedule, "taxes on income, other than agricultural income". The argument on behalf of the assessee was that in "pith and substance" DDT was a tax on Agricultural income, which was rejected by the Hon'ble Supreme Court. The law is well settled that a judicial precedent is only "an authority for what it actually decides and not what may come to follow from some observations which find place therein". The Hon'ble Supreme Court was not dealing with the nature of DDT as to whether it is tax on the company or a tax on the shareholder. Thus, in our considered view the decision rendered in the case of Tata Tea Co. Ltd. (supra) does not support the cause of assesses.

72. On appeal against the decision of the Hon'ble Bombay High Court, the Hon'ble Supreme Court, in the judgment reported as Godrej & Boyce Mfg Co Ltd Vs DCIT (supra), has observed that "the fact that section 10(33) and section 115 O of the Act were brought in together; deleted and reintroduced in a composite manner, also, does not assist the assessee" and that "if the argument is that tax paid by the dividend paying company under section 115-O is to be understood to be on behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid" which is wholly incongruous in view of the provisions of Section 10(33). The payment of dividend distribution tax under section 115 O does not discharge the tax liability of the shareholders. It is a liability of the company and discharged by the company. Whatever be the conceptual foundation of such a tax, it is not a tax paid by, or on behalf of, the shareholder.

74. Dealing with the first question, the Hon'ble Supreme Court made the following observations:

> *"30. While it is correct that Section 10(33) exempts only dividend income under Section 115-O of the Act and there are other species of dividend income on which tax is levied under the Act, we do not see how the said position in law would assist the assessee in understanding the provisions of Section 14A in the manner indicated. What is required to be construed is the provisions of Section 10(33) read in the light of Section 115-O of the Act. So far as the species of dividend income on which tax is payable under Section 115-O of the Act is concerned, the earning of the said dividend is tax free in the hands of the assessee and not includible in the total income of the said assessee. If that is so, we do not see how the operation of Section 14A of the Act to such dividend income can be foreclosed. The fact that Section 10(33) and Section 115-O of the Act were brought in together; deleted and reintroduced later in a composite manner, also, does not assist the assessee. Rather, the aforesaid facts would countenance a situation that so long as the dividend income is taxable in the hands of the dividend paying company, the same is not includible in the total income of the recipient assessee. At such point of time when the said position was reversed (by the Finance Act of 2002; reintroduced again by the Finance Act, 2003), it was the assessee who was liable to pay tax on such dividend income. In such a situation the assessee was entitled under Section 57 of the Act to claim the benefit of exemption of expenditure incurred to earn such income. Once Section 10(33) and 115-O was reintroduced the position was reversed. The above,*

actually fortifies the situation that Section 14A of the Act would operate to disallow deduction of all expenditure incurred in earning the dividend income under Section 115-O which is not includible in the total income of the assessee.

31. So far as the provisions of Section 115-O of the Act are concerned, even if it is assumed that the additional income tax under the aforesaid provision is on the dividend and not on the distributed profits of the dividend paying company, no material difference to the applicability of Section 14A would arise. Sub-sections (4) and (5) of Section 115-O of the Act makes it very clear that the further benefit of such payments cannot be claimed either by the dividend paying company or by the recipient assessee. The provisions of Sections 194, 195, 196C and 199 of the Act, quoted above, would further fortify the fact that the dividend income under Section 115-O of the Act is a special category of income which has been treated differently by the Act making the same non-includible in the total income of the recipient assessee as tax thereon had already been paid by the dividend distributing company. The other species of dividend income which attracts levy of income tax at the hands of the recipient assessee has been treated differently and made liable to tax under the aforesaid provisions of the Act. In fact, if the argument is that tax paid by the dividend paying company under Section 115-O is to be understood to be on behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid. Such a position in law would be wholly incongruous in view of Section 10(33) of the Act.

32. A brief reference to the decision of this Court in Commissioner of Income-Tax vs. Walfort Share and Stock Brokers P. Ltd. (supra) may now be made, if only, to make the discussion complete. In Walfort Share and Stock Brokers P. Ltd.(supra) the issue involved was: "whether in a dividend stripping transaction the loss on sale of units could be considered as expenditure in relation to earning of dividend income exempt under Section 10(33), disallowable under Section 14A of the Act?"

33. While answering the said question this Court considered the object of insertion of Section 14A in the Income Tax Act by Finance Act, 2001, details of which have already been noticed. Noticing the objects and reasons behind introduction of Section

14A of the Act this Court held that: "Expenses allowed can only be in respect of earning of taxable income." In paragraph 17, this Court went on to observe that: "Therefore, one needs to read the words "expenditure incurred" in section 14A in the context of the scheme of the Act and, if so read, it is clear that it disallows certain expenditure incurred to earn exempt income from being deducted from other income which is includible in the "total income" for the purpose of chargeability to tax." The views expressed in Walfort Share and Stock Brokers P. Ltd. (supra), in our considered opinion, yet again militate against the plea urged on behalf of the Assessee.

34. For the aforesaid reasons, the first question formulated in the appeal has to be answered against the appellant-assessee by holding that Section 14A of the Act would apply to dividend income on which tax is payable under Section 115-O of the Act."

[Emphasized by us]

The aspect which weighed with the Hon'ble Supreme Court was the fact that the payment of DDT was not a payment on behalf of the shareholder. Leaving aside the question whether it is a tax on company or shareholder, the position that remains undisturbed is the conclusion that "DDT is not a payment on behalf of the shareholder" by the domestic company. The observations of the Hon'ble Bombay High Court regarding the legal characteristics of DDT that it is tax on a company paying the dividend and "is chargeable to tax on its profits as a distinct taxable entity and that the domestic company paying DDT does not do so on behalf of the shareholder nor does it act as an agent of the shareholder in paying the tax under Section 115-O, cannot therefore be said to have been diluted or overruled by the Hon'ble Supreme Court. It can be said that the Hon'ble Supreme Court has taken a different basis to reach the same conclusion but without diluting the reasoning of the Hon'ble Bombay High Court that DDT is not a tax paid by the domestic company on behalf of the shareholder. The additional reasoning in the Hon'ble Bombay High Court's judgment is the conclusion that it is a tax on domestic company on its profits/amount payable on declaration, distribution or payment, as the case may be, of amount as dividend out of accumulated profits. Therefore the argument that DDT is paid on behalf of the shareholder and has to be regarded as payment of liability of the shareholder, discharged by the domestic company paying DDT, is neither correct nor does it flow from the ratio laid

down in the decision by the Hon'ble Apex Court in the case of Godrej & Boyce (supra).

75. In the case of Small Industries Development Bank of India Vs Central Board of Direct Taxes (supra) the Hon'ble Bombay High Court had an occasion to consider the question whether charge u/s.115 O of the Act is on the company's profits and not income in the hands of the shareholder. The Assessee in this case was a statutory corporation that came into existence by virtue of the Small Industries Developments Bank of India Act, 1989 (hereinafter referred to as the SIDBI Act). Sec.50 of the said Act, exempts, the Assessee from payment of income tax on any income, profits or gains derived or any amount received by it. Section 50 of the SIDBI Act reads as under:

> *"Notwithstanding anything to the contrary contained in the Income-tax Act, 1961 or in any other enactment for the time being in force relating to income-tax or any other tax on income, profits or gains, the Small Industries Bank shall not be liable to pay income-tax or any other tax in respect of:- (a) any income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that Fund, and b) any income, profits or gains derived or any amount received by the Small Industries Bank." 10. Section 50 of the SIDBI Act contains non-obstante clause giving overriding effect over provisions of Income Tax Act in respect of any income, profits, gains derived or any amount received by the company. It is well settled that a provision beginning with non-obstante clause must be enforced and implemented by giving effect to the provisions of the Act and by limiting the provisions of other laws."*

The assessee paid dividend to it's shareholders. The question before the Court was whether it has to pay DDT u/s.115O of the Act. If Dividend was to be regarded as, "(a) any income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that Fund, and b) any income, profits or gains derived or any amount received by the Small Industries Bank....." tax u/s. 115-O was not payable. The assessee relied on the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Mfg. Co. Ltd. (supra) and contended that the court in Godrej and Boyce case (supra) held that the charge under sub-section (1) of Section 115-O of the said Act is on the profits of the domestic company and more specifically on that part of the

profits which is declared and distributed by way of dividend. Therefore, it was submitted that the Bank was entitled to refund of the tax amount paid under protest by it. The Court after discussing the effect of the non-obstante clause in Sec.50 of SIDBI Act, and holding that those provisions will override Sec.115O of the Act, further went on to hold that dividend is distributed from and out of the accumulated profits and therefore would fall within the ambit of the expression "income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that fund, and be any income profits or gains derived or any amount received by the Small Industries Bank". The following were the relevant observations by the Hon'ble High Court:

