IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ **"A"** कोलकाता,

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.527/Kol/2021
Assessment Year: 2012-13
&
ITA No.487/Kol/2021
Assessment Year: 2013-14
&
ITA No.528/Kol/2021
Assessment Year: 2016-17

T.M. International Logistics Ltd., 7th Floor, Infinity IT Lagoon Building, Plot-E2/1, Block EP & GP, Sector-V, Salt Lake, Kolkata-700091. (PAN: AABCT5399M)	Vs.	Deputy Commissioner of Income Tax, Circle-8(1), Kolkata.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Nageswar Rao, Advocate
Respondent by : Shri P. P. Barman, Addl. CIT

Date of Hearing : 26.12.2022
Date of Pronouncement : 09.01.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This set of three appeals filed by the assessee are against the separate orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide Order No. ITBA/NFAC/S/250/2021-22/1036175382(1), ITBA/NFAC/S/250/2021-22/1035509963(1) & ITBA/NFAC/S/250/

2021-22/1036256615(1) dated 05.10.2021, 13.09.2021 & 08.10.2021, respectively, passed against the separate assessment orders by DCIT, Circle-8(1), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 30.03.2016 (for AYs. 2012-13 & 2013-14) & by ACIT, circle-8(1) dated 18,12,2019 (for AY 2016-17).

2. Grounds raised by the assessee are identical in nature for all the three years except variation in amount. Since the issues are common, the three appeals are disposed of by passing a consolidated order for which we take facts of assessment year 2012-13 as the lead case. Findings of this shall apply *mutatis mutandis* to the other two assessment years in appeal before us.

3. Assessee has also raised additional grounds in respect of issue relating to whether payment made by the assessee qualifies as royalty or not and claim of refund of Dividend Distribution Tax (DDT) and Education Cess on income tax and DDT. At the outset, we would like to first deal with the aspect of admission of additional grounds raised by the assessee before adverting on the grounds of appeal set out in the Memorandum of Appeal.

3.1. Additional grounds of appeal taken vide application dated 05.12.2022 are reproduced as under:

> *"Ground 8.1: That, on the facts and in the circumstances of the case and in law, the subject payment being made by the Appellant to KOPT as a percentage of revenue earned by the Appellant does not qualify as 'royalty' as per the definition prescribed under Explanation (2) to clause (vi) of section 9(1) the Act.*
>
> *Ground 8.2: That, on the facts and in the circumstances of the case and in law, the nomenclature used in the license agreement is not determinative of the nature of payment being 'royalty' as per the provisions of the Act.*
>
> *Ground 8.3: That, on the facts and in the circumstances of the case and in law, the Appellant contends that the subject payments not being in the nature*

of 'royalty' are not liable to tax deduction at source under section 194J of the Act.

Ground 8.4: That, on the facts and in the circumstances of the case and in law, the Learned AO has erred in disallowing the disputed amount payable to KOPT as appearing in the books of accounts of the Appellant for non-deduction of TDS under section 194J of the Act.

Ground 8.5: That on the facts and circumstances of the case and in law, Ld. AO/CIT have erred in routinely applying section 40(a)(ia) of the Act, without satisfaction of all the requirements stipulated under second proviso to section 40(a)(ia) of the Act. The Appellant has not been held as an 'assessee in default' in terms of provisions of section 201 (1) of the Act."

3.2. For adverting on the admission of these additional grounds vide ground nos. 8.1 to 8.5, we refer to rule 11 of the ITAT Rules, according to which grounds not set forth in the Memorandum of Appeal shall be taken by leave of the Tribunal. It is stated that additional ground raised is a pure question of law and, therefore, may be admitted and adjudicated upon. Ld. Counsel has placed reliance on the decision of National Thermal Power Co. Ltd. Vs. CIT [1998] 229 ITR 383 (SC), amongst other decisions. In the decision of National Thermal Power Co. Ltd. (supra), the admissibility of additional ground was permitted by the Hon'ble Supreme Court on the issues relating to the jurisdictional aspect which goes to the root of the matter as pure question of law. From the perusal of the above stated additional grounds, we find that ground nos. 8.1 to 8.3 are in the nature of peripheral arguments in respect of the disallowance made by the Ld. AO u/s. 40(a)(ia) and confirmed by the Ld. CIT(A) for the additional royalty payable by the assessee to KOPT of Rs.31,24,829/-. By raising these additional grounds, assessee has made an attempt to change the colour of litigation to challenge that the amount payable does not

qualify as royalty for the first time before the Tribunal though all along, right from filing of its return of income and its audited financial statement and up to this stage of coming before the Tribunal, the claim of the assessee has been towards royalty paid/payable to KOPT. Adjudication of these additional grounds require discovery of new facts for which Ld. Counsel attempted to draw the attention of the bench to the license agreement entered between KOPT and the assessee, dated 29.01.2002, filed as additional evidence under Rule 29 of ITAT rules, for its admission also. Since these additional grounds do not pertain to assumption of jurisdiction as pure question of law and are merely peripheral arguments vis-à-vis ground no. 2 as set out in Memorandum of Appeal reproduced supra, we are not inclined to admit these grounds and hence, are not adjudicated upon. Additional ground nos. 8.1. to 8.3 are dismissed as not admitted. Since these additional grounds have been dismissed, we also reject the application for admission of additional evidence made under Rule 29 of ITAT Rules as stated above. However, additional ground nos. 8.4 and 8.5 essentially relate to the ground no.2 as set out in Memorandum of Appeal, these are admitted for adjudication along with the said ground no.2.

3.3. Another set of additional grounds of appeal taken in respect of DDT vide application dated 26.11.2021 are reproduced as under:

> *"Ground 6.1: That, on the facts and in the circumstances of the case and in law, the learned Assessing Officer ('AO') ought to have restricted levy of Dividend Distribution Tax ('DOT') liability by considering the benefit of applicable DTM between India - Netherlands and India - Germany respectively qua the rate of tax (i.e. 10%) towards payment of dividend to the non-resident*

shareholders namely NYK Holding Europe BV, Netherlands and IQ Martrade Holding Und Management GmbH, Germany.

Ground 6.2: That, on the facts and in the circumstances of the case and in law, the Learned AO ought to have restricted the levy of DOT to lower rate 5% of dividend income shall apply on the dividends paid to NYK Holding Europe BV., Netherlands, by virtue of the Most Favoured Nation ('MFN') clause available in the Protocol to the DTM between India and Netherland, as such lower rate has been agreed by the Government of India with another member of the OECD i.e. Slovenia, at a subsequent date.

Ground 6.3: That, on the facts and in the circumstances of the case and in law, the Assessee contends that in terms of section 90(2) read with section 10(34) of the Act, the dividend income being taxable in the hands of the non-resident, it could not be subjected to a rate in excess of the rate prescribed under the DTM's.

Ground 6.4: That as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained by the Government.

Ground 6.5: That the Learned AO be directed to extend the benefit of applicable DTMs qua the rate of tax towards payment of dividend to the non-resident shareholders and grant refund of the excess tax deposited.

Deduction of education cess on income tax and DDT paid for the AY as allowable expenditure

Ground 7.1: That on the facts and in the circumstances of the case and in law, Appellant prays that education cess on the income tax paid for the year under consideration ought to be allowed as a deduction under Section 37(1) of the Act while computing the total income.

Ground 7.2: That on the facts and circumstances of the case, and in law, the Appellant prays that deduction of education cess on the DOT paid on dividend distributed to resident shareholders ought to be allowed as deduction.

Ground 7.3: Without prejudice to Ground No.6 above, that on the facts and in the circumstances of the case and in law, the Appellant prays that deduction of education cess on the DOT paid in respect of non-resident shareholders ought to be allowed as deduction."

3.4. On the issue relating to claim of refund of DDT in respect of payments made to non-resident shareholders, assessee has raised additional ground reproduced (supra) vide ground no. 6.1 to 6.5. In this respect, the factual position is that assessee had declared final dividend of Rs.2.52 Cr. and paid corresponding DDT of Rs.40,88,070/- @ 16.225% including surcharge of 5% and cess of 3% on the base rate of 15% as per section 115 O of the Act. Additional

grounds claim that while calculating the DDT liability in respect of non-resident shareholders, assessee has inadvertently considered the rate of tax as per section 115-O of the Act as against the rates prescribed in the relevant articles of the corresponding Double Tax Avoidance Agreement (DTAA) entered into between Govt. of India and respective countries of the non-resident shareholders. Assessee thus, claims refund of the excess DDT which has been paid to the exchequer in respect of non-resident shareholders. To buttress its contention, Ld. Counsel placed reliance on the decision of coordinate bench of ITAT, Kolkata in the case of Reckitt Benckiser (I) Pvt. Ltd. Vs. DCIT in ITA No.404/Kol/2015 order dated 17.06.2020 wherein it was held that issue be remitted back to the file of Ld. AO for factual verification in the light of agreement and other relevant documents and the provisions of DTAA. The relevant extract of the above decision is reproduced as under:

> *"54.The assessee has raised this additional ground stating that the Assessing Officer ("AO") erred in not extending the benefit of applicable Double Taxation Avoidance Agreements between India - UK and India - Spain ("DTAA") respectively qua the rate of tax towards payment of dividend to the shareholders namely Reckitt Benckiser Pic., UK and Lancaster Square Holdings, Spain. The AO also failed to appreciate that in terms of section 90(2), dividends being the income in the hands of the non-resident could not be subjected to tax by applying DDT at a rate in excess of the rate prescribed under the DT AA and hence, erred in subjecting the Appellant to additional income tax in terms of section 115-0 of the Act and the AO also erred in not granting refund of the excess Dividend Distribution Tax paid by the Appellant.*
>
> *We are of the view that this issue should be remitted back to the file of the ld AO for factual verification. The assessee is directed to file before AO, the amount of dividend paid, copy of agreement and other relevant documents, as required by AO. Therefore we direct the AO to examine relevant Double Taxation Avoidance Agreements between India - UK with reference to payment of dividend to the shareholders and adjudicate the issue in accordance to law. For statistical purposes, the additional ground raised by the assessee is allowed."*

3.5. Before us, Ld. Counsel for the assessee submitted that the matter has been referred to the Hon'ble Special Bench for which he could not give the specific details as to the constitution of the Special Bench as well as how the present issue is covered by such a reference to the Special Bench. He also submitted that the matter may be set aside to the file of Ld. AO for verification and be subjected to the outcome of the decision of Hon'ble Special Bench. To this effect, we find that the issue relating to claim of refund of DDT in respect of payments made to non-resident shareholders has been dealt by the coordinate bench of ITAT, Kolkata in the case of Reckit Benkiser India Pvt. Ltd. (Supra), wherein it was set aside to the file of Ld. AO for factual verification in the light of an agreement and other relevant documents and the provisions of DTAA. Without any specific details furnished by the Ld. Counsel in respect of his submission relating to constitution of a Special Bench and without his pointing out as to how the present issue is *pari materia* referred to the Special Bench, we are unable to lay our hands on this submission. Be that as it may, in the light of decision of coordinate Bench of Kolkata in the case of Reckit Benkiser India Pvt. Ltd. (supra), we find it proper to remit the matter back to the file of Ld. AO for verification of the amount of dividend paid relating to DDT deposited by the assessee, relevant agreement and documents in respect of non-resident shareholding and the DTAAs of the respective countries of the non resident shareholders and thereafter consider granting of refund of the DDT so claimed by deciding the issue in accordance with law. Accordingly, the additional

grounds raised by the assessee on this issue vide ground nos. 6.1 to 6.5 are admitted and adjudicated hereinabove which are allowed for statistical purposes.

3.6. On the another issue raised through additional ground vide ground nos. 7.1. to 7.3 in respect of claim of deduction towards education cess paid on income-tax and DDT as allowable expenditure u/s. 37(1) of the Act, the issue is no longer *res integra* as the coordinate bench of ITAT, Kolkata in the case of Kanoria Chemicals & Industries Ltd. Vs. Addl. CIT, ITA No. 2184/Kol/2018 dated 26.10.2021 has held that it is not an allowable expenditure u/s. 37(1) of the Act which has been adequately affirmed by the subsequent amendment vide Finance Act, 2021 with retrospective effect. Accordingly, in terms of the amendment having retrospective effect and the decision of coordinate bench of ITAT, Kolkata in Kanoria Chemicals & Industries Ltd. (supra), the additional ground raised by the assessee for claim of deduction of education cess as allowable expenditure are admitted and dismissed in terms of observations hereinabove.

4. Grounds taken by the assessee for AY 2012-13 as set out in the Memorandum of Appeal are reproduced as under:

> *"1. General*
>
> *(a) That, on the facts and in the circumstances of the case and in law, impugned order under section 250 of the Act, is contrary to law laid down by courts, based on extraneous consideration, unsubstantiated presumptions, ignoring to consider all relevant facts and relevant law, bad in law.*
>
> *2. Disallowance of royalty under section 40(a)(ia) of the Act due to non-deduction of tax at source*

(a) That, on the facts and in the circumstances of case and in law, the Learned CIT(A) has erred in upholding addition of amount under dispute with Kolkata Port Trust ('KOPT') due to non-deduction of tax at source.

(b) That, on the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in not appreciating that withholding tax provisions are not applicable on amount under dispute with KOPT and hence disallowance under section 40(a)(ia) of the Act is not warranted.

(c) That on the facts and in the circumstances of the case and in law, the Learned AO be directed to grant deduction of the amount under dispute with KOPT.

(d) Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in not considering the curative amendment in section 40(a)(ia) of the Act as retrospective and not restricting the disallowance under section 40(a)(ia) of the Act to 30% of the expense.

3. Addition under section 14A of the Act

(a) That, on the facts and circumstances of the case, and in law, the learned CIT(A) erred in directing the learned AO to compute disallowance under section 14A of the Act read with Rule 8D of the Rules, without appreciating the submission made by the Appellant that no expenditure has been incurred in earning the exempt income.

4. That, on the facts and in the circumstances of the case and law, the Learned AO be directed to grant interest under section 244A of the Act on refund determined.

5. The above grounds are independent and without prejudice to each other. The Appellant craves leave to add, amend, modify, after, withdraw or vary any grounds of appeal either before or at the time of hearing of appeal proceedings. "

4.1 From the perusal of above grounds, there are two following issues involved in the appeals before the Tribunal:

(i) Disallowance u/s. 40(a)(ia) due to non-deduction of tax at source on additional amount provided as payable to KOPT;

(ii) Disallowance u/s. 14A of the Act read with Rule 8D2(iii);

4.2. The above two issues are dealt hereunder in seriatim:

(a) Brief facts of the case are that assessee is engaged in Port operation, cargo handling and other related services. Return of income for AY 2012-13 was filed on 27.11.2012 reporting a

total income of Rs.13,02,02,450/-. Return was selected for scrutiny and was completed u/s. 143(3) of the Act by making, *inter alia,* additions/disallowances for which the assessee is in appeal before the Tribunal.

(b) On the first issue relating to disallowance of royalty payable to KOPT amounting to Rs.31,24,829/-, Ld. AO has disallowed the same on following two grounds:

(i) The said amount is an estimated liability which is provided by the assessee in its books of account, not an ascertained liability and, therefore, not allowable u/s. 37(1) of the Act.

(ii) Non-deduction of tax at source on royalty payable u/s. 194J. Hence, disallowed u/s. 40(a)(ia) of the Act.

(c) In this respect, Ld. AO noted from Note No. 21 of the P& L Account that assessee has claimed expenses amounting to Rs.2,53,65,800/- on account of royalty to KOPT, Halida Dock Complex. In the course of assessment, it was submitted by the assessee that this amount was charged to the P&L Account. Also assessee had provided a sum of Rs.31,24,829/- on account of royalty payable to KOPT for which a provision was created pursuant to a report from independent auditors with which the assessee does not agree. Assessee is in arbitration process on this amount of royalty payable to KOPT.

(d) On the aspect of allowability of royalty payable to KOPT u/s. 37(1) of the Act, in assessee's own case for AY 2009-10, it was decided in favour of the assessee by the co-ordinate bench of ITAT, Kolkata in ITA No.988/Kol/2013 dated 17.03.2017. The relevant finding of the coordinate bench on this aspect is reproduced as under;

> *"We have heard both the parties and perused the records. As per the license agreement granted to it by KOPT, the assessee is operating birth no. 12 and the profit of birth no. 12 is eligible for 100% tax holiday. As per the agreement between the KOPT and the assessee, the assessee should obtain independent auditor's report certifying the final royalty payment. Before obtaining the independent auditor's report the assessee had paid royalty as per its own calculation based on the agreement. However, according to assessee, the computation of royalty by the independent auditor was very high. Therefore, a mutual settlement for this issue was attempted by the assessee with KOPT. But the said exercise failed, so the assessee invoked the arbitration clause and the matter is before the arbitrator. The amount for which the provision was made of Rs.2,76,60,137/- which is the amount which the assessee needs to pay extra than what the assessee has paid to the KOPT. The Ld. CIT(A) has taken note of the fact that as per the agreement, the final royalty figure has to be computed by the independent auditor and according to the KOPT it is correct and final. So as per the agreement, the amount which the independent auditor has computed as the final royalty figure has crystallized and, therefore, is an allowable business expenditure. In case if the assessee is able to succeed in the arbitration proceedings then the assessee by virtue of the order gets any benefit in any subsequent assessment years by way of cessation or remission which has been allowed as a deduction in the present assessment year then the said amount can be brought for taxation by invoking the provision of Section 41(1) of the Act.*
>
> *Therefore, in view of the above, we do not find any infirmity in the order passed by the ld. CIT(A) and we are inclined to dismiss the appeal of the Revenue.*
>
> *In the result this ground of appeal of the Revenue is dismissed."*

(e) Based on the above finding of the coordinate bench of ITAT, Ld. CIT(A) held that royalty determined by the independent auditor is an ascertained liability which has crystallised. Following the above finding of the coordinate bench of ITAT, Kolkata in assessee's own case, in the impugned year also, the royalty payable of Rs.31,24,829/- is allowable u/s. 37(1) of the Act, as held by the Ld. CIT(A).

(f) Now delving into the second aspect of disallowance of this amount u/s. 40(a)(ia) of the Act for non-deduction of tax at source as applicable u/s. 194J of the Act, Ld. CIT(A) has observed that since the additional royalty payable has been held to be an ascertained liability, the liability to deduct tax at source on royalty payable to a resident payee u/s. 194J no longer remains inchoate/contingent to the outcomes of arbitration. Ld. CIT(A) thus, held that assessee cannot make different claims, on the one hand that the said amount is ascertained liability for the purpose of claiming it as a business expenses u/s. 37(1) and on the other hand, a contingent one for the purpose of TDS. Ld. CIT(A) thus upheld the disallowance of the additional royalty payable to KOPT made by the Ld. AO by invoking the provisions of section 40(a)(ia) of the Act.

5. Ld. Counsel for the assessee referred to second proviso to section 40(a)(ia) inserted by the Finance Act, 2012 w.e.f. AY 2013-14 which is reproduced as under:

> [Provided further that where an assessee fails to deduct whole or any part of the tax in accordance with the provisions of Chapter XVll-B on any such sum but is not deemed to assessee in default under the first proviso to sub-section section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso.]"

5.1. Ld. Counsel thus submitted that even if the assessee has not deducted tax at source, it is important to bear in mind the fact that the payee i.e. KOPT has duly discharged its tax liability on receipt/receivable of royalty from the assessee as provided in the second proviso to section 40(a)(ia) stated above. To buttress its contention, Ld. Counsel placed reliance on the decision of CIT Vs. S. M. Anand [2020] 420 ITR 209 (Kar) which held that insertion of second proviso to section 40(a)(ia) of the Act is declaratory and curative in nature and is retrospective effect from 01.04.2005 being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. Ld. Counsel also placed reliance on the decision of Hon'ble High Court of Punjab & Haryana in the case of PCIT Vs. Shivpal Singh Chaudhury [2018] 409 ITR 87 (P&H) wherein also similar view was taken by the Hon'ble Court. In view of the above submission, ld. Counsel submitted that the matter may please be remitted back to the file of the Ld. AO who would verify the factual position in respect of discharge of tax liability by the KOPT on the amount of royalty paid/payable by the assessee. The contentions made by the

Ld. Counsel when confronted to the Ld. Sr. DR, he had no objection on setting it aside to the file of Ld. AO for the limited purpose of verification as submitted by the Ld. Counsel.

5.2. Considering the above submission, factual matrix and the applicable law duly supported by the above referred judicial precedents, we find it proper to remit the matter back to the file of Ld. AO for the limited purpose of verification of discharging of tax liability by KOPT on the impugned amount of royalty payable by the assessee to KOPT of Rs.31,24,829/-. In this respect, we also direct the Ld. AO to exercise his powers available under the Act to call for the relevant information from KOPT for the factual verification and confronting the same to the assessee for its reply, if so desired. After considering this, Ld. AO may decide on the allowability of the said amount in terms of sec. 40(a)(ia) of the Act. Accordingly, ground taken in this respect is allowed for statistical purposes.

6. On the second issue relating to disallowance u/s. 14A of the Act read with Rule 8D(2)(iii) of the Rules, ld. AO noted from the Balance sheet as at 31.03.2012 that the value of investment as on 01.04.2011 and 31.03.2012 were Rs.41,76,71,871/- and Rs.47,56,50,148/-, respectively. It was also noted that assessee has earned exempt income of Rs.46,84,492/- during the year. Assessee submitted that it did not incur any expenditure for earning the exempt dividend income and, therefore, no disallowance is called for u/s. 14A of the Act. On appeal before the Ld. CIT(A), he

observed that in assessee's own case for AY 2009-10 on the identical issue, the coordinate bench of ITAT, Kolkata (supra) had set aside the matter to the file of Ld. AO to compute the disallowance under Rule 8D(2)(iii) only, in respect of investment made by assessee in shares which yielded dividend in the instant assessment year. By placing reliance on the decision in the case of REI Agro Ltd. Vs. DCIT 144 ITD 141 (Kol) and in view of the above findings of the coordinate bench of ITAT, Kolkata in assessee's own case, Ld. CIT(A) directed the Ld. AO to verify and re-compute the disallowance @ 0.5% of the average value of those investment which resulted in exempted income.

6.1. This issue, we find, is no longer *res integra* as the matter in respect of REI Agro Ltd. (supra) travelled upto Hon'ble jurisdictional High Court of Calcutta who had affirmed the proposition in CIT vs. REI Agro Limited (GA 3022 of 2013 ITAT 161 of 2013). We find no reason to interfere with the directions given by the Ld. CIT(A) to the Ld. AO for verification and recomputation of the disallowance in view of the finding given by the coordinate bench of ITAT, Kolkata in assessee's own case and also by respectfully following the decision of Hon'ble jurisdictional High Court of Calcutta in the case of REI Agro Ltd. (supra). Accordingly, this ground taken by the assessee is dismissed.

7. The findings given above in ITA No. 527/Kol/2021 for AY 2012-13 applies *mutatis mutandis* for other two assessment years also i.e. AYs. 2013-14 and 2016-17.

Thus, all the three appeals of the assessee are partly allowed for statistical purposes.

8. In the result, all the three appeals of the assessee are partly allowed for statistical purposes.

Order is pronounced in the open court on 9th January, 2023.

Sd/- Sd/-

(Rajpal Yadav) **(Girish Agrawal)**
Vide President **Accountant Member**

Dated: 9th January, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. CIT(A), NFAC, Delhi
4. The Pr. CIT, Kolkata.
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata