

TAX FLASH NEWS

2 June 2022

Additional ground can be raised before the Tribunal to apply a lower rate of DDT under a tax treaty

Recently, the Bangalore Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of GE BE Private Limited¹ (the taxpayer) held that the taxpayer is permitted to raise an additional ground before the Tribunal relating to the application of a lower rate of dividend distribution tax (DDT) under the India-Mauritius tax treaty (tax treaty).

Facts of the case

- During Assessment Year 2015-16, the taxpayer had declared and distributed dividend to its equity shareholders and paid DDT at the rate of 16.995 per cent under Section 115-O.
- The taxpayer raised an additional ground before the Tribunal and contended that since the shareholder is a Mauritian tax resident, therefore, DDT would be restricted to the dividend taxation under the India-Mauritius Double Taxation Avoidance Agreement and the Assessing Officer (AO) should have applied the lower rate of 5 per cent and refunded the excess DDT paid.
- The taxpayer contended that the decision in the case of Texas Instruments² relied on by the tax department was distinguishable on the facts of the case and for the following reasons:
 - In that case the taxpayer had first appealed to the CIT(A) against the assessment order under Section 143(3). Therefore, the CIT(A) was the first appellate authority to adjudicate any issue arising out of the regular assessment order. In the present case, against the draft assessment order, the objections were filed before the Dispute Resolution Panel. Thereafter, the final assessment order was passed, which is the

subject matter of the present appeal before the Tribunal. Therefore, in this case, the Tribunal is the first appellate authority for the taxpayer.

- Similar kind of additional grounds were allowed to admit by the Delhi High Court³ and various Tribunals. The Tribunal in the case of Texas Instruments did not consider these decisions.
- The Supreme Court's decision in the case of Genpact India⁴ was misinterpreted in the case of Texas Instruments. In that case, an appeal was already filed before the CIT(A) on several grounds other than the DDT rate dispute and in that context the SC directed the taxpayer to appeal before the CIT(A). The SC has nowhere held that the additional ground cannot be admitted by the ITAT.

Tribunal's decision

- The Tribunal in the case of Texas Instruments (India) Pvt. Ltd. had failed to consider its earlier decision in the case of Robert Bosch Engineering and Business Solutions Pvt. Ltd.⁵
- There are divergent views on this issue. The Supreme Court, in the case of Vegetable Products Ltd.⁶ held that if two reasonable constructions of taxing provisions are possible, that construction which favours the taxpayer must be adopted.
- Hence, the Tribunal followed its earlier decision in the case of Robert Bosch Engineering and Business Solutions Pvt. Ltd., admitted the additional ground of the appeal and remitted it back to the AO for fresh consideration in accordance with the law.

¹ GE BE Private Limited v. DCIT (IT/TP)A No.2615/Bang/2019) – Taxsutra.com

² JCIT v. Texas Instruments India Pvt Ltd, IT (TP) A No. 275/Bang/2019 (Bang)

³ Maruti Suzuki India Ltd. (WP(C) 1324/2019) (Delhi High Court)

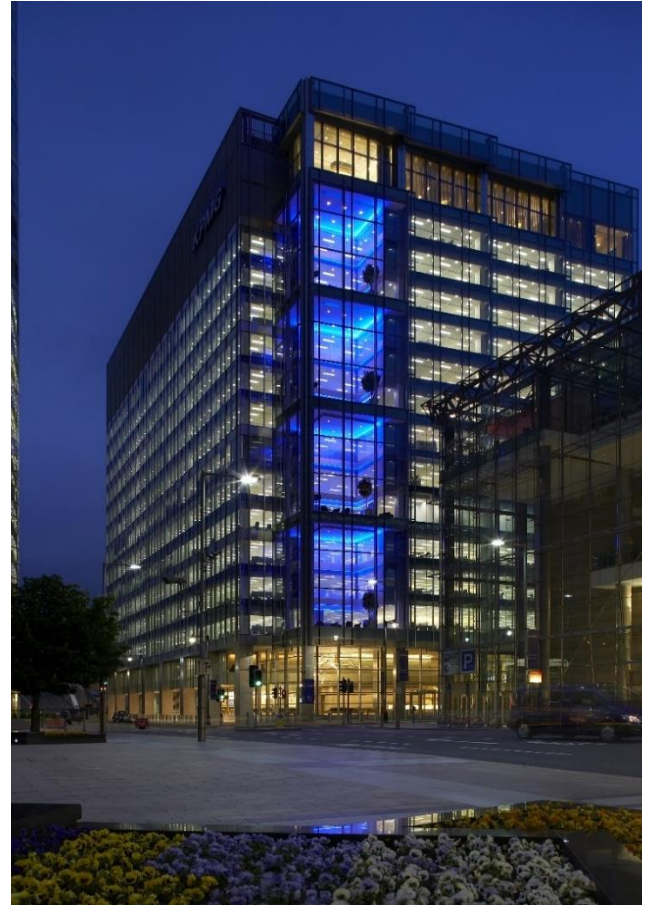
⁴ Genpact India (P) Ltd [2019] 419 ITR 440 (SC)

⁵ IT (TP)A No.608 & 445/Bang/2016 dated 2 February 2022

⁶ CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 (SC)

Our comments

The issue of applicability of a lower rate of DDT under a tax treaty is a recent one and several taxpayers sought to claim it through an additional ground before the Tribunal for the past years. However, this mode of claim came under dispute after the Bangalore Tribunal in the case of Texas Instruments took a view that this issue cannot be admitted by the Tribunal and the taxpayer should file an appeal before the CIT(A) as directed by the SC in the case of Genpact India. While the Tribunal in the current case has followed its earlier decision in the case of Robert Bosch Engineering, choosing a view favourable to the taxpayers, it has not dealt with the view taken by the Tribunal in the case of Texas Instruments. An ongoing debate on this issue would create an additional burden on the taxpayers who are already fighting for claiming a lower rate of tax on dividend paid to a non-resident under a tax treaty.



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