

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA
(Virtual Court)**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

**I.T.A. Nos. 1884 & 1885/Kol/2019
Assessment Years: 2013-14 & 2014-15**

DCIT, Circle-10(1), Kolkata.....Appellant

Vs.

**M/s. Indian Oil Petronas Pvt. Ltd.....Respondent
[PAN: AAACI 5573 R]**

**C.O. Nos. 26 & 27-Kol-2020
Arising out of I.T.A. Nos. 1884 & 1885/Kol/2019
Assessment Years: 2013-14 & 2014-15**

**M/s. Indian Oil Petronas Pvt. Ltd.....Appellant
[PAN: AAACI 5573 R]**

Vs.

DCIT, Circle-10(1), Kolkata.....Respondent

Appearances by:

Sh. Dhawal Singh, CIT, appeared on behalf of the Revenue.

Mrs. Priyanka salarpuria, A/R, appeared on behalf of the Assessee.

Date of concluding the hearing : April 12th, 2021

Date of pronouncing the order : April 30th, 2021

ORDER

Per J. Sudhakar Reddy, AM:

Both these appeals are filed by the Revenue directed against separate but identical orders of the Learned Commissioner of Income Tax (Appeals)-4, Kolkata [hereinafter the "CIT(A)"], passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), dated 07.02.2019 for the Assessment Years 2013-14 & 2014-15.

2. The assessee is a company and is engaged in the business of manufacturing, trading and terminalling/bottling of liquefied petroleum gas. The sole issue that arises for our consideration in these appeals is whether the process of blending of butane and propane which is carried out in scientific manner, with use and aid of sophisticated

plant and machinery and whether the transformation brought about an entirely new product in the name of LPG and whether such activity is a manufacturing activity so that the assessee is eligible to claim additional depreciation u/s 32(1)(iiia) of the Act. This issue is no more *res-integra*.

2.1. The Hon'ble Supreme Court in the case of *Commissioner of Income-tax-1, Mum. vs. Hindustan Petroleum Corpn. Ltd.* reported in [2017] 84 taxmann.com 215 (SC) held as follows:

"Section 80-I, read with sections 80-IA and 80HH, of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings, etc., after certain dates (Manufacture) - Whether process of bottling of gas into cylinders for domestic use by complex technical process undertaken in plant with machinery amounts to production or manufacture of gas cylinders for purposes of deduction under sections 80-I, 80-IA and 80HH - Held, yes [Paras 17 & 18] [In favour of assessee]"

2.2. This Bench of the Tribunal in the case of *D.C.I.T, Cir-10(1), Kolkata vs. M/s. Indian Oil Petronas Pvt. Ltd.* in ITA No.1930/Kol/2016 order dated 15.03.2019 on the very same issue held as follows:

"19. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. Counsel, we note that the contentions put forth by the AO are not well founded and the AO did not bring on record any sufficient material or technical information to dislodge the submissions made by the assessee. From the assessee's audited accounts and other materials reported in the audited accounts, we find that in production of LPG: propane & butane are principal raw materials. From the audited accounts, we note that during the relevant year, the assessee was engaged both in trading and manufacturing activities. The assessee had purchased propane & butane both for trading purposes as well as for manufacturing LPG. The assessee made disclosures in its accounts in respect of its trading activities and manufacturing activities separately. Even in the Tax Audit Report as well as in the audited financial statements, the assessee had made separate quantitative disclosures with regard to its trading & manufacturing operations and in the impugned order the AO has not disputed or disapproved these audited figures. The Ld Counsel had explained in detail the production process employed for production of LPG. The Ld Counsel has explained that the propane and butane are stored in special conditions which are heated separately through various stages. These two materials which exist in gas form are then processed in manner where they are condensated and are reduced from gas to liquid form in scientific manner. For undertaking the transformation of butane & propane into liquid form and then to obtain Liquefied Natural Gas, the assessee has to employ scientific methods and it also utilizes sophisticated plant & machinery. From the assessee's audited profit & loss account, we find that the assessee owns substantial block of plant & machinery and as per the records the WDV of plant & machinery employed exceeded Rs.141 crores as on 31.03.2010. Therefore we note that the process employed by the assessee in production of LPG is considered as a "manufacture" under the provisions of the Central Excise Act, 1944 and on production of LPG, the assessee pays excise duty. If under the provisions of the Central Excise Act, 1944, the production of LPG is considered to be a manufacturing activity then it does not appeal to logic that the same activity does not amount to manufacture under the Income-tax Act. 1961.

20. We note that raw materials, butane & propane have different chemical compositions and the end uses for butane & propane are much different from the LPG. Butane / Propane are primarily used as a source of energy for industrial purpose whereas blended LPG facts

primarily as fuel for operating commercial vehicles or used as cooking gas. We note that both in terms of chemical composition as also with regard to its commercial use and application as also as a commercial product: propane, butane & LPG are regarded as different & distinct products. Merely because all the three products in themselves are considered as source of energy or power and these are consumed by different end users for providing energy, such fact in itself does not lead to conclusion that all three products are one and the same. Had that been the case then both scientifically as well as commercially these three products would have been known by three distinct & different names or chemical terminologies. The question as to whether the blending of two different gases i.e. propane & butane for producing LPG constitutes 'production' or 'manufacture'. For that we rely on the judgment of the Hon'ble Supreme Court in the case of CIT Vs Sesa Goa Ltd (271 ITR 331) and CIT Vs India Cine Agencies Ltd (308 ITR 98). In the latter judgment, the Hon'ble Supreme Court referred to its earlier judgment and the findings of the Apex Court having bearing on the assessee's case was as follows:

"3. In Black's Law Dictionary (5th Edition), the word 'manufacture' has been defined as, 'the process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine'. Thus by process of manufacture something is produced and brought into existence which is different from that, out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See Dy. CST (Law), Board of Revenue (Taxes) Coca Fibres [1992] Supp. 1 SCC 290). 4. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but Instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connect with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

8. The aforesaid aspects were highlighted in Kores India Ltd. v. CCE [2005] 1 SCC 385 in the background of Central Excise Act, 1944 (in short the Excise Act) and Central Excise Rules, 1944 (in short the 'Excise Rules') and Central Excise Tariff Act, 1985 (in short the 'Tariff Act'). The stand of the revenue was that it amounted to "manufacture ", contrary to what has been pleaded in these cases. This Court held that it amounted to manufacture.

9. The matter can be looked at from another angle. In CIT v. Sesa Goa Ltd [2004] 271 ITR 3311, this Court considered the meaning of word 'production'. The issue in that case was whether the extraction and processing of iron ore amounted to manufacture or not in view of the various processes involved and the various processes would involve production within the meaning of section 32A of the Act. It was inter alia observed as under:

" ... There is no dispute that the plant in respect of which the assessee claimed deduction was owned by it and WDS installed after 31-3-1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. The issue had arisen before different High Courts over a period of time. The High Courts

have held that the activity amounted to 'production' and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in *CIT v. Singareni Collieries Co. Ltd.* [1996] 221 ITR 48, the Calcutta High Court in *Khalsa Brothers v. CIT* [1996] 217 ITR 185 and *CIT v. Mercantile Construction Co.* [1994] 74 Taxman 41 (Cal.) and the Delhi High Court in *CIT v. Univmin .) Ltd.* [1993] 202 ITR 825. The Revenue has not questioned any of these decisions, at least not successfully, and the position of law. therefore, was taken as settled.

The reasoning given by the High Court, in the decisions noted by us earlier, is in our opinion, unimpeachable. This Court had as early as in 1961, in *Chrestian Mica Industries Ltd. v. State of Bihar* [1961] 12 STC 150, defined the word 'production' albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning 'amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort. From the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort. It has also been held by this Court in *CIT v. N .C. Budharaja & Co.* [1993] 204 ITR 412 that the word 'production' is much wider than the word 'manufacture'. It was said (page 423):

The word 'production' has a wider connotation than the word 'manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture

The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which mayor may not amount to manufacture. It also takes in all the by-products, intermediate products and residue rodeos which emerge in the course of manufacture of goods. "