> *"14. Dividend is defined in Section 2(22) of the IT Act to, inter alia, include any distribution by a company of accumulated profits, which entails releasing any assets by the company to its shareholders. In terms of Explanation 2 to Section 2(22) of the said Act, the expression accumulated profits includes all company profits up to the date of distribution or payment thereof. It appears that the transfer of profits of Petitioner to IDBI in terms of Section 29(2) of SIDBI Act entails payment by Petitioner to IDBI. This payment or distribution of Petitioner's liquid assets constitutes dividend distributed by Petitioner out of its accumulated profits as envisaged under Section 2(22)(a) of the IT Act. It needs to be noted that the charge under sub-section (1) of Section 115-O of the said Act is on the company's profits, more specifically on that part of the profits which is declared, distributed or paid by way of dividend. The charge under sub-section (1) of Section 115-O of the said Act is not on income by way of dividend in the shareholder's hands. Therefore, the additional income-tax payable on profits of a domestic company under Section 115-O of the said Act is not a tax on dividend. In our considered opinion, the amount distributed or paid by way of dividend falls in the category of income, profit or gains derived .*
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> *15. Once it is held that the amount distributed or paid by Petitioner by way of dividend falls in the category of profits under Section 50 of the SIDBI Act, on any income, profits, gains derived or any amount received, Petitioner shall not be liable to pay income tax or any other tax in the relevant years. Therefore Petitioner was not liable to*

pay additional income tax under Section 115-O of the said Act. In the circumstances, Petitioner's payments under protest need to be refunded to the Petitioner."

[Emphasized by us]

It is thus clear from the aforesaid decision that charge u/s.115 O of the Act is on the company's profits and not income in the hands of the shareholder.

76. The aforesaid decision by Hon'ble Jurisdictional High Court has also taken note of the decision of Hon'ble Supreme Court of India in the case of Godrej & Boyce (supra). We have already expressed the view that the decision of the Hon'ble Supreme Court in the case of Godrej & Boyce (Supra) does not dilute the principle laid down by the Hon'ble Bombay High Court in the case of Godrej & Boyce (supra). The decision in the case of SIDBI (supra) reiterates this position.

78. Another argument that was advanced was that the incidence of tax in the form of DDT is on the domestic company but in effect it is a tax paid on behalf of the shareholder and it is income of the shareholder that is sought to be taxed albeit in the hands of the domestic company. In this regard, the proposition advanced by the learned DR was that in fundamental concept of income-tax there is nothing which prevents imposition of immediate and apparent incidence of tax on a person other than person whose income is to be assessed, i.e., the legislature has power to enact provisions imposing tax liability on domestic company on income of shareholder (even if it is construed as income of shareholder without conceding that it was tax on income of the domestic company). In this regard he relied on decision of Hon'ble Madras High Court in the case of B.M. Amin Umma Vs. ITO 26 ITR 137 (Mad). In the aforesaid case the constitutional validity of the provisions of Section 16(3)(a)(ii), of Income Tax Act, 1922 (equivalent to Sec.64 of the Act), was challenged. The said provision provided for inclusion of the income of wife or minor child of an individual in the income of the individual. It was challenged on the ground that it was beyond the legislative powers of the Central Legislature conferred on it by entry 54 of List 1 of the Seventh Schedule of the Government of India Act, 1935. The Hon'ble Madras High Court held that the incidence of the tax whether it is the immediate and apparent incidence, or whether it is the ultimate or real economic incidence, does not, limit the taxing power given to the Central Legislature by entry 54 of list 1. All that entry 54 requires is that the tax must be a tax on Income other than agricultural income. The impugned provision in Section 16(3) (a) (ii), Income-tax Act, 1922 provides only for a tax on income. It does not cease to be a tax on income either in

form or in substance, though it provides for the incidence of the tax not on the person whose income is assessed to tax, but on another. In this case that incidence of the tax on the minor child's income falls under the statute on a parent of that minor. The Hon'ble Court went on to hold that there is nothing in the fundamental concepts of income-tax even to prevent the imposition of the immediate and apparent incidence of the tax on a person other than the person whose income is to be assessed. This decision was approved by the Hon'ble Supreme Court in the case of Balaji Vs. ITO 1962 AIR 123 (SC). These decisions again point to the fact that DDT is a tax on the distributed profits of a domestic company and is a tax on profits of the domestic company and not on the shareholder.

79. As we have discussed earlier, the purpose of DTAA is to avoid double taxation/allocation of taxing rights between two Sovereign nations. When we hold that DDT is a tax not on the shareholder but on the amount declared, distributed, paid as the case may be, by way of dividend and being a tax on income of the company, there is no double taxation of the same income. DTAAs seek to reduce the impact of double taxation which has harmful effects on the international exchange of goods and services and cross-border movements of capital, technology and persons. Bilateral tax treaties address instances of double taxation by allocating taxing rights to the contracting states. Most existing bilateral tax treaties are concluded on the basis of a model, such as the OECD Model Tax Convention or the United Nations Model, which are direct descendants of the first Model of bilateral tax treaty drafted in 1928 by the League of Nations. As a result, while there can be substantial variations between one tax treaty and another, double tax treaties generally follow a relatively uniform structure, which can be viewed as a list of provisions performing separate and distinct functions: (i) Articles dealing with the scope and application of the tax treaty, (ii) Articles addressing the conflict of taxing jurisdiction, (iii) Articles providing for double taxation relief, (iv) Articles concerned with the prevention of tax avoidance and fiscal evasion, and (v) Articles addressing miscellaneous matters (e.g. dministrative assistance). Articles 23A and 23B of the OECD model convention give methods to eliminate double taxation.

80. A reading of Article 10 of the model OECD DTAA shows that Dividends paid by a company which is a resident of a Contracting State, say India to a resident of the other Contracting State (say France) may be taxed in that other State (France). However, if the beneficial owner of the Dividend is a resident in France, the tax so charged shall not exceed specified percent. The first condition is that the non-resident in France should be taxed in India. We have to look

at the DTAA from the recipients taxability perspective. DDT is paid by the domestic company resident in India. It is a tax on its income and not tax paid on behalf of the shareholder. In such circumstances, the domestic company u/s.115-0 does not enter the domain of DTAA at all.

81. If domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect. In the Treaty between India and Hungary, the Contracting States have extended the Treaty protection to the dividend distribution tax. It has been specifically provided in the protocol to the Indo Hungarian Tax Treaty that, 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. While making Reference in the case of Total Oil (supra), the ld. Division Bench has made the following observations on this aspect:

> *"(f) Wherever the Contracting States to a tax treaty intended to extend the treaty protection to the dividend distribution tax, it has been so specifically provided in the tax treaty itself. For example, in India Hungry Double Taxation Avoidance Agreement [(2005) 274 ITR (Stat) 74; Indo Hungarian tax treaty, in short], it is specifically provided, In the protocol to the Indo Hungarian tax treaty it is specifically stated that "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". That is a provision in the protocol, which is essentially an integral part of the treaty, and the protocol to a treaty is as binding as the provisions in the main treaty itself. In the absence of such a provision in other tax treaties, it cannot be inferred as such because a protocol does not explain, but rather lays down, a treaty provision. No matter how desirable be such provisions in the other tax treaties, these provisions cannot be inferred on the basis of a rather aggressively creative process of interpretation of tax treaties. The tax treaties are agreements between the treaty partner jurisdictions, and agreements are to be interpreted as they exist and not on the basis of what ideally these agreements should have been.*
>
> *(g) A tax treaty protects taxation of income in the hands of residents of the treaty partner jurisdictions in the other treaty partner jurisdiction. Therefore, in order to seek treaty protection of an income in India under the Indo French tax*

treaty, the person seeking such treaty protection has to be a resident of France. The expression 'resident' is defined, under article 4(1) of the Indo French tax treaty, as "any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Obviously, the company incorporated in India, i.e. the assessee before us, cannot seek treaty protection in India- except for the purpose of, in deserving cases, where the cases are covered by the nationality non-discrimination under article 26(1), deductibility non-discrimination under article 26(4), and ownership non-discrimination under article 24(5) as, for example, article 26(5) specifically extends the scope of tax treaty protection to the "enterprises of one of the Contracting States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State". The same is the position with respect of the other non-discrimination provisions. No such extension of the scope of treaty protection is envisaged, or demonstrated, in the present case. When the taxes are paid by the resident of India, in respect of its own liability in India, such taxation in India, in our considered view, cannot be protected or influenced by a tax treaty provision, unless a specific provision exists in the related tax treaty enabling extension of the treaty protection.

(h) Taxation is a sovereign power of the State- collection and imposition of taxes are sovereign functions. Double Taxation Avoidance Agreement is in the nature of self-imposed limitations of a State's inherent right to tax, and these DTAAs divide tax sources, taxable objects amongst themselves. Inherent in the self-imposed restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices. The dividend distribution tax, not being a tax paid by or on behalf of a resident of treaty partner jurisdiction, cannot thus be curtailed by a tax treaty provision."

82. We are of the view that the above exposition of law is correct and we agree with the same. Therefore, the DTAA does not get triggered at all when a domestic company pays DDT u/s. 115O of the Act.

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.115-0 of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in section 115-0 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 DTAAs. 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"

6. Respectfully following the decision of ITAT Special Bench in Total Oil India Private Limited, [2023] 104 ITR (T) 1 (Mumbai Trib) (SB), we hold that DTAA does not get triggered when a domestic company pays DDT under section 115O of the Act, therefore, assessee is not eligible for refund of Excess DDT as claimed by Assessee. Accordingly, we uphold the order of ld.CIT(A) on this issue. Therefore, sole ground of appeal raised by the assessee is dismissed.

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

Order pronounced in the open Court on 23rd December, 2024.

Sd/-	**Sd/-**
(VINAY BHAMORE)	**(DR. DIPAK P. RIPOTE)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 23rd Dec, 2024/ *SGR**

<u>आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "एस एम सी" बेंच, पुणे / DR, ITAT, "SMC" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.