आयकर अपीलीय अधिकरण
मुंबई पीठ "स्पेशल बेंच ", मुंबई
श्री जी.एस.पन्नू, अध्यक्ष, श्री एन.वी. वासुदेवन, उपाध्यक्ष एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SPECIAL BENCH", MUMBAI
BEFORE SHRI G. S. PANNU, PRESIDENT, SHRI N.V.VASUDEVAN, VICE PRESIDENT &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आअसं.6997/मुं/2019(नि.व. 2016-17)
ITA NO.6997/MUM/2019 (A.Y.2016-17)

Deputy Commissioner of Income Tax
Circle 11(3)(1), Mumbai ...... अपीलार्थी/Appellant

बनाम Vs.

Total Oil India Pvt. Ltd.
3rd Floor, The Leela Galleria,
Andheri (East), Mumbai 400 059
PAN: AAACE-2175-M ..... प्रतिवादी/Respondent

C.O. NO.57/MUM/2019
ITA NO.6997/MUM/2019 (A.Y.2016-17)

Total Oil India Pvt. Ltd.
Mumbai – 400 059 ...... Cross Objector

बनाम Vs.

Deputy Commissioner of Income Tax
Circle 11(3)(1), Mumbai. ...... प्रतिवादी/Respondent

Revenue by : Shri Vinod Tanwani, CIT-DR
Assessee by : Shri Niraj Sheth

ITA NO.287/DEL/2016 (A.Y.2011-12)
ITA NO.901/DEL/2017 (A.Y.2012-13)
ITA NO.6949/DEL/2017 (A.Y.2013-14)
ITA NO.8009/DEL/2018 (A.Y.2014-15)
ITA NO.8968/DEL/2019 (A.Y.2015-16)
ITA NO.521/DEL/2021 (A.Y.2016-17)
ITA NO.1952 /DEL/2022 (A.Y.2017-18)
ITA NO.1953 /DEL/2022 (A.Y.2018-19)

Maruti Suzuki India Limited.
Plot No.1, Nelson Mandela Road,
Vasant Kunj, New Delhi – 110 070.
PAN:AAACM-0829-Q ...... अपीलार्थी/Appellant

बनाम Vs.

Deputy Commissioner of Income Tax
Circle 16(1), Delhi. ...... प्रतिवादी/Respondent

ITA NO.1024/DEL/2016 (A.Y.2011-12)

Deputy Commissioner of Income Tax
Circle 16(1), Delhi ...... अपीलार्थी/Appellant

बनाम Vs.

Maruti Suzuki India Limited.
New Delhi. ...... प्रतिवादी/Respondent

Assessee by : S/Shri Ajay Vohra, Sr. Advocate,
V.Sridharan, Sr. Advocate,
Neeraj Jain Adv., Anshul Sachar, Alok Vasant,
Ravi Sawana & Dinesh Kukreja
Revenue by : Sh. Vinod Tanwani

ITA NO.123 & 124/Ahd/2012 (A.Y.2006-07 & 2007-08)

Gujarat Gas Co. Ltd.
2, Shantisadan Society,
Near Parimal Garden Ellisbridge,
Ahmadabad – 380 006
PAN: AAACG-5600-M ...... अपीलार्थी/Appellant

बनाम Vs.

Joint Commissioner of Income Tax/DCIT,
Circle -4, Ahmadabad ...... प्रतिवादी/Respondent

ITA NO.350 & 351/Ahd/2012 (A.Y.2006-07 & 2007-08)

The ACIT, Circle -4,
Ahmadabad- 380 006. ...... अपीलार्थी/Appellant

बनाम Vs.

Gujarat Gas Co. Ltd.
Ahmadabad – 380 006 ...... प्रतिवादी/Respondent

ITA NO.1414/Ahd/2013 (A.Y.2008-09)
ITA NO.2458/Ahd/2014 (A.Y.2009-10)
ITA NO.2338/Ahd/2015 (A.Y.2010-11)
ITA NO.3450/Ahd/2015 (A.Y.2011-12)

Gujarat Gas Co. Ltd.
Ahmadabad – 380 006 ...... अपीलार्थी/Appellant

बनाम Vs.

