IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'F', NEW DELHI

BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos. 4347 to 4350/Del/2016
AY: 2010-11 to 2013-14

M/s Polyplex Corporation Ltd. 40, New Mandakini, Greater Kailash, New Delhi. **PAN No. AAACP0278J**	**vs**.	ACIT Circle-14(1) New Delhi.
(Appellant)		**(Respondent)**

Assessee by : Shri Ved Jain, Adv.
Shri Rishabh Jain, CA &
Shri Ashish Goel, CA

Department by : Sh. Surender Pal, Sr. DR

Date of Hearing : 23/01/2019

Date of Pronouncement: 24/01/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by assessee against order dated 24.06.2016 passed by Ld.CIT (A)-7, New Delhi for assessment years 2010-11 to 2013-14.

2. Ld.AR submitted that grounds raised in these appeals are on identical issue and facts leading to the issue are similar. He thus submitted that all appeals may be taken up together for sake of convenience. Ld.Sr.DR also submitted that issues raised in all the appeals are identical on similar facts.

3. We are, therefore, inclined to pass a consolidated order, by taking into consideration facts and figures for assessment year 2010-11.

A.Y:2010-11

4. Grounds pertaining to assessment year 2010-11 are being reproduced hereunder:

1. *"On the facts and circumstances of the case, the order passed by the Ld.CIT(A) is bad both in the eyes of law and on facts.*
2. *On the facts and circumstances of the case, the Ld. CIT(A) has erred, both on facts and in law in confirming the disallowance of tax credit of Rs. 1,59,13,089/- claimed by the assessee us/ 90 of the Income Tax Act.*
3. *On the facts and circumstances of the case, the Ld. CIT(A) has erred, both on facts and in law in confirming the disallowance despite the fact that the credit has been availed in view of the provisions of Article 23(3) of the Double Tax Avoidance Agreement (DTAA) between India and Thailand.*
4. *On the facts and circumstances of the case, the ld. CIT(A) has erred, both on facts and in law in misinterpretating para 2 of Article 23 which specifically allows the tax benefit for which tax is not payable in Thailand.*
5. *On the facts and circumstances of the case, the Ld. CIT(A) has erred, both on facts and in law in ignoring the fact that the interpretation placed on para 2 of Article 23 by AO will make the para 2 otiose.*
6. *(i) On the facts and circumstances of the case, Ld. CIT(A) has erred in giving similar treatment to the transaction in India which is exempt in Thailand or taxable in the Thailand.*
   (ii) That the said action of the CIT(A) will alter the underlying benefit of exemption claimed by the assessee company in Thailand.
7. *That the appellant craves leave to add, amend or alter any of the grounds of appeal."*

Brief facts of the case are as under:

5. Return declaring total income of Rs.11,41,46,171/- was filed on 13.10.2010. Return was processed u/s 143(1) of the Income Tax Act, 1961. Case was selected for scrutiny, and statutory notices were issued, in response to which, representative of assessee attended assessment proceedings and furnished details in support of queries raised during course of assessment proceedings.

6. Ld.AO, while passing final assessment order, observed that, assessee assessee has claimed relief under section 90 of the Act. The Ld.AO thus called for various informations.

Disallowance of relief claimed u/s 90 of the Act

7. Computation of income and tax liability that the assessee has claimed a relief of Rs.1,60,74,706/- u/s 90 of the Act, on account of tax paid in Thailand by its subsidiary, from whom assessee received dividend which was offered for taxation as per provisions of Indian I.T. Act.

8. Ld.AO vide order sheet entry dated 24.02.2014 called upon assessee to provide proof of payment of tax in Thailand, in support of tax credit claim. In response to which assessee filed letter dated 27.02.2014 stating therein that ROI filed by it includes Dividend Income of Rs. 68,81,05,808/- earned from M/s Polyplex (Thailand) Public Limited Company, and contended that as per the Paragraph 2 & 3 of Article 23 of Double Taxation Avoidance Agreement between Indian and Thailand read with section 90(2) of the Indian Income Tax, 1961 assessee is eligible for tax rebate of 10% on the said income.

8.1 Submissions of assessee were analyzed Ld.AO with provisions of Income Tax Act and DTAA with Thailand *vis-a-vis* claim of assessee, and Ld.AO observed as under:

1. *That assessee has not paid tax actually in Thailand, for tax on dividend is exempt in Thailand under provisions of Investment Promotion Act of Thailand.*
2. *That, since tax has only been paid in India therefore, the question of double taxation of an income does not arise at all.*
3. *That contention of assessee that Article 23 of DTAA with Thailand allows relief for tax which has been exempted and has never been paid by assessee is falsified. Ld.AO is of the view that Article nowhere allows tax benefit for tax which has not been paid at all. Para 2 of Article 23, specifically allows relief against income "which has been subjected to tax both in India and in Thailand" but in case of assessee, tax has only been paid in India, since dividend income has been exempted under Investment Promotion Act of Thailand. Further, para 3 of Article 23 explains Thai tax payable and specifically excludes exemptions granted of tax, from Thai tax payable, "Thai tax payable" shall be deemed to include any amount which would have been payable as Thai tax for any year but for an exemption or reduction of tax granted for that year or any part thereof under the provisions of the Investment Promotion Act (B.E. 2520) or of the Revenue code (B.E. 2481) which are designed to promote economic development in Thailand, or which may be introduced hereafter in modification of, or in addition to, the existing laws for promoting economic development in Thailand.*

In view of the above, provisions of the Act and discussion in above para, relief of Rs.1,60,74,706/- claimed by assessee u/s 90 of the Act is denied.

9. Aggrieved by order of Ld.AO, assessee preferred appeal before Ld.CIT (A).

10. Before Ld.CIT(A), assessee sought to take shelter of para 3 of Article 23 of DTAA between India and Thiland. He contended that "Thai tax payable shall be deem to include any amount which would have been payable as Thai tax for any year but for an exemption or reduction of tax granted for that year or any part thereof under provisions of Investment Promotion Act or of Revenue Code which are designed to promote economic development in Thailand, or which may be introduced in modification subsequently, or in addition to, existing laws for promoting economy in Thailand. The Ld.AR filed Promotion Certificate issued by Board of Investment to M/s Polyplex Thailand Co. Ltd., which has distributed dividend to assessee. Ld.CIT(A) observed that Thailand company is allowed Privilege in terms of para 6 of the Promotion Certificate, as per which dividend distributed form promoted activity to which exemption from Corporate Income Tax is granted u/s 31, is also exempt from inclusion in tax calculation throughout the period, the promoted person (Thailand company) remains exempt from Corporate Income Tax payments. However, this clause does not refer to any dividend distributed by Thailand company to Non-resident holding company (assessee).

11. Ld.CIT(A), thus confirmed addition made by Ld.AO.

12. Aggrieved by order of Ld.CIT(A), assessee is in appeal before us now.

13. Ld.AR submitted that assessee received dividend of Rs.68,81,05,808/- from its subsidiary company in Thailand. He submitted that dividend so received was offered to tax by assessee as per Indian tax laws, however assessee also claimed relief as per provisions of DTAA amounting to Rs.153.13 lacs u/s.90 & 91 of the Act. LdAR referring to Article 23 of DTAA between India and Thailand submitted that as per Paragraph 3, of Article 23 pertaining to elimination of Double Tax, amount of Thai Tax payable under laws of Thailand, and in accordance with provisions of DTAA, directly or indirectly by a resident of India in respect of profit of income arising in Thailand, which has been subjected to tax, both in India and Thailand, shall be allowed as credit against Indian Tax payable in respect of such profits of income, provided such credit shall not exceed Indian tax.

He placed reliance on decision of *Hon'ble Delhi High Court* in case of *Pr.CIT vs. Krishak Bharati Cooperative Ltd. (2017) reported in (4) TMI 1035*, in support of his arguments.

14. On the contrary, Ld.Sr.DR submitted that, by placing reliance upon promotion certificate issued by board of investment of Thailand would not entitled assessee to claim credit of deemed tax payable in Thailand on the dividend income received. He submitted that exemption as per the promotion certificate is applicable for Thailand company and not for assessee as no references made in such certificates on deemed payment of tax on dividend distributed by Thailand company. Ld. senior DR vehemently argued that, unless tax is paid by assessee in

Thailand on the dividend income, no credit can be allowed against tax payable on such dividend income in India.

15. We have carefully considered relevant facts and arguments advanced by both sides and have perused submission advanced by both sides on the basis of records placed before us.

16. Before assailing to our view, it is necessary to refer to laws applicable to issue in hand as per Income Tax Act, 1960, as well as DTAA between India and Thailand.

Facts to be considered for determination:

17. Assessee is an Indian company and has 100% holding in its subsidiary, situated in Thailand by name M/s Polytex Thailand Co.Ltd. It is observed that, Thailand subsidiary declared dividend during years under consideration, which was received by assessee, and that by virtue of *Investment Promotion Act B.E, 2520(1977)*, ta on income is exempt under Section 31 in the hands of Thailand company and under Section 34 in assessee's hands.

18. Assessee claims that, for years under consideration, it is entitled to claim sparing of foreign tax payable in Thailand, due to exemption available to assessee as per *Investment Promotion Act B.E, 2520(1977)*, under Article 23(3) of DTAA between India and Thailand, as credit against Indian Tax payable in respect of such profits or income against tax paiyable in India on the dividend income.

19. Now question that arises is, whether benefit of tax spairing is available to assessee under DTAA between India and Thailand. Article 23 dealing with, 'Elimination of Double Taxation' reads as under:

"

CHAPTER IV
METHODS FOR ELIMINATION OF DOUBLE TAXATION

Article 23: ELIMINATION OF DOUBLE TAXATION

1. *The laws in force in either of the Contacting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Convention.*
2. *The amount of Thai tax payable, under the laws of Thailand and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of profits or income arising in Thailand, which has been subjected to tax both in India and in Thailand, shall be allowed as a credit aganist the Indian tax payable in respect of such profits or income provided that such credit shall not exceed the Indian tax (as computed before allowing any such credit) which is appropriate to the profits or income arising Thailand Further, where such resident is a company by which sur-tax is payable in India, the credit aforesaid shall be allowed in the first instance against income-tax payable by the company in India and as to the balance, if any, against surtax payable by it in India."*
3. *For the purposes of the credit referred to in paragraph 2, the term " Thai tax payable " shall be deemed to include any amount which would have been payable as Thai tax for any year but for an exemption or reduction of tax granted for that year or any part thereof under the provisions of the Investment Promotion Act (B.E. 2520) or of the Revenue Code (B.E. 2481) which are designed to promote economic development in Thailand or which may be introduced hereafter in modification of, or in addition to, the existing laws for promoting economic development in Thailand.*
4. *The amount of Indian tax payable under the laws of India and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of Thailand, in respect of profits or income arising in India, which has been subjected to tax both in India and Thailand, shall be allowed as a credit against Thai tax payable in respect of such profits or income provided that such credit shall not exceed the Thai tax (as computed before allowing any such credit) which is appropriate to the profits or income arising in India.*

5. *For the purposes of the credit referred to in paragraph 4, the term " Indian tax payable " shall be deemed to include any amount which would have been payable as Indian tax for any assessment year but for an exemption or reduction of tax granted for that year or any part thereof by the special incentive measures under the provisions of the Income-Tax Act, 1961 (43 of 1961). which are designed to promote economic development, or which may be introduced hereafter in modification of, or in addition to, the existing provisions for promoting economic development in India.*
6. *Where under this Convention a resident of a Contracting State is exempt from tax in that Contracting State in respect of income derived from the other Contracting State, then the firstmentioned Contracting State may, in calculating tax on the remaining income of that person, apply the rate of tax which would have been applicable if the income exempted from tax in accordance with this Convention had not been so exempted.*

20. Article 23(3) of Treaty with Thailand provides for relief from double taxation. The methodology prescribed under is "Tax sparing method.

20.1 Commentary to Model Conventions (both OECD and UN Model Conventions) acknowledges that there may be lot of difficulties in application of Article on "relief from double taxation". It therefore recommends that domestic legislation should provide solutions for all difficult areas/issues. There are no rules in domestic statute in India dealing with manner of granting relief from double taxation. Relief from double taxation is thus to be calculated on the basis of provisions of Treaty, read with domestic legislations in India.

21. As per section 90(2) where treaty exists, for granting relief of tax in relation to an assessee to whom such agreements applies, provisions of the Act shall apply to the extent, they are more beneficial to assessee. Thus, though chargeable provision of

Income-tax Act is applicable to assessee for its global income, yet as per section 90, if income is taxed both in India and Thailand, assessee is entitled to relief as per clause 23 of the DTAA with Thailand.

22. Reading above reproduced provision of Article 23(2), following are the circumstances that arise:

- resident of India who earns income, taxed in Thailand directly or by deduction in respect of profits or income arising in Thailand, and also in India, India is to allow credit against Indian tax payable in respect of such profits or income, with a caveat that, credit shall not exceed Indian Taxes. Credit is granted against tax liability in resident country. Therefore, resident would not be required to pay tax to the extent of credit available to him.
- in the event assessee is not liable to pay tax in India, or if tax payable by him in India, because of deduction/exemption granted, is less than tax payable outside India, assessee cannot claim credit for entire taxes paid. The credit is out of tax on income, of resident. Thus, if there is no tax or lesser tax because of exemption/deduction in India, there is no double taxation and applicability of article 23 of Indo Thailand DTAA does not arise.

23. For several developing countries tax sparing credits become essential to ensure that incentives offered by them to foreign investors yield results.

Commentary to UN Model Convention notes;

> "*One of the principal defects of the foreign tax credit method, in the eyes of the developing countries, is that the benefit of low taxes in developing countries or of special tax concessions granted by them may in large part inure to the benefit of the treasury of the capital-exporting country rather than to the foreign investor for whom the benefits were designed. Thus, revenue is shifted from the developing country to the capital-exporting country. The effectiveness of the tax incentive measures introduced by most developing countries thus depends on the inter-relationship between the tax systems of the developing countries and those of the capital-exporting countries from which the investment originates. It is of primary importance to developing countries to ensure that the tax incentive measures shall not be made ineffective by taxation in the capital-exporting countries using the foreign tax credit system. This undesirable result is to some extent avoided in bilateral treaties through a "tax sparing" credit, by which a developed country grants a credit not only for the tax paid but for the tax spared by incentive legislation in the developing country*."

Provisions for tax sparing credit are seen in India's DTAA with UK, Australia, Canada, etc.

Klaus Vogel notes regarding Article 23 in his book for *Double Taxation Conventions* as under:

> *"In accepting the '**tax sparing credit'** method, the State of residence takes into consideration special measures by which the State of source has for reasons of economic policy or the like, **reduced** its tax individually order for certain categories of cases. The tax allowed as credit by the State of residence is that which would have been paid **in the absence of such a special reduction**. This arrangement avoids the otherwise unavoidable result of the credit method is that the tax relief offered by the State of source would be 'siphoned off' by the higher tax in the State of residence and would, therefore, have no effect. In this regard, the State of residence respect the indirect subsidy given by the State of source. From the point of view of international tax law, the result would be the same if the state of source had given the tax spared a direct*

subsidy and the state of residence had refrained from taxing it."

24. On perusal of above commentaries, it is clear that concept of '*tax sparing credit*' shall be applicable to an assessee, only if dividend received by assessee is taxable in the hands of assessee as per "Thai tax laws" and exemption is available to assessee either as per the *'Revenue Code of Thailand'* or as per *'Investment Promotion Act B.E, 2520(1977)'* in order to avail credit of such taxes spared in Thailand as mentioned in paragraph 2 of Article 23.

25. We shall now analyse taxability of dividend income under Thailand Revenue Code and whether any exemption has been granted to such dividend income to assessee in Thailand either under *'Revenue Code of Thailand'* or as per *'Investment Promotion Act B.E, 2520(1977)'*.

In paper book filed before us, at pages 103-276 assessee has placed copy of Revenue Code of Thailand.

26. Ld.AR submitted that page 178 deals with *Schedule of Income Tax Rate* applicable in Thailand, as per *Thailand Revenue Code*, where for a Company or Juristic Partnership following tax rates apply:

Schedule of Income Tax Rate

(a) tax from net profit of a company or journalistic partnership	*- 30%*
(b) tax under section 70, except those mentioned in (c)	*- 15%*
(c) tax under section 70, only for the case of payment of assessable income under section 40 (4) (b)	*- 10%*

(d) tax under section 70bis - 10%

(e) tax from cross income before deduction of any expenses of a foundation or Association operating a business that generates money which is not income under section 65bis (13) - 10%

27. Ld.AR submitted that assessee's case falls under section 70*bis*, of *'Thailand Revenue Code',* which has been reproduced at page 172 of paper book and reads as under:

.....

*"**Section 70bis**. A company or journalistic partnership formed under foreign law which does not do business in Thailand, but receives assessable income under section 40 (2), (3), (4), (5), or (6), that is paid from or in Thailand, shall be liable to pay tax; the payer shall deduct the tax from assessable income at the income tax rate for companies and journalistic partnerships, and shall remit it to the local Amphoe and at the same time file a return in the form prescribed by the director-general within 7 days from the last day of the month in which such assessable income is paid....."*

28. It was argued that as per Section 70*bis*, dividend income received by assessee is taxable in Thailand and that Section 40 (4) (b) includes dividends as assessable income, which reads as under:

*"**Section 40 (4) (b)** a diffident, share of profit or any other benefits derived from a company or journalistic partnership, a*

mutual fund or a financial institution established under a specific law in Thailand for the purpose of providing a loan to promote agriculture, commerce or industry, the portion of dividend or share of profits after deduction of withholding tax under the law governing petroleum income tax."

It was further submitted that, as per *Section 34* of *Investment Promotion Act B. E. 2520* as has been amended by *Investment Promotion Act (No. 2) B. E. 2534*, which was further amended by *Investment Promotion Act (No. 3) B.E. 2544,* provides exemption on income tax on dividends derived from a promoted activity in Thailand. The said clause reads as under:

*"**Section 34.** Dividends derived from a promoted activity granted an exemption of journalistic person income tax shall be exempt from computation of taxable income throughout the period the promoted person receives the exemption of journalistic person income tax"*

prior to amendment said section read as under :

*"**Section 34**. Dividends derived from the promoted business undertakings being exempted from corporate income tax under section 31 shall be excluded from calculation of taxable income throughout the period of that tax exemption"*

Thus from co-joint reading of taxability of dividend income under *Thailand Revenue Code*, which has been exempted as per *Investment Promotion Act (supra)*, it is clear that exemption is available to assessee on dividend received from its subsidiary in Thailand, which would have been otherwise taxable as per *Thailand Revenue Code* @ 10%. Meaning thereby, assessee was not liable to pay any tax in Thailand by virtue of exemption

granted as per *Investment Promotion Act (supra)*, and therefore assessee would be entitled to credit of such taxes deemed to have been payable in Thailand under article 23 (3) of DTAA between India and Thailand.

29. From records placed before us, it is noted that assessee has sought credit at 10% on dividend received by it from its Thailand subsidiary, which is the tax that would have been otherwise payable by assessee in Thailand as per section 70*bis* of *Thailand Revenue Code*. The tax paid by assessee on dividend income in India is at 30%, which is more than tax payable in Thailand and therefore, we do not find any violation of requirements of Paragraph 2 of Article 23 of DTAA between India and Thailand.

Accordingly we allow Ground No. 2 raised by assessee.

30. Insofar as **Ground Nos. 1, 3-7** are concerned, these have been raised in support of Ground No.2. As we have already allowed Ground No. 2 aforestated paragraphs, these grounds also stands allowed.

31. **In the result, appeal filed by assessee for assessment year 2010-11 stands allowed.**

A.Y: 2011-12 to 2013-14

32. Both parties agree that facts and circumstances in assessment years 2011-12 to 2013-14 are same and identical and that view taken for assessment year 2010-11 would also be applicable to assessment years 2011-12 to 2013-14.

33. We have perused records for these years and found that afore stated submissions by parties to be correct.

34. Accordingly, relying upon our discussion, tax credit claimed by assessee against dividend received from Thailand company at 10% stands allowed.

In the result, appeal filed by assessee for assessment years 2011-12 to 2013-14 stands allowed.

Order pronounced in the open court on 24/01/2019

Sd/-	Sd/-
(PRASHANT MAHARISHI)	**(BEENA A PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dt. 24/01/2019

*Kavita Arora

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

		Date
1.	Draft dictated on	27/12/18, 15/01/19, 24/1/19
2.	Draft placed before author	12/12/19, 24/1/19
3.	Draft proposed & placed before the second member	
4.	Draft discussed/approved by Second Member.	
5.	Approved Draft comes to the Sr.PS/PS	24/01
6.	Kept for pronouncement on	24/01
7.	File sent to the Bench Clerk	24/01
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	