

TAX FLASH NEWS

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Additional ground with respect to DDT liability cannot be raised before the Income-tax Appellate Tribunal

Recently, the Bangalore Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Texas Instruments India Pvt Ltd¹ (the taxpayer) dealt with the issue whether the taxpayer can challenge the Dividend Distribution Tax (DDT) liability under Section 115-O by raising an additional ground before the Tribunal.

The Tribunal observed that the DDT liability was not forming part of the assessment order passed under Section 143(3). Further as per Section 246A(1)(a), the liability under Section 115-O can be challenged before the Commissioner of Income tax (Appeals) [CIT(A)]. Therefore, the taxpayer cannot raise the additional ground relating to DDT liability in the present appeal before the Tribunal.

The taxpayer may prefer an appeal in that regard before the CIT(A). Since the taxpayer was under a bonafide belief that its grievance on DDT liability can be raised as an additional ground before the Tribunal, it did not file an appeal before the CIT(A). Accordingly, the CIT(A) was directed to take a lenient view on the matter of condonation of delay if the taxpayer prefers this appeal before him on the DDT liability.

Facts of the case

The taxpayer is engaged in the business of designing, manufacturing and export of computer software. Under the India-U.S. tax treaty dividends paid by an Indian company to a US resident who is the beneficial owner of the dividends is subject to withholding tax at 15 per cent in India. The taxpayer filed an appeal raising additional ground before the Tribunal contending that the Assessing officer (AO) /CIT(A) ought to have restricted the levy of DDT on the dividend paid to the US company to 15 percent in terms of Article 10 of India-U.S. tax treaty instead of 16.0688 percent charged in terms of Section 115-O.

The question was whether the taxpayer can challenge the liability under Section 115-O by raising an additional ground in the appeal filed against the assessment order passed under Section 143(3).

The taxpayer placed reliance on the interim order passed by the Delhi Tribunal in the case of Maruti Suzuki India Ltd², where the Tribunal had observed that DDT is a 'tax on income' and hence additional ground can be raised by the taxpayer in appellate proceedings. Further the taxpayer placed heavy reliance on Genpact India (P) Ltd³.

Tribunal's decision

DDT is paid as per the provisions of Section 115-O, which is titled as 'Tax on Distributed Profits of Domestic Companies'. The expression 'total income' is defined in Section 2(45) to mean the 'total amount of income' referred to in Section 5, computed in the manner laid down under the Income-tax Act, 1961. Section 5 deals with the income received or deemed to be received or accrued or deemed to accrue or arise. The AO while determining the total income is required to look into the income received or deemed to be received or accrued or deemed to accrue or arise. On the contrary, the DDT is a 'tax payable on the distribution of dividend' and it is in no way connected to the determination of 'total income'.

The High Court in the case of Genpact India (P) Ltd dealt with a writ petition filed by the taxpayer challenging the demand raised under Section 115QA, which relates to tax on distributed income by way of buy-back of shares. The High Court observed that the additional tax liability under Section 115QA was raised in the assessment order itself. Hence, the Delhi High Court held that 'it is not possible for the High Court to read this part of the order separate from the rest of the assessment order'.

¹ JCIT v. Texas Instruments India Pvt Ltd (IT (TP) A No. 275/Bang/2019) – Taxsutra.com

² Maruti Suzuki India Ltd v. DCIT (2019)(ITA No.961/Del/2015, dated 31 October 2019)

³ Genpact India (P) Ltd [2019] 419 ITR 440 (SC)

Subsequently, when the matter reached before the Supreme Court, the Court held that since the DDT payable under Section 115-O is an additional tax liability akin to the tax payable under Section 115QA, there should not be any dispute that the taxpayer can challenge the liability imposed on it under Section 115-O.

However, in the instant case, the question was whether the taxpayer can challenge the liability under Section 115-O by raising an additional ground in the appeal filed against the assessment order passed under Section 143(3).

The grievance of the taxpayer on DDT liability falls under different class of liabilities mentioned in Section 246A. In the case of Genpact India P Ltd, the Delhi High Court observed that the additional tax liability under Section 115QA was raised in the assessment order itself. Hence, it was not possible for the Court to read this part of the order separate from the rest of the assessment order. The Tribunal also observed that Genpact India P Ltd had filed an appeal before the CIT(A) challenging various additions made by the AO while determining the total income of the taxpayer and by the time the writ petition was disposed of by the Delhi High Court, the CIT(A) had disposed of the appeal filed by the taxpayer and further the revenue had challenged his order by filing an appeal before the Tribunal. However, the taxpayer was directed by the Delhi High Court to agitate the issue of tax liability under Section 115QA by filing an appeal before CIT(A) only.

In the present case, first of all, the DDT liability was not forming part of the assessment order passed under Section 143(3). Further, the liability under Section 115-O can be challenged under the clause 'an order against the assessee where the assessee denies his liability to be assessed under this Act' mentioned in Section 246A(1)(a) as held by the Supreme Court. The above said clause is a separate clause unconnected with the clause 'any order of assessment under Section 143(3)'. Accordingly, it was observed that the taxpayer cannot raise the additional ground relating to DDT liability in the present appeal before the Tribunal.

The taxpayer, if so advised, may prefer an appeal in that regard before the CIT(A). Since the taxpayer was under a bonafide belief that its grievance on DDT liability can be raised as an additional ground before the Tribunal, it did not file an appeal before the CIT(A). Accordingly, the CIT(A) was directed to take a lenient view on the matter of condonation of delay, if the taxpayer prefers this appeal before him on the DDT liability of the year under consideration.

Our comments

Several tax treaties provide for taxation of dividends at a lower rate of tax than the DDT rate. Thus, taxpayers have been claiming that DDT paid on the distribution of dividend to a non-resident shareholder should be restricted to the rate of tax on dividends as set out in the relevant tax treaty. The Delhi Tribunal in the case of Giesecke & Devrient [India] Pvt Ltd⁴ held that the DDT rate should be restricted to the rate specified in the respective tax treaty. Subsequently, following Delhi Tribunal's decision, the Kolkata Tribunal in the case of Indian Oil Petronas Pvt Ltd⁵ held the decision in favour of the taxpayer.

However, the Mumbai Tribunal in the case of Total Oil India Pvt Ltd⁶ did not agree with the above-referred benches of Tribunal and referred the matter to the Special Bench consisting of three or more Members.

In the meantime, a new issue has arisen with respect to admissibility of additional ground relating to DDT liability under Section 115-O in the appellate proceedings.

The Delhi Tribunal in the case of Maruti Suzuki Ltd⁷ observed that the DDT is a 'tax on income' and hence additional ground can be raised by the taxpayer in the appellate proceedings.

The Bangalore Tribunal, in the present case has observed that the DDT liability was not forming part of an assessment order passed under Section 143(3). Further, the liability under Section 115-O can be challenged before the CIT(A). Therefore, the taxpayer cannot raise the additional ground relating to DDT liability in the appeal before the Tribunal.

⁴ Giesecke & Devrient India Pvt Ltd. v. ACIT [2020] 120 taxmann.com 338 (Del)

⁵ DCIT v. Indian Oil Petronas Pvt Ltd [2021] 127 taxmann.com 389 (Kol)

⁶ DCIT v. Total Oil India Pvt Ltd (ITA No. 6997/Mum/2019)

⁷ Maruti Suzuki India Ltd v. DCIT (ITA No.961/Del/2015, dated 31 October 2019)

KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate
Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru –
560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytila, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing),
Lodha Excelus, Apollo Mills
Compound, N M Joshi Marg,
Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

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KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

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