Joint Commissioner of Income Tax/DCIT,
Circle -4, Ahmadabad ...... प्रतिवादी/Respondent

Assessee by : None
Revenue by : Shri Vinod Tanwani

INTERVENERS

Sr.No.	ITA Nos.	Name of Party	Advocate/CA S/Shri
1.	423/Mum/2017	Astra Zeneca Pharma India Ltd.	Rajan Vora, & Nikhil Tiwari
2.	7189/Mum/2018& 7858/Mum/2019	GE Power India Ltd.	Ms. Fereshte Sethna & Mrunal Parikh
3.	C.O 01/Kol/2020	Exide Industries Ltd.	Anup Sinha (FCA)
4.	3643/Mum/2021	Tech Mahindra Ltd.	J.D.Mistry, Sr.Adv.
5.	1942/Del/2021	Sennheiser Electronics India Pvt. Ltd.	Neeraj Jain, Adv. & Alok Vasant
6.	625/Del/2021	J.C.Bamford Excavators Pvt. Ltd.	Ajay Vohra, Sr. Adv, Vishal Kalra, Amit Bablani & Sahil Gupta

सुनवाई की तिथि/ Date of hearing	:	22/02/2023
घोषणा की तिथि/ Date of pronouncement	:	20/04/2023

आदेश/ ORDER

The question for consideration before Special Bench is:-

"Where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts additional income-tax (tax on distributed profits) referred to in section 115-O of the Income-Tax Act,1961 (in short 'the Act'), whether such additional income-tax payable by the domestic company shall be at the rate mentioned in Section 115-O of the Act or the rate of tax applicable to the non-resident shareholder(s) with reference to such dividend income".

Backdrop for constitution of Special Bench:

2. One of the issue in Cross Objection No.57/Mum/2021 arising out of ITA No.6997/Mum/2019 for Assessment Year 2016-17 in the case of M/s. Total Oil India Private Limited was:

> ***"The learned Assessing Officer be directed to compute the tax payable by the assessee under section 115-O of the Income Tax Act, 1961 ('the Act') at the rate prescribed in the DTAA between India and France in respect of dividend paid by the assessee to the non-resident shareholders i.e., Total Marketing Services and Total Holdings Asie, a tax resident of France."***

3. The assessee declared/paid dividend during the previous year relevant to AY 2016-17. One of the shareholder to whom dividend was to be paid was a Non-resident (Tax resident of France). Under Section 115-O of the Income Tax Act, 1961 (in short 'the Act'), if a domestic company (the assessee is a domestic company), is required to pay additional income tax on any amount declared, distributed or paid by way of dividend for any Assessment Year section 115-O of the Act prescribes the rate at which tax on distributed profit has to be paid. Since, one of the shareholders of the assessee was a Non- resident, the assessee sought to raise a plea that the rate at which tax u/s.115-O has to be paid cannot be more than the rate at which dividend can be taxed in the hands of the Non-resident shareholder in India under the DTAA between India and France. The rate of tax prescribed in the DTAA is generally less than the rate prescribed in Section 115-O and this is the reason why the Assessee which is the Domestic company distributing dividend took a stand that DTAA rate ought to apply and not the rate of tax prescribed u/s.115-O. In support of this argument, the assessee placed reliance on the decision rendered by Delhi Bench of the Tribunal in the case of

Giesecke & Devrient India Pvt Ltd vs. ACIT 120 taxmann.com 338 (Del). In the said case, the Delhi Bench of the Tribunal took a view that the rate of tax prescribed in the DTAA has to be applied in preference to the higher rate of tax prescribed in Sec.115-O. The line of reasoning taken by the Ld. Delhi Bench in the case of Giesecke & Devrient India Pvt.Ltd. (supra) firstly, was that DDT is a levy on the dividend distributed by the payer company, being an additional tax, falls within the definition of 'Tax' as defined u/s 2(43) of the Act, which is subject to the charging section 4 of the Act and charging section itself is subject to the provisions of the Act thereby bringing it within the sweep of which section 90 of the Act. Secondly, the Bench held that payment of dividend distribution tax u/s 115-O by the Domestic Company was for and on behalf of the shareholder and in discharge of shareholders liability to pay tax on dividend distributed. Reliance was also placed on the decision of Kolkata Bench in the case of **DCIT vs. Indian Oil Petronas Pvt. Ltd., 127 taxmann.com 389**, wherein similar view was taken.

4. The Tribunal in the case of Giesecke & Devrient India Pvt. Ltd. (supra) examined the nature of DDT and observed as under:

> *"44. The genesis of charge for levy of additional Income Tax u/s 115-0 on the profits declared/distributed and paid by a corporate assessee by way of dividend can be traced to the charging provisions of Section 4 of the Act which provides as under:*
>
> > *"4. Charge of income- tax (1) Where any Central Act enacts that income- tax shall be charged for any assessment year at any rate or rates, income- tax at that rate or those rates shall be charged for that year in accordance with, and 2 subject to the provisions (including provisions for the levy of additional income- tax) of, this Act] in respect of the total income of the previous year] of every person."*
>
> *45. It can be seen from the above that this section provides for charge of tax, including additional Income tax on the total income of every person.*

46. Section 2(24) defines "Income" which includes:

a) profits and gains; and

b) dividend.

Xxxxxx

47. Tax has been defined in section 2(43) as under:

> *" Tax" in relation to the assessment year commencing on the 1st day of April, 1965 , and any subsequent assessment year means income- tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super- tax chargeable under the provisions of this Act prior to the aforesaid date;] and in relation to the A.Y commencing on the 1st day of April 2006, and any subsequent A.Y includes the fringe benefit tax payable u/s 115WA".*

48. A perusal of the above shows that the term "Tax" would cover additional Income Tax levied u/s 115-0 of the Act.

49. The first critical issue, which needs to be decided, is as to whether the DDT is tax on the company or the shareholder since the admissible surplus stands reduced to the extent of DDT. We are aware of the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited 328 ITR 81 though the same was rendered in the context of section 14A r.w.s 115O of the Act. The relevant findings of the Hon'ble Bombay High Court read as under:

> *"35. Section 115-O has been enacted with a view to exempt dividend income. Prior to the insertion of Section 115-O, domestic companies were liable to pay tax on the total income (including profits distributed as dividends) and shareholders were liable to pay tax on dividend income received. Domestic companies distributing profits as dividends were liable to deduct tax at source and shareholders receiving the dividend were entitled to take credit of such tax deducted at source. As this method was found to be cumbersome, Parliament chose to exempt dividend income in the hands of the shareholder and chose to levy additional income-tax on the amount of profits declared, distributed or paid as dividend by the domestic companies. Thus, by inserting Section 115-O, additional income- tax is levied on the amount of profits declared, distributed or paid as dividend and by inserting Section 10(33) it is made clear that the dividends referred to in Section 115-O would be exempt from tax."*

50. Thus, it can be stated that the Hon'ble Bombay High Court has unequivocally held that DDT is tax 'on the company' and not 'on the shareholder'.

51. There is no dispute that the liability is on the payer company to pay DDT, but, at the same time, we must not lose sight of the fact that additional Income tax is part of tax as defined in Section 2(43) of the Act and levy of additional Income tax u/s 115 O has its genesis in charging provision of Section 4 of the Act. We must also remember that this additional Income tax [DDT] levied u/s 115 O is a tax on income and definition of "Income" includes dividend.

52. As per the Income Tax Rules, relevant details regarding payment of DDT have to be provided in the Income Tax return form and have to be disclosed in the Tax Audit Return [Form 3CD]. Further, the Income tax assessment order read with the Income tax computation form quantifies DDT liability. It would not be out of place to mention that the Act does not provide for a separate adjudication/passing of separate order with regard to adjudication of liability of DDT. Section 115-Q merely provides for the consequences of non-payment of DDT, but there is no separate/specific provision in the Act for collection and recovery of DDT in default."

5. Thereafter, the Tribunal went on to examine the reasons for introduction of Sec.115-O of the Act and observed that it was purely for administrative convenience of collection of tax on dividends. The Tribunal went on to hold that fact that the liability to DDT under the Act, falls on the company distributing dividend, is not relevant as it is a tax on dividend earned by the shareholders, and therefore the applicable rate of dividend tax set out in the tax treaties would be applicable in the cases of non-resident recipients of dividend. The following were the observations of the Tribunal in this regard:

"65. A conjoint reading of the Memorandum to Finance Bill 1997, 2003 and 2020 would show that levy of DDT was merely for administrative conveniences and withdrawal of DDT is keeping in mind that revenue was across-the-board, irrespective of marginal rate, at which recipient is otherwise taxed.

66. To recapitulate, the DDT is levy on the dividend distributed by the payer company, being an additional tax is covered by the definition of 'Tax' as defined u/s 2(43) of the Act which is covered by the charging section 4 of the Act and charging section itself is subject to the provisions of the Act which would include section 90 of the Act.

67. In our humble opinion, the liability to DDT under the Act which falls on the company may not be relevant when considering applicability of rates of dividend tax set out in the tax treaties. The generally accepted principles relating to interpretation of treaties in the light of object of eliminating double taxation, in our view does not bar the application of tax treaties to DDT."

6. The Tribunal thereafter examined the relevant DTAA, especially the clauses relating to Dividends, and concluded that DTAA will prevail over the Act in view of Sec.90(2) of the Act. The Tribunal finally concluded as follows:

"71. In light of the aforesaid decision, we are of the considered view that tax rates specified in DTAA in respect of dividend must prevail over DDT.

72. Article 10.4 above specifies that clause 1 and 2 will not be applicable if beneficial owner of dividend carries on business in other contracting state of which the company paying dividend is a resident through PE situated therein. Though supporting documents have been filed before us, but these documents need verification from primary officer, that is, the Assessing Officer. We, therefore, deem it fit to restore this issue for limited purpose of verification in the light of the aforesaid Articles of DTAA.

73. Considering the above in totality, in our considered opinion, the DDT levied by the appellant should not exceed the rate specified in Article 10 in India Germany DTAA.

74. The additional ground is, accordingly, allowed on principle, though subject to verification as directed hereinabove."

7. In the case of Indian Oil Petronas (P) Ltd. (supra), the Kolkata Bench held as under:

"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.

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. The ld. Division Bench while considering the issue raised in the CO in Total Oil India Private Limited (in short 'Total Oil') doubted the correctness of decision in the aforesaid cases i.e. Giesecke & Devrient India Pvt Ltd vs. ACIT (supra) and DCIT vs. Indian Oil Petronas Pvt. Ltd. (supra). The Division Bench observed:

"10. The reasons for our doubting the correctness of the decisions of the coordinate bences, on the dividend distribution tax rate being restricted by the treaty provisions dealing with taxation of dividends in the hands of the shareholders (i.e. Article 11 of the Indo French tax treaty, as in this case), are as set out below:

(a) Hon'ble Supreme Court, in the judgment reported as Godrej & Boyce Mfg Co Ltd Vs DCIT [(2017) 394 ITR 449 (SC)], has observed that "the fact that section

10(3) and section 115 O of the brought in together, deleted and reintroduced in a composite manner also does not assist the assessee" and that "if the argument is that tax paid by the dividend paying company under section 115- O is to be understood to be in behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid" which is wholly incongruous in view of the provisions of Section 10(33). The payment of dividend distribution tax under section 115 'O' doers not discharge the tax liability of the shareholders. It is a liability of the company and discharged by the company. Whatever be the conceptual foundation of such a tax, it is not a tax paid by, or on behalf of, the shareholder. In our considered view, therefore, dividend distribution tax cannot be treated as a tax on behalf of the recipient of dividends, i.e. the shareholders. In Giesecke & Devrient India Pvt Ltd's case, the division bench did not have any occasion to deal with this judicial precedent from Hon'ble Supreme Court.

(b) The stand of the assessee that in the light of the subsequent judgment of Hon'ble Supreme Court in the case of Union of India Vs Tata Tea Co Ltd [(2017) 398 ITR 260 (SC)], one has to proceed on the basis that dividends received by the shareholders are taxed as income in the hands of the shareholders, is simply incorrect. The question which fell for consideration before Hon'ble Supreme Court was whether levy of tax under section 115 O was constitutionally valid or not, and Hon'ble Supreme Court has held that under section 2(24)(ii) dividend is included in 'income' and is thus covered by Entry 82 of List I to Seventh Schedule, "taxes on income, other than agricultural income" in the legislative competence of the Parliament. It deals with the constitutionality, not the interpretation, of Section 115 'O'. It does not overrule, or even remotely deal with, the specific decision of Hon'ble Supreme Court holding that the "argument is that tax paid by the dividend paying company under section 115-O is to be understood to be in behalf of the recipient assessee" cannot be accepted in law. It is only elementary, as was held by Hon'ble jurisdictional High Court in the case of in the case of CIT v. Sudhir Jayantilal Mulji [(1995) 214 ITR 154 (Bom)], a judicial precedent is only "an authority for what it actually decides and not what may come to follow from some observations which find place therein". The propositions which are assumed by the Court to be correct for the purpose of deciding the same are, according to this judgment of the Hon'ble jurisdictional High Court, lack precedence value and are not binding in nature. The assessee is not relying upon what has been decided in Tata Tea case, but on what logically follows from the said precedent. The inferences drawn on the basis of Tata Tea decision (supra) are thus, in our considered view, misplaced.

(c) Under the scheme of the tax treaties, no tax credits are envisaged in the hands of the shareholders in respect of dividend distribution tax paid by the

company in which shares are held. The dividend distribution tax thus cannot be equated with a tax paid by, or on behalf of, a shareholder in receipt of such a dividend. Infact, the payment of dividend distribution tax does not, in any manner, prejudice the foreign shareholder, and any reduction in the dividend distribution tax does not, in any manner, act to the benefit of the foreign shareholder resident in the treaty partner jurisdiction. This taxability is wholly tax-neutral vis-à-vis foreign resident shareholder and the treaty protection, when given in respect of dividend distribution tax, can only benefit the domestic company concerned. The treaty protection thus sought goes well beyond the purpose of the tax treaties.

(d) Hon'ble Delhi High Court's judgment in the case of DIT v. New Skies Satellite BV [(2016) 382 ITR 114 (Del)] does lay down the principle that an amendment in the domestic law will not influence the interpretation of that expression in the tax treaty, and there is absolutely no doubt on that proposition, but that proposition cannot support the interpretation, as is canvassed by the coordinate benches, that even when tax burden is shifted from a resident of the tax treaty partner jurisdiction to resident of another jurisdiction, the tax burden on the another person, who is not eligible for tax treaty benefits anyway, will nevertheless be subjected to the same level of tax treaty protection. That is stretching things a bit too far. Such a proposition does not even find mention in any tax treaty literature, and we are, therefore, not really surprised that the present decision, extending the tax treaty protection to the company paying dividends, in respect of dividend tax distribution tax, appears to be a solitary decision of its kind, to the best of our knowledge, anywhere in the world. Quite to the contrary, in the case of Volkswagen of South Africa (Pty) Ltd Vs Commissioner of South AfricanRevenue Service (Case no. 24201/2007; www.ibfd.org database) Hon'ble South African High Court has observed that a similar dividend distribution tax, known as Secondary Tