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Total Oil India Pvt. Ltd. & Others [TS-197-ITAT-2023(Mum)]

Special Bench of the Mumbai Tribunal held that Dividend Distribution Tax (DDT) shall be paid by the Indian company at rates specified in section 115O and not at the rate specified in the Tax Treaty with reference to dividend income

Brief Background

Prior to abolishment of DDT regime by the Finance Act 2020, distribution of dividend by an Indian Company was liable to DDT @ 20.56% as per section 115O of the Act. DDT was calculated on the grossed-up amount of dividend declared by an Indian company. Liability to pay DDT was cast upon the Indian Company. Failure to pay DDT would result in levy of and imposition of penalty and interest on the Indian Company. Such dividend received by the shareholder was exempt in their hands under Section 10(34) of the Act.

The Tribunal in following cases took a view that the rate of tax prescribed in the Tax Treaty with reference to dividend income has to be applied in preference to higher rate of tax as per section 115O:

- Delhi Tribunal in the case of Giesecke & Devrient India Pvt. Ltd. vs. ACIT (120 taxmann.com 338).
- Kolkata Tribunal in the case of DCIT vs. Indian Oil Petronas Pvt. Ltd. (127 taxmann.com 389).

However, the Mumbai bench of Tribunal in the case of the assessee was not convinced with the position taken by the Delhi and Kolkata Tribunal and thereby, proposed that this issue be referred to a special bench. Similar request was made by the Revenue before the Delhi Tribunal and Ahmedabad Tribunal. Hence, the special bench was constituted to decide the issue as to whether the tax rate specified in the Tax Treaty with reference to taxation of dividend income would prevail over the higher rate specified in section 115O.

Observations of the Special Bench

- 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.

- DDT is a tax on 'distributed profits' and not a tax on 'dividend distributed'.

- The non-obstante clause in section 115O gives an indication that the DDT is independent and divorced from the concept of "total income" under the Act.

- The payment of DDT under section 115O 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 DDT, it is not a tax paid by or on behalf of the shareholder.

- Tax Treaty benefit can be claimed only by non-resident with reference to income earned from India. The domestic company while paying DDT as per section 115O of the Act cannot claim benefit of Tax Treaty.

- The Tax Treaty entered between India and Hungary extends Treaty protection to the DDT. The protocol to the said Tax Treaty states that when the company paying the dividends is a resident of India, DDT shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10% of the gross amount of dividend.

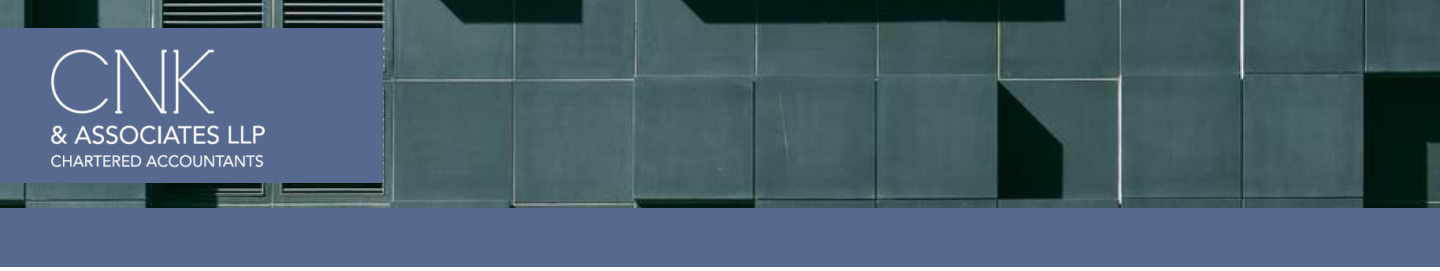
Held

DDT payable by the domestic company shall be at the rate mentioned in section 115O of the Act and not at the rate of tax applicable to the non-resident shareholder as per the relevant Tax Treaty with reference to such dividend income.

CNK Comments

Several taxpayers relying on the decision of Delhi Tribunal in the case of Giesecke & Devrient India Pvt. Ltd. wherein it was held that DDT liability needs to be restricted to the rate prescribed under the Tax Treaty, made an application for refund under section 237 of the Act either with the return of income or filed a fresh claim in the course of ongoing assessment proceedings. Further several taxpayers whose assessment proceeding were already completed, filed additional grounds of appeal before the CIT(A), DRP and Tribunal claiming the refund of excess tax collected under DDT on dividend income.

With the decision of Special bench of Mumbai Tribunal decided in favour of the Revenue, all such matter would now be decided on the basis of the Special bench's decision in favour of the Revenue.



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