$-J-1 & 2

+ **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on **16.03.2021**
Judgement pronounced on **22.04.2021**

+ **W.P.(C) 9051/2020**

CONCENTRIX SERVICES NETHERLANDS B.V. .....Petitioner

Through: Mr. Deepak Chopra & Mr. Ankul Goyal, Advs.

*versus*

INCOME TAX OFFICER (TDS) AND ANR. .....Respondents

Through: Mr. Puneet Rai, Senior Standing Counsel for Income Tax.

+ **W.P.(C) 882/2021, CM Appl. 2302/2021**

OPTUM GLOBAL SOLUTIONS INTERNATIONAL BV .....Petitioner

Through: Mr. Kamal Sawhney with Mr. Prashant Meharchandani, Mr. Arun Bhadauria & Mr. Divyansh Singh, Advs.

*versus*

DEPUTY COMMISSIONER OF INCOME TAX & ANR.....Respondents

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms. Zehra Khan & Mr. Shubhendu Bhattacharya, Advs

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**HON'BLE MR. JUSTICE TALWANT SINGH**

**RAJIV SHAKDHER, J :**

## TABLE OF CONTENTS



**Preface: -**

1. The moot issue, which arises for consideration, in the captioned writ petitions is: as to what should be the withholding rate of tax in respect of dividend?

2. The petitioners, in both cases, before us, are the deductees, i.e., the ultimate tax-payers. The grievance of the petitioners is that their request to respondent no. 1, for issuance of a certificate at a lower withholding tax rate of 5%, was rejected, despite The Government of the Republic of India and the Government of the Kingdom of Netherlands Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion [in short "subject DTAA"], [when read, along with] the appended protocol, making a provision *qua* the same.

2.1. What is not in dispute is that the impugned certificates issued by respondent no. 1, with the approval of respondent no. 2, have stipulated a withholding tax rate of 10% on dividends receivable by the petitioners.

3. Therefore, insofar as W.P. (C) 9051/2020 [hereafter referred to as the "first writ petition"] is concerned, a challenge is laid to the certificate dated 16.09.2020 issued by respondent no. 1. The relief sought is that the same be quashed. The consequential relief sought is that the petitioner's Indian counterpart, i.e., the deductor be permitted to remit dividend, after deducting withholding tax at the rate of 5%. Likewise, in W.P. (C) 882/2021 [hereafter

referred to as the “second writ petition”], the relief sought is for quashing the certificate dated 04.01.2021 issued by respondent no. 1 with the approval of respondent no. 2 whereby the withholding tax rate is pegged at 10%.

**Background facts: -**

4. Thus, to adjudicate upon the captioned writ petitions, the following broad facts are required to be noticed:

4.1. India entered into the subject DTAA with the Kingdom of Netherlands on 21.01.1989. A notification, in that behalf, was issued on 27.03.1989 which was amended by a subsequent notification dated 30.08.1999.

4.2. The petitioner, in the first writ petition, is an entity going by the name Concentrix Services Netherlands B.V. [hereafter referred to as “Concentrix Netherlands”] while the remitter of the dividend is an Indian company, i.e., Concentrix Daksh Services India Private Limited [hereafter referred to as “Concentrix India”]. Similarly, insofar as the petitioner in the second writ petition is concerned, it is an entity going by the name Optum Global Solutions International B.V. [hereafter referred to as “Optum Netherlands”] and the remitter of the dividend is once again an Indian entity described as Optum Global Solutions (India) Private Limited [hereafter referred to as “Optum India”]. What is not in dispute is that Concentrix Netherlands and Optum Netherlands hold 99.99% share in their Indian counterparts i.e. Concentrix India and Optum India respectively.

4.3. It is in this background that Concentrix Netherlands, on 29.07.2020, had applied to the concerned statutory authority under Section 197 of the Income Tax Act, 1961 [in short "the Act"] in the prescribed form, i.e., Form 13 seeking issuance of a certificate that would authorize Concentrix India to deduct withholding tax at a lower rate of 5% in consonance with the subject DTAA read with the protocol appended thereto.

4.4. Likewise, Optum Netherlands had applied to respondent no. 1 on 15.07.2020 under Section 197 of the Act for issuance of a certificate that would authorise Optum India to deduct withholding tax at the rate of 5% under the subject DTAA and the protocol appended thereto.

4.5. In the case of Concentrix Netherlands, respondent no. 1, after obtaining approval of respondent no. 2 issued the impugned certificate dated 16.09.2020 wherein the stipulated withholding tax rate was shown as 10%. In the case of Optum Netherlands, a similar situation obtained, i.e., the impugned certificate dated 04.01.2021 was issued wherein the withholding tax rate was indicated as 10%.

4.6. In both cases, the validity period of the impugned certificates came to an end on 31.03.2021. *Via* the communication dated 17.09.2020, Concentrix Netherlands, through its accountants, Earnst & Young LLP [in short "Earnst & Young], sought, not only the permission of respondent no. 1 to inspect the files but also copies of order sheet(s) which concerned processing of its application preferred under Section 197 of the Act.

4.7. In the first writ petition, there is an assertion made by Concentrix Netherlands that it had also filed an application seeking reasons as to why a higher rate of TDS had been stipulated and that a response *qua* the same was received from respondent no. 1 justifying its stance. While the response of the respondent no. 1 dated 01.10.2020 is on record [See: page number 53 of the paper book in the first writ petition], the application seeking reasons is not part of the record. Although notice in this writ petition was issued on 17.11.2020, no counter-affidavit was filed on behalf of the respondents despite an opportunity being granted in that behalf.

4.8. Insofar as Optum Netherlands is concerned, it has placed on record letter dated 27.08.2020 and 11.11.2020 addressed to respondent no. 1. These letters were written by the chartered accountancy firm, i.e., SRBC and Associates LLP, appointed by Optum Netherlands, to respond to the queries raised on the subject matter of the issuance of a lower rate of withholding tax certificate. Furthermore, it appears that, thereafter, Optum Netherlands availed the services of Earnst & Young. Earnst & Young, *via* e-mail dated 04.01.2021, like in the first writ petition, sought both, an inspection of file and also copies of order sheet(s) which dealt with the application filed by Optum Netherlands for issuance of lower rate withholding tax certificate under Section 197 of the Act. However, after the issuance of the impugned certificate dated 04.01.2021, in the matter involving Optum Netherlands, Earnst & Young, on its behalf, wrote a letter to respondent no. 1 seeking reasons for authorizing tax deduction at the rate of 10% as against 5%, as requested, by Optum Netherlands. The record shows that respondent no. 1 furnished reasons to justify the withholding tax rate which was pegged at 10% *vide* communication dated 22.01.2021 addressed to Optum Netherlands.

5. It is in these circumstances, both Concentrix Netherlands and Optum Netherlands were, perhaps, impelled to approach this Court by way of the instant writ petitions.

**<u>Submissions made on behalf of the petitioners:</u>**

6. Arguments on behalf of Concentrix Netherlands were addressed by Mr. Deepak Chopra while those on behalf of Optum Netherlands were advanced by Mr. Kamal Sawhney. The revenue was represented by Mr. Deepak Anand in the first writ petition while Mr. Kunal Sharma advanced arguments, on behalf of the revenue, in the second writ petition.

7. Since the arguments of counsels appearing for the parties were similar, we intend to paraphrase them by indicating herein as to what each side had to say concerning the controversy-at-hand.

8. Insofar as Mr. Chopra and Mr. Sawhney were concerned, they made the following submissions:

i. Although the subject DTAA provides for a withholding tax rate of 10% on dividends received by an entity residing in the Netherlands from an entity residing in India, the petitioners sought a lower rate withholding tax certificate of 5% by placing reliance on the Most Favoured Nation [in short "MFN"] Clause obtaining in the protocol appended to the subject DTAA. In this context, reliance was placed on Article 10 (2) read with Clause IV.Ad Articles 10, 11 and 12 contained in the protocol appended to the subject DTAA. In particular, reliance was placed on Clause IV (2) of the protocol.

ii. Based on the said provisions of the subject DTAA and the protocol, it was contended that since India had entered into DTAAs with other countries which were members of Organization for Economic Co-operation and Development [in short "OECD"], the lower rate or the restricted scope in the DTAA executed between India and such a country would automatically apply to the subject DTAA. This argument was based on the provision made in the preface of the protocol which *inter alia* stated that the protocol "shall form part an integral part of the Convention" i.e., the subject DTAA.

iii. For applicability of the provisions of the DTAA which followed the subject DTAA, contrary to the stand of the respondents, no fresh notification was required. In support of this plea, reliance was placed on the judgement of Division Bench of this Court in ***Steria (India) Ltd. vs. Commissioner of Income-tax-VI***, [2016] 386 ITR 390 (Delhi) and the judgement of the Karnataka High Court in ***Apollo Tyres Ltd. vs. Commissioner of Income Tax, International Taxation***, [2018] 92 taxmann.com 166 (Karnataka). Besides this, reliance was also placed on the judgement of another Division Bench on this Court rendered in ***EPCOS Electronic Components S.A vs. Union of India***, [2019] 107 taxmann.com 227 (Delhi).

iv. It is in this context, reliance was placed on the following DTAAs entered into between India and countries, other than the Netherlands:

a) DTAA executed between India and Slovenia; which came into force on 17.02.2005 and was notified on 31.05.2005.
b) DTAA executed between India and Lithuania; which came into force on 10.07.2012 and was notified on 25.07.2012.
c) DTAA executed between India and Columbia; which came into force on 07.07.2014 and was notified on 23.09.2014.

v. The reasons advanced on behalf of the respondents, in defence of the impugned certificates, issued under Section 197 of the Act, that there was no separate notification issued, which entailed importing the benefit of the MFN Clause from DTAAs executed with countries like Slovenia, Lithuania, and Columbia into the subject DTAA, was completely misconceived, given the provisions contained in the protocol appended to the subject DTAA. The protocol contained in the subject DTAA was configured, to self-trigger, upon the execution of a DTAA other than the subject DTAA, if it provided a lower rate of tax or a scope more restricted, as long as the deductee held more than 10% of the share capital of the deductor. In these cases, admittedly, the deductees own nearly 99.99% share capital of the deductee.

**<u>Submissions advanced on behalf of the revenue:</u>**

9. On the other hand, Mr. Anand and Mr. Sharma made the following submissions:

i. A bare reading of Clause IV (2) of the protocol appended to the subject DTAA would show that the benefit of the lower rate of withholding tax or a scope more restricted would be available only if the country with which India enters into a DTAA was a member of the OECD at the time of the execution of the subject DTAA. In other words, the benefit of the lower rate of withholding tax or a scope more restricted would extend to those governed by the subject DTAA if the DTAA(s) on which reliance is placed are entered into before the subject DTAA or with a country which was not a member of the OECD on the date when the subject DTAA was executed.

ii. In this context, our attention was drawn to the fact that the DTAA between India and Slovenia which provided for a withholding tax rate of 5% on dividends was executed on 17.02.2005. Slovenia, we were told, became a member of OECD in August 2010. Likewise, we were informed that the DTAA between India and Lithuania was executed on 10.07.2012 whereas Lithuania became a member of OECD only in July 2018. Insofar as Columbia was concerned, we were informed that the DTAA between India and Columbia was executed on 07.07.2014 whereas it became a member of OECD in April 2020. The argument was, since none of the aforementioned countries, i.e., Slovenia, Lithuania, and Columbia were members of the OECD, on the date when they executed DTAAs with India, Clause IV (2) of the protocol appended to the subject DTAA would have no applicability.

iii. It was contended, based on the aforesaid dates and events, that the benefit of the lower rate of withholding tax or a scope more restricted was extended to Slovenia, Lithuania and Columbia in their own right and not because they were members of the OECD.

iv. Furthermore, the submission made was that several amendments have been made to the subject DTAA which have been ratified by both India and the Netherlands and therefore, if the benefit of a lower rate of withholding tax or a scope more restricted as provided in the DTAA(s) executed between India and Slovenia, Lithuania and Colombia is to be extended to those governed by the subject DTAA it could only be done by amending the subject DTAA followed by the issuance of notification. Since no such amendment has been made to the subject DTAA, the withholding tax cannot be lower than 10%.

v. Clause IV (2) of the protocol appended to the subject DTAA is like a contingent contract and before any benefits availed by the residents of OECD countries are extended to those who reside in Netherlands, the following two contingencies are required to be fulfilled:

a) The other country should be a member of the OECD on the date when the subject DTAA was executed and also on the date when a claim for the lower rate of withholding tax is made by a resident of the Netherlands.

b) The more beneficial provisions should have been extended to the residents of countries who are members of the OECD post the execution of the subject DTAA.

vi. As indicated above, Slovenia, Lithuania and Columbia were not members of the OECD when the subject DTAA was executed. Furthermore, DTAAs were signed with Slovenia, Lithuania and Columbia before they became members of OECD. Therefore, Clause IV (2) of the protocol will have no applicability.

vii. Each sovereign nation is free to choose as to when it should obtain membership of multilateral organizations such as OECD. Therefore, the mere fact Slovenia, Lithuania, and Columbia have chosen to become members of OECD cannot be the reason for applying the provisions contained in the DTAAs concerning them (which are more beneficial) to the subject DTAA only because of the protocol accompanying it.

**<u>Analysis and Reasons:</u>**

10. Having heard learned counsel for the parties and perused the record, to our minds, what needs to be noticed, in the first instance, are the relevant provisions of the subject DTAA, insofar as they are relevant, to determine as to what is the withholding tax rate applicable qua dividends.

> "ARTICLE 10
>
> DIVIDENDS
>
> 1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State.
>
> [2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.]"

11. A perusal of Clause (1) and (2) of Article 10 of the subject DTAA would show that when dividends are paid by a company which is a resident of one of the contracting State, to a resident of other State, it may be taxed in that other State. However, such dividends can also be taxed in the contracting State of which the company paying dividends is a resident according to laws of that State, and if the recipient is the beneficial owner of the dividend, the tax so charged shall not exceed 10% of the gross amount of the dividend.

11.1. In the given facts and circumstances, although, the remitter of dividends are Indian entities, the recipients are companies residents of the Netherlands. Therefore, in consonance with Article 10 (2) of the subject DTAA, the remittance, i.e., the dividends can be taxed in India provided the recipients are beneficial owners of the dividends and the tax rate does not exceed 10% of the gross amount of dividends. The respondents have not contested the assertion that the recipients, i.e., Concentrix Netherlands and Optum Netherlands are the beneficial owners of the dividends. In fact, in consonance with a request made by them, certificates under Section 197 of the Act were issued authorizing the deductors, i.e., the remitters namely Concentrix India and Optum India to deduct withholding tax @ 10% in accordance with Article 10(2) of the subject DTAA.

12. The point of inflection is the rejection of the request of the deductees made to respondent no. 1 that the rate of withholding tax should be pegged at 5% and not 10% (as indicated in the impugned certificates) in consonance with Clause (IV) of the protocol appended to the subject DTAA.

13. Therefore, it would be necessary to extract the relevant provisions of the protocol.

> **"PROTOCOL**
>
> At the moment of signing the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, this day concluded between the Kingdom of the Netherlands and the Republic of India, the **undersigned have agreed that the following provisions shall form an integral part of the Convention.**
>
> **I**V.Ad Articles 10, 11 and 12
>
> 1. Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Article 10, 11 or 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied.
>
> 2. **If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."** [Emphasis is ours]

14. A perusal of the aforesaid extract of the protocol would show that the protocol forms an integral part of the Convention. Therefore, plainly read, no separate notification is required, insofar as the applicability of provisions of the protocol is concerned. In this regard, it would be useful to extract the apposite observations, made by a Division Bench of this Court, in ***Steria (India) Ltd. vs. Commissioner of Income-tax-VI***, [2016] 386 ITR 390 (Delhi).

> "16. The AAR appears to have failed to notice that the wording of Clause 7 of the Protocol makes it self-operational. It is not in dispute that the India-France DTAA was itself notified by the Central Government by issuing a notification under Section 90 of the Act. It is also not in dispute the separate Protocol signed between India and France simultaneously forms an integral part of the Convention itself. The preamble in the Protocol, which states "the undersigned have agreed on the following provisions which shall form an integral part of the Convention", makes this position clear. **Once the DTAA has itself been notified, and contains the Protocol including para 7 thereof, there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other Convention between India and another OECD country to be separately notified to form part of the Indo-France DTAA.**
>
> **17. Reliance is rightly placed by the Petitioner on the following passage at page 32 in the commentary by Klaus Vogel on "Double Taxation Conventions":**
>
> **"As previously mentioned, (final) protocols and in some cases other completing documents are frequently attached to treaties. Such documents elaborate and complete the text of a treaty, sometimes even altering the text. Legally they are part of the treaty, and their binding force is equal to that of the principal treaty text. When applying a tax treaty, therefore, it is necessary carefully to examine these additional documents**"
>
> 18. The Court is, therefore, unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable and that there has to be a separate notification incorporating the beneficial provisions of the DTAA between India and UK as forming part of the India- France DTAA."

[Emphasis is ours]

15. A bare perusal of Clause IV (2) shows that it incorporates the principle of parity between the subject DTAA and the Conventions/DTAAs executed thereafter *qua* the rate of withholding tax or the scope of the Conventions in respect of items of income concerning dividends, interest, royalties, fees for

technical services, or payments for use of equipment [in short "subject remittances"].

16. However, the principle of parity kicks-in, only if the following conditions are fulfilled:

i. First, the third State with whom India enters into a Convention/DTAA should be a member of the OECD.

ii. Second, India should have, in its Convention/DTAA, executed with the third State, limited its rate of withholding tax, on subject remittances, at a rate lower or a scope more restricted, than the rate or scope provided in the subject Convention/ DTAA.

17. Once the aforementioned conditions are fulfilled, then, from the date on which the Convention/DTAA between India and a third State comes into force, the same rate of withholding tax or scope as provided in the Convention/DTAA executed between India and the third State would necessarily have to apply to the subject DTAA.

17.1. Therefore, the argument advanced on behalf of the revenue, that the beneficial provisions contained in the Conventions/DTAAs, executed both prior to or after the coming into force of the subject DTAA, i.e., 21.01.1989, could not be made applicable to the recipients of remittances covered under the subject DTAA even though the concerned third State was a member of the OECD is, to our minds, completely misconceived and contrary to the plain terms of Clause IV (2) of the protocol appended to the subject DTAA.

17.2. Although it must be said in favour of the revenue, the construct of Clause IV (2) is such that in certain cases there could be a hiatus between the dates on which the Convention/DTAA is executed between India and the third State and the date when such third State becomes a member of OECD. The limit on the lower rate of tax or the scope more restricted contained in the

Convention/DTAA executed between India and the third State can only apply when the third State fulfils the attribute of being a member of the OECD.

17.3. We must point out that a lot of emphases is laid on behalf of the revenue on the word "**is**" mentioned in the following part of Clause IV (2) in the context of the aforementioned third States with which India has entered into Conventions/DTAAs after the execution of the subject DTAA "... *which **is** a member of the OECD* ...".

17.4. In our view, the word "is" describes a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under Section 197 of the Act. The word 'is'- is both autological and heterological. An autological[1] word is one that expresses the property that it possesses. Opposite of that is a heterological[2] word, i.e., it does not describe itself. The examples of autological words are expressions such as "English", "Noun", or "Word". Heterological words as indicated above are those which do not describe themselves or have the potential of developing into several forms or supporting multiple interpretations. An example of a heterological word is the word "long". The word long does not describe itself because it is not a long word.

17.5. Therefore, bearing the aforesaid in mind, the best interpretative tool that can be employed to glean the intent of the Contracting States in framing Clause IV (2) of the protocol would be as to how the other contracting State [i.e., the Netherlands] has interpreted the provision. In this context, it would relevant to note the contents of the decree issued by the Kingdom of Netherlands on

---

1 See: Oxford Reference, Oxford University Press, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095436320, last accessed on 17.04.2021, at 13:00 IST.

2 See: Oxford Reference, Oxford University Press,https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095934970, last accessed on 17.04.2021, at 13:00 IST.

28.02.2012 [No. IFZ 2012/54M, Tax Treaties, India] which was published on 13.03.2012:

"Decree of 28 February 2012, No. IFZ 2012 / 54M, Tax Treaties. India
February 28, 2012
No. IFZ 2012 / 54M
Directorate-General for Tax Affairs, International Tax Affairs
**The State Secretary of Finance has decided the following.**
**This decision reflects the consequences of Slovenia's membership of the OECD for the application of the tax treaty between the Netherlands and India as a result of the MFN clause included in this treaty. Furthermore, this decision is a merger and update of previous policy decisions on the consequences of this MFN clause.**

1 Introduction
On February 17, 2005, the tax treaty between India and Slovenia entered into force. Slovenia became a member of the OECD on 21 July 2010. In this decision, I describe the consequences of these events for the application of the tax treaty between the Netherlands and India. The opportunity was taken to merge and update previous policy decisions on the consequences of the most favored nation clause in the tax treaty between the Netherlands and India.
1.1 Terms and abbreviations used
The treaty: the Convention between the Netherlands and India for the avoidance of double taxation and the prevention of fiscal evasion with regard to taxes on income and capital of July 30, 1988 (Treaty Series 1988, 122)
2. Profit from business
The Convention includes a most favored nation clause relating to a restriction on the deduction of head office expenses by a permanent establishment under the national law of the State in which the permanent establishment is located (Article 7 (3) (a)).
The most-favored-nation clause in Article 7 provides that if one of the Contracting Governments agrees a tax treaty with another state that relaxes (or removes) the limitation on the deduction of head office expenses, its application will not extend to the India - Netherlands relationship until after the relaxation of the deduction limitation as such is included in the Convention. The MFN clause in Article 7 of the Treaty therefore does not have automatic effect.
**3. Dividends**
**The Protocol to the Convention contains a most-favored-nation clause in relation to Articles 10, 11 and 12 (Article IV, paragraph 2). This provision shall apply if, after the signing of the Convention in a treaty with another State which is a member of the OECD, India lowers the rate in respect of its taxation at source below the rate provided for in the Convention or when India has a more limited scope for the withholding tax provisions of Articles 10, 11 and 12.**
**The treaty that India has agreed with Slovenia, which entered into force on February 17, 2005, includes a participation dividend rate of 5 percent. This constitutes a participation dividend if a company immediately owns at least 10 percent of the capital of the company that pays the dividends.**
**Slovenia became a member of the OECD on 21 July 2010. Under the most favored nation clause in the Protocol to the Convention, this event has the effect**

> **that, with retroactive effect to July 21, 2010, a rate of 5 per cent will apply to participation dividends paid by a company resident in the Netherlands to a body resident in India**. The text of the relevant treaty provision from the India-Slovenia treaty is set out in the Annex.
> Under the MFN clause, portfolio dividends (where an entity owns less than 10 percent of the capital of the entity paying the dividends) in the Netherlands - India relationship will continue to be subject to a rate of 10 percent. This rate is derived from the treaty between India and Germany of June 19, 1995 and has been applicable since April 1, 1997. The treaty between India and Slovenia does not change this.
> The treaty between India and Slovenia has no consequences for the so-called Dividend Distribution Tax that India levies from bodies established in India on the distribution of profits by these bodies to shareholders in the Netherlands. India considers that this tax should be seen as an additional tax on Indian profit tax and that India therefore does not levy withholding tax on dividends. The Indian Dividend Distribution Tax therefore cannot be considered a withholding tax for the purposes of the Convention as referred to in Article 10 (dividends) and is not eligible for set-off under Article 23, paragraph 3,"

[Emphasis is ours]

17.6. Clearly, the Netherlands has interpreted Clause IV (2) of the protocol appended to the subject DTAA in a manner, indicated hereinabove by us, which is, that the lower rate of tax set forth in the India-Slovenia Convention/DTAA will be applicable on the date when Slovenia became a member of the OECD, i.e., from 21.08.2010, although, the Convention/DTAA between India and Slovenia came into force on 17.02.2005. Therefore, participation dividend paid by companies resident in the Netherlands to a body resident in India will bear a lower withholding tax rate of 5 per cent.

17.7. Thus, can the converse be any different? We think not. The reason being that one of the avowed purposes of entering into DTAAs is the equitable allocation of taxes concerning transactions that are taxable in both States. The approach adopted by us aligns with the accepted principle applied in the interpretation of Conventions/DTAAs. This is the principle of "Common Interpretation". [See: Klaus Vogel, ***Double Tax Treaties and Their Interpretation,*** (1986)]

17.8. This principle of Common Interpretation is also recognized in private international law with regard to conflict rules. The purpose, it appears, as indicated above, is to allocate tax claims equally between the contracting States.

The Courts of the contracting States are, thus, required to ensure that Conventions/DTAAs are applied efficiently and fairly so that there is consistency in the interpretation of the provisions by the tax authority and courts of the concerned contracting State.

17.9. Having said so, the common interpretation if adopted [whether it concerns a tax authority or a foreign court] should be applied with care and caution having regard to the fact that the view expressed could be unique and/or personal to the tax authority or a Court. An attempt should be made to choose a view that finds general acceptance with Courts and authorities.

18. Therefore, the judgement cited by Mr. Sawhney on behalf of Optum Netherlands which was rendered in ***Corocraft Ltd. vs. Pan American Airways Inc.***, [1968] 3 W.L.R. 1273, 1283 must, to our minds, align with the more tempered view taken in ***Fothergill vs. Monarch Airlines***[3], 3 W.L.R. 209, 224 (1980). In ***Corocraft Ltd.***, Lord Denning expounded a very broad principle concerning the applicability of the common interpretation principle in the context of foreign decisions.

> "even if I disagreed, I would follow them in a matter which is of international concern. The courts of all the countries should interpret this convention in the same way."

---

[3] "… As respects decision of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system. For instance your Lordships would not be fostering uniformity of interpretation of the Convention if you were to depart from the prima facie view which you had yourselves formed as to its meaning, in order to avoid conflict with a decision of a French court of appeal that would not be binding upon other courts in France, that might be inconsistent with an unreported decision of some other French court of appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that would have binding effect upon lower courts in France. It is no criticism of the contents of the judgments in those foreign cases to which your Lordships have been referred if I say that the courts by which they were delivered do not appear to me to satisfy the criteria which would justify your Lordships in being influenced to follow their decisions in the interests of uniformity of interpretation."

19. However, the case before us is one where the other contracting State, i.e., the Netherlands has interpreted Clause IV (2) in a particular way and therefore in our opinion, in the fitness of things, the principle of common interpretation should apply on all fours to ensure consistency and equal allocation of tax claims between the contracting States.

19.1. Thus, we are not impressed with the argument advanced on behalf of the revenue that since Slovenia, Lithuania, and Columbia became members of the OECD, not only after the subject DTAA came into force but also after their own DTAA came into force, and therefore, lower rate of withholding tax, i.e., 5% on dividends would not apply to recipients in the Netherlands, who are otherwise covered under the subject DTAA - as that is not how the other contracting State, i.e., the Netherlands has interpreted Clause IV (2) of the protocol appended to the subject DTAA.

19.2. Closer home, the Supreme Court in ***Union of India and Anr. vs. Azadi Bachao Andolan and Another***, (2004) 10 SCC 1, in paragraph 130 and 131, made the following observations concerning the interpretation of treaties:

> ***Interpretation of treaties***
> 130. **The principles adopted in interpretation of treaties are not the same as those in interpretation of a statutory legislation**. While commenting on the interpretation of a treaty imported into a municipal law, **Francis Bennion observes:**
> **"With indirect enactment, instead of the substantive legislation taking the well-known form of an Act of Parliament, it has the form of a treaty.** In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument. It is rather like saying that, by Act of Parliament, a woman shall be a man. Inconveniences may ensue. **One inconvenience is that the interpreter is likely to be required to cope with disorganised composition instead of precision drafting. The drafting of treaties is notoriously sloppy usually for a very good reason. To get agreement, politic uncertainty is called for.**
> … **The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English law, or by English legal precedent, but conducted on broad principles of general acceptation**. **This echoes the optimistic dictum of Lord Widgery, C.J. that the words 'are to be given their general meaning, general to lawyer and layman alike … the meaning of the diplomat rather than the lawyer'**." [ Francis Bennion: Statutory Interpretation, p. 461 [Butterworths, 1992 (2nd Edn.)].]

131. An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases. **Commenting on this aspect of the matter, David R. Davis in Principles of International Double Taxation Relief [ David R. Davis: Principles of International Double Taxation Relief, p. 4 (London, Sweet & Maxwell, 1985).] , points out that the main function of a Double Taxation Avoidance Treaty should be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. It is observed (vide paragraph 1.06):**

**"The benefits and detriments of a double tax treaty will probably only be truly reciprocal where the flow of trade and investment between treaty partners is generally in balance. Where this is not the case, the benefits of the treaty may be weighed more in favour of one treaty partner than the other, even though the provisions of the treaty are expressed in reciprocal terms**. This has been identified as occurring in relation to tax treaties between developed and developing countries, where the flow of trade and investment is largely one-way.

Because treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides."

And, finally, in paragraph 1.08:

"Apart from the allocation of tax between the treaty partners, tax treaties can also help to resolve problems and can obtain benefits which cannot be achieved unilaterally."

[Emphasis is ours]

19.3. A perusal of the aforesaid observations would show that while interpreting international treaties including Tax treaties the rules of interpretation that apply to domestic or municipal law need not be applied, for the reason, that international treaties, conventions and tax treaties are negotiated by diplomats and not necessarily by men instructed in the law. [Also see: Observations of Lord Diplock[4] in ***Fothergill*** Case].

---

[4] "… The Warsaw Convention of 1929 and its later protocols are exceptions inasmuch as the only authentic text is that expressed in the French language which is set out in Part 2 of the Schedule to the Carriage by Air Act 1961. The language of that Convention that has been adopted at the international conference to express the common intention of the majority of the states represented there, is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to travaux preparatoires, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text.

19.4. Therefore, their interpretation is liberated from the technical rules which govern the interpretation of domestic/municipal law. The core function of a DTAA should be seen to aid commercial relations and equitable distribution of tax revenues in respect of income which falls for taxation in both the deductor and the deductee States, i.e., the contracting States.

**<u>Conclusion:</u>**

20. Thus, having regard to the foregoing discussion, we are of the view that the impugned certificates dated 16.09.2020 and 04.01.2021 deserve to be quashed.

21. It is ordered accordingly. Respondent no. 1 will issue a fresh certificate under Section 197 of the Act, which would indicate, that the rate of withholding tax, in the facts and circumstances of these cases, would be 5%.

22. The case papers shall stand consigned to record.

**RAJIV SHAKDHER, J.**

**TALWANT SINGH, J.**

**APRIL 22, 2021**

*<u>Click here to check the corrigendum, if any</u>*

---

The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted as Lord Wilberforce put it in James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (UK) Ltd. [1978] A.C. 141. at 152, " unconstrained by technical rules of English law, or by English legal " precedent, but on broad principles of general acceptation "."