21. We also note that the assessee's process of production of LPG is subjected to levy of Central Excise Duty and the Excise Department which also falls under the Department of Revenue collects substantial amount of excise duty on the footing that the assessee is engaged in manufacture of an article or product. In the context as to whether the definition of 'manufacture or production' employed for levy of Central Excise should also be employed under the Income-tax Act, 1961, as it was examined by the Supreme Court in the case of *ITO Vs Arihant Tiles & Marbles Ltd* (320 ITR 79). We note that in the process of blending of butane & propane which is carried out in scientific manner with use and aid of sophisticated plant & machinery, transformation is brought about and entirely new product by the name LPG is obtained. The said object or product i.e. LPG is known to the trade and commerce by its separate distinctive commercial name and it has a different character and its end use is also different. Accordingly provisions of Section 2(29BA) of the Act and also the ratios laid down by the Supreme Court in several decisions, we have no hesitation in holding that the assessee was engaged in manufacture or production of an article or thing and therefore it was eligible for claiming additional depreciation u/s 32(1)(ia) of the Act. That being so, we decline to interfere in the order passed by Id CIT(A), his order on this issue is hereby upheld and grounds of appeal raised by the Revenue is dismissed."

3. Respectfully following the same, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue.

4. The assessee has filed Cross Objection No. 26/Kol/2020 in ITA No. 1884/Kol/2019 and Cross Objection No. 27/Kol/2020 in ITA No. 1885/Kol/2019 wherein it raised the following grounds of objections:

"1. For that on the facts and in the circumstances of the case, the AO be directed to allow the deduction for Cess of Rs. 81,56,589/- paid by the assessee in F.Y 2012-13.

2. For that on the facts and in the circumstances of the case, the AO be directed to compute the tax payable by the assessee u/s 115-O of the Income Tax Act at the rate prescribed in the Agreement for Avoidance of Double Taxation between India & Malaysia in respect of dividend paid by the Company to Petroliam Nasional Berhad, a tax residents of the Malaysia.

3. For that the appellant craves leave to submit additional grounds and/or amend or alter the grounds already taken either at the time of hearing of the appeal or before."

5. There is a delay of 424 days in filing of the Cross Objections. The assessee filed objections seeking condonation of the delay. The sum and substance of this condonation of delay petition is that the issues raised in Cross Objections are legal issues, which were not raised before the lower authorities earlier and consequent to certain judicial decisions that have been pronounced recently the assessee became aware of the fact that these particular claims are legally allowable to the assessee and hence this Cross Objection was filed with delay. As this was not claimed before the lower authorities, these additional grounds were filed in the Cross Objections by the assessee. He has submitted that these additional grounds in Cross Objections are purely legal grounds and do not require enquiry to the facts and prayed that the same be admitted by relying on the decision of the Hon'ble Supreme Court of India in the case of *National Thermal Power Co. Ltd. vs. CIT* reported in (1998) 229 ITR 383 (SC).

6. After considering rival submissions, we condone the delay of 424 days for the reason that the assessee became aware of its rights to claim for deduction, consequent to pronouncement of judgement of these issues by the ITAT. The legal position is that such legal claims can be made by the assessee at any stage of proceedings. The entire exercise of assessments and appeals should ultimately result in determining the correct taxable income of the assessee. Thus we admit the additional ground raised in the Cross Objections.

7. We have heard rival contentions on these additional grounds on merits. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows.

8. As per the provisions of section 195 of the Income-tax Act, 1961 (hereinafter referred to as the 'Act'), any person responsible for paying to a non-resident any income chargeable to tax under the provisions of the Act, shall deduct tax at source at the 'rates in force'.

8.1. As per the provisions of section 2(37A) of the Act, the term 'rates in force' means the rates specified in the Act or rates specified in the relevant Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA'), whichever is more beneficial to the assessee.

8.2. In the instant case, the dividend income should be chargeable to tax in the hands of the shareholders as per the provisions of section 4 of the Act. However, for administrative convenience, the incidence of tax is shifted to the resident company paying dividend income and as such, the company being the person responsible for distributing dividend income among the shareholders including the non-resident shareholders, the rate of tax to be paid on such dividend income would be governed by the tax rate specified in the DTAA (being more beneficial) and not the rate specified in section 115-O of the Act.

8.3. As per the provisions of the Act, dividend distribution tax (DDT) is a tax on dividend income and not on undistributed profits of the company. Undistributed profits of a company are still the profits of the company. They constitute the income of the company. Until the company declares dividend, no portion of these profits can become the income of the shareholders [Kindly refer *C W Spencer v ITO - 37 ITR 107 (Mad)*].

8.4. As per the aforesaid principle, the dividend income would constitute income in the hands of the shareholders and would be chargeable to tax under section 4 of the Act. The Finance Ministry, in the 'Memorandum Explaining the Provisions of the Finance Bill 1997 to 2020', has stated that for administrative convenience, the incidence of tax on dividend income is shifted to the resident company paying such dividend income.

8.5. Thus, it may be appreciated that once the dividend constitutes income in the hands of the shareholders, the same should be chargeable to tax as per the provisions of section 4 of the Act. As per the provisions of section 4 of the Act, the income tax including the additional income tax should be charged at the rate specified in the Act or DTAA, whichever is more beneficial to the assessee.

8.6. In the instant case, the dividend, being an income in the hands of non-resident shareholders in respect of which the incidence of tax is borne by the resident company

paying dividend. The rate of tax as specified in the DTAA, being more beneficial to the assessee, would be applicable over the rate specified in section 115-O of the Act.

8.7. We now consider the principles emanating from Supreme Court ruling in the case of *Tata Tea Limited*. The Hon'ble Supreme Court in the case of *Tata Tea* reported in *398 ITR 260 (SC)* has overruled the relevant decision of the Hon'ble Calcutta High Court and held that DDT is leviable on the entire amount of dividend, even if it is distributed partly out of agricultural income. Following points emerge on an analysis of the Supreme Court ruling. The Hon'ble Supreme Court referred to its earlier decision in the case of *Bacha Guzdar* to hold that dividend distributed by a company is not impressed with the character of its own income. Thus, the levy of DDT by the Parliament on the entirety of the dividend, even if distributed wholly or partly out of agricultural income, is valid under the Constitution of India.

8.8. The dividend is still taxable as income, though the incidence of tax has shifted from the shareholder, to the company paying the dividend. Once the Hon'ble Supreme Court has held that dividend connotes income, the logical conclusion is that as per section 4 of the Act, the said income should be chargeable to tax in the hands of the person earning such income.

8.9. We now consider whether the earlier ruling of Hon'ble Supreme Court in the case of *Godrej & Boyce Manufacturing Co* reported in *394 ITR 449 (SC)* runs counter to the later ruling in the case of *Tata Tea Limited* (supra).

The two rulings do not convey contrary or contradictory principles in the context of the issue on hand, as discussed herein below:

i) In the case of *Godrej & Boyce*, a point was made by the taxpayer, being recipient of dividend income, that since dividend suffered DDT in the hands of the payer company, it could not be considered as exempt income for any expenditure incurred by the taxpayer-shareholder for earning such income, to be disallowed under section 14A of the Act.

ii) The Hon'ble Supreme Court rejected the claim of the taxpayer and held that since dividend income did not form part of the total income of the shareholder, in view of

section 10(33) of the Act, being the condition precedent or sine qua non for the applicability of section 14A of the Act, the taxpayer could not per se be absolved from the rigors of section 14A of the Act.

iii) However, the Hon'ble Supreme Court did not hold that dividend income, per se is not taxable.

iv) Incidentally the Hon'ble Supreme Court held that dividend income was taxable in the hands of the payer company and thus the same did not form part of the total income of the shareholder.

v) Thus, similar to its later ruling in the case of Tata Tea, the Hon'ble Supreme Court had held in the earlier case of *Godrej & Boyce* that dividend income was taxable, *albeit* in the hands of the payer company and not in the hands of the recipient.

vi) When the Hon'ble Supreme Court holds that dividend income is taxable, the conclusion is that taxability of an income has to be considered from the perspective of the recipient, since the term 'income' can only have a logical relevance qua the recipient of a certain sum of money or its equivalent; and not the payer thereof. The term 'income' cannot be reconciled qua the payer.

vii) It may be a different matter altogether that the incidence of tax on 'dividend income' has been fixed on the payer of dividend under the relevant scheme of the Act. However, the fact remains that the dividend income is taxed in the form of DDT under section 115-O of the Act, which can only be autopsied for the purposes of calculating the rate of tax thereon from the perspective of the recipient shareholder, though the quantum of tax, once decided, is to be borne by the payer of dividend. Thus, though optically appearing to run counter to the subsequent ruling in the case of Tata Tea, the earlier ruling in the case of *Godrej Boyce* does not actually or in substance, convey any contrary or contradictory view, as expressed by the Hon'ble Supreme Court in the case of Tata Tea in the context of the issue on hand.

viii) Further, another interesting point to note is that both the rulings, as above, were rendered by coterminous benches (two judges) of the Supreme Court, with one judge, namely Hon'ble Mr. Justice Ashok Bhushan, being common in both the benches.

8.10. The section 195A of Act, provides that where, pursuant to any agreement or arrangement, the withholding tax on any income is to be borne by any person to whom the income is payable so that the recipient of any income receives the income free of tax then such income shall be grossed up by such amount.

8.11. In the instant case, the incidence of tax on dividend income is borne by the company paying dividend income by virtue of statute and not by way of any agreement and as such, the rigor of section 195A of the Act would not be applicable.

8.12. In any event, it may be stated that even if the payment is to be grossed up, yet the rate specified in DTAA (if more favourable) would be applicable to gross up the said payment.

8.13. Thus, in conclusion, it may be stated that the rate of tax payable on dividend distributed to non-resident shareholders would depend upon the relevant Article of the DTAA entered into between India and the country to which the non-resident belongs, subject to the fulfilment of the conditions stated hereinbelow:

- i) Dividend should be paid to the non-resident shareholder.
- ii) Dividend constitutes income in the hands of the non-resident shareholder.
- iii) The non-resident shareholder is the beneficial owner of the dividend.
- iv) The non-resident shareholder should not have a 'Permanent Establishment' in India.

8.14. The Hon'ble Delhi High Court in the case of *Pr. CIT v Maruti Suzuki Limited - 2019(12) TMI 1080 (Del)* held that the Hon'ble Tribunal is within its power to admit the additional ground in respect of claim of refund of tax paid in excess, by following provision of section 115-O of the Act instead of the relevant Article of the applicable DTAA.

8.15. The Delhi ITAT in the case of *Giesecke & Devrient (India) Pvt. Ltd. vs. Addl. CIT* bearing *ITA No. 7075/Del/2017* has held that the rate specified in DTAA would be applicable to dividend distributed by company to non-resident shareholders and not the rate specified in section 115-O of the Act. However, the Hon'ble Tribunal after deciding the issue has set aside the ground to the file of the Ld. AO to verify, only to admitted

purpose, as to whether the non-resident shareholder was having any 'Permanent Establishment' in India.

8.16. The Hon'ble ITAT Kolkata Bench in the case of *Reckitt Benkiser (I) Pvt. Ltd. vs. DCIT* bearing *ITA No. 404/Kol/2015* has set aside the above issue to the file of the AO without adjudication after admitting the additional ground taken up by the company.

9. In view of the above discussion and as the relevant Article of the DTAA have to be examined, we are setting aside this matter to the file of the AO for fresh adjudication in accordance with law after admitting this claim of the assessee. The AO shall consider this claim of the assessee and dispose off the case in accordance with law.

10. In the result, the Cross Objections of the assessee are allowed for statistical purposes.

Kolkata, the 30th April, 2021.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated: 30.04.2021

Bidhan (P.S.)

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. ***DCIT, Circle-10(1), Kolkata.***
2. ***M/s. Indian Oil Petronas Pvt. Ltd., Acropolis, 12th Floor, Unit-I & II, 1858/1, Rajdanga Main Road, Kolkata-700 107.***
3. CIT(A)- 4, Kolkata (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches