

# TAX FLASH NEWS

7 December 2022

## The taxpayer is entitled to set-off of loss and deduction under Section 80G against the foreign dividend income

### Executive summary

Dividend income received by an Indian company from a specified foreign company<sup>1</sup> is taxable at a lower rate of 15 per cent on a gross basis under Section 115BBD of the Income-tax Act, 1961 (the Act). The tax department has been arguing that the taxpayer is not eligible for set-off of business losses or deduction under Chapter VI-A against the dividend income which is taxable at a concessional rate. On the other hand, taxpayers have been contending that Section 115BBD starts with the expression 'total income' which has to be determined after considering the set-off of brought forward and current year losses and deductions under Chapter VI-A.

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Tata Industries Ltd<sup>2</sup> (the taxpayer) held that the taxpayer is entitled to set-off of current year loss, brought forward business loss and unabsorbed depreciation of earlier years against the foreign dividend income. Further, the taxpayer was eligible for deduction under Section 80G. The starting point of the applicability of Section 115BBD is the determination of 'total income'. Only after the determination of total income the remaining foreign dividend income included in the said total income would be taxed at the rate of 15 per cent.

### Facts of the case

- The taxpayer is engaged in the business of providing business investment and finance, promotion of new companies, etc. During the Assessment Year 2016-17, the taxpayer received a dividend from its 100 per cent foreign subsidiary. The taxpayer had set-off current year business loss against such foreign dividend income. Further, the taxpayer claimed deduction under Section 80G against the foreign dividend income.
- The taxpayer contended that Section 115BBD starts with the expression 'total income' which has to be determined after considering all other provisions of the Act including set off of brought forward and current year losses and deductions under Section 80G.
- The Assessing Officer (AO) rejected the taxpayer's contentions and held that the foreign dividend income was to be taxed at the rate of 15 per cent on a gross basis under Section 115BBD without allowing any set off of losses and deduction under Section 80G.

### Tribunal's decision

- The starting point of the applicability of Section 115BBD is the determination of 'total income'. Only after the determination of total income the remaining foreign dividend income included in the said total income would be taxed at the rate of 15 per cent.

<sup>1</sup> Specified foreign company means a foreign company in which the Indian company holds 26 per cent or more of equity share capital

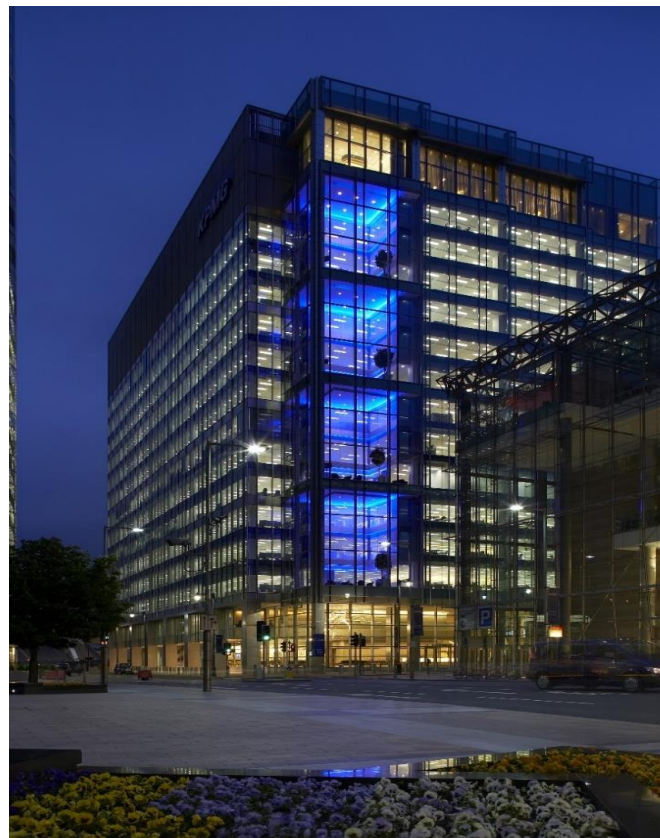
<sup>2</sup> Tata Industries Ltd v. DCIT (ITA No.217/Mum/2020) – Taxsutra.com  
Note: The Tribunal, in this decision, dealt with various issues. However, this flash news only deals with the issue of eligibility of set-off of current year loss with the foreign dividend income

<sup>2</sup> The Finance Act, 2021 amended Section 45(4) to provide that profit or gains from receipt of money or capital asset or both by the specified person from a specified entity on reconstitution of the specified entity shall be chargeable to income-tax as income of such specified entity under the head 'Capital Gains'

- The taxpayer was in the business of making an investment in various companies and promotion of companies in various fields. Hence, it could be construed as an investment company. Accordingly, the resultant income in the form of the dividend would partake the character of business receipts, though it was taxed under the head 'income from other sources' under Section 56(2)(i).
- The investments made by the taxpayer to exercise control over the other investee companies constitute the business activity of the taxpayer<sup>3</sup>.
- The Chennai Tribunal in the case of Tamilnadu Industrial Development Corporation Ltd<sup>4</sup> observed that the taxpayer was engaged in the promotion and development of new undertakings in the State and thus held shares in various undertakings. Therefore, the dividend income from such shares would form part of the business of the taxpayer and accordingly taxable under the head 'income from business'. The taxpayer would be entitled to set-off of brought forward business loss and unabsorbed depreciation of earlier years against the said dividend income.
- Section 115BBD would cover both current year loss as well as brought forward business loss.
- Accordingly, the taxpayer would be entitled to set-off of current year losses, brought forward business loss and unabsorbed depreciation of earlier years against the foreign dividend income. Further, the taxpayer was eligible for deduction under Section 80G.

## Our comments

The Mumbai Tribunal upheld the principle that provisions of concessional tax rates apply after the amount of total income is determined, for example, after considering the set-off of losses. However, taxpayers should carefully analyse concessional tax rate provisions and check whether there is any specific restriction for the set-off of losses in such provisions.



<sup>3</sup> Tata Industries Ltd. v. ITO [2016] 181 TTJ 600 (Mum), CIT v. Amalgamations P Ltd 108 ITR 895 (Mad), CIT v. Amalgamations (P.) Ltd [1977] 108 ITR 895 (Mad)

<sup>4</sup> Tamilnadu Industrial Development Corporation Ltd (TIDCO) v. ACIT (ITA No. 1181/Chny/2008) (Chennai)

# 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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