

SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.
151

Total Oil India Private Ltd.

Vs

Deputy Commissioner of Income Tax

DDT is a tax by company and hence DTAA benefit of non-resident shareholder will not be applicable on DDT

Date: 29.04.2023

Facts of the Case

- ❖ Assessee is an Indian company which declared dividend during the AY2016-17 to its shareholders.
- ❖ Assessee also had some non-resident shareholders. Company was told that such dividend distribution was liable to Dividend Distribution Tax (DDT) rates in India u/s 115-O of the Income Tax Act and no DTAA benefit can be availed even in case of non-resident shareholders.

Assessee's Contention

- ❖ Assessee contended that dividend is an income in hands of shareholder and DDT paid by the company is just for the sake of convenience, rather it's a tax on income of shareholder and accordingly if DTAA benefit is available to shareholder same should be available to the company while making the payment of DDT.
- ❖ Assessee relied on the judgement of Delhi Bench in the case of Giesecke & Devrient India Pvt. Ltd. 120 taxmann.com 338 (Del) wherein it was held that while paying DDT, company can take benefit of DTAA.

Revenue's Contention

- ❖ Ld. DR (Department representative) submitted that the charge u/s 115-O of the Act is on distributable profits of the company and not on dividend. Section 115-O of the Act is not a procedural section but a charging section.
- ❖ Referring to the decision rendered in the case of CIT vs. Elphistone Spg. & Wvg. Mills Co. Ltd. 40 ITR 142 (SC), the ld. DR submits that the additional tax levied under the section is on the distributable profits of the company.
- ❖ With reference to application of DTAA, the ld. DR submits that tax u/s 115-O of the Act is a tax on the company and not on the shareholder. Hence, its levy does not give any rise to double taxation. The ld. DR submits that invariably in all the DTAAAs the words used are “dividends paid by a company”.

Question before the Special bench of Hon'ble Mumbai Tribunal was as under:

- ❖ 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 section 115-O of the Income-Tax Act, 1961 (in short 'the Act'), whether such additional income-tax payable by the domestic company shall be at the rate mentioned in Section 115-O of the Act or the rate of tax applicable to the non-resident shareholder(s) with reference to such dividend income”

Legal provisions

As per Section 115-O of Income Tax Act, 1961 –

(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 April, 2003 ⁶³[but on or before the 31st day of March, 2020], 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 fifteen per cent.

(1B) For the purposes of determining the tax on distributed profits payable in accordance with this section, any amount by way of dividends referred to in sub-section (1) as reduced by the amount referred to in sub-section (1A) [hereafter referred to as net distributed profits], shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in sub-section (1), be equal to the net distributed profits:

Ruling

- ❖ The word “Dividend” has its origin from the Latin word “Dividendum”. It means a thing to be divided. Dividend means the portion of the profit received by the shareholders from the company’s net profit, which is legally available for distribution among the members. Therefore, dividend is a return on the share capital subscribed for and paid to its shareholders by a company.
- ❖ **Though dividend is income in the hands of the shareholder, its taxability need not necessarily be in the hands of the shareholder.** The sovereign has the prerogative to tax dividend, either in the hands of the recipient of the dividend or otherwise. This takes us to the mode in which Dividend is taxed.
- ❖ 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.

Ruling

- ❖ 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”.
- ❖ Hon’ble Supreme Court in the case of Balaji Vs. ITO 1962 AIR 123 (SC) upheld that there is nothing in the fundamental concepts of income tax to prevent imposition of tax on one person and income getting assessed in the hands of another person. 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.
- ❖ After the 2014 Amendment, domestic companies paying DDT took a stand that since dividend was ultimately taxable in the hands of the shareholder and since Sec.115-O merely shifts the burden on the domestic company distributing dividend, the rate at which tax has to be deducted, wherever dividend is paid to non-resident shareholders who are tax resident of a country with whom India has Treaty for Avoidance of Double Taxation (DTAA), it would be the lower rate of tax, if so provided in the relevant DTAA.

Ruling

- ❖ 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. Therefore, the DTAA does not get triggered at all when a domestic company pays DDT u/s.115O of the Act.
- ❖ 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.**
- ❖ 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.

Our Comments

- ❖ In the above judgement Hon'ble Tribunal has relied on judgement of Hon'ble Supreme court and held that DDT is a additional tax on the income tax distributed by company and is not a tax on shareholders. In our opinion there are two issues here:
- ❖ If it is being said that this is an additional tax on company, however it is a tax on dividend which is an income in the hands of shareholder. Further, such dividend was only exempt if tax was paid on it under 115-O by the logic that such income has already been taxed and the tax is being paid by the company out of the shareholders fund which is available for distribution to shareholders and grossing up such tax also states that the tax being paid by company is a tax on dividend which is taxable in the hands of shareholder. Since, it is a tax on dividend income of shareholder he should be allowed a relief under double taxation.
- ❖ Also, dividend was always a double taxed income as company would first pay tax on it's taxable income and then when the dividend is distributed a person would again pay tax on same without other person getting it's deduction. If we consider that DDT is an additional tax on company itself then we are trying to state that company itself is paying double tax on it's income and is a person normally required to pay double tax on it's income?

Court	Mumbai Tribunal
Date of decision	20.04.2023
Section/Article	Section 115-O of Income Tax Act & Article 11, 10 Of DTAA
DTAA/Country	India-France, Japan

Note: Case law name in **Red**- in favour of the revenue, **Green**-In favour of the Assessee, **Orange** = Partial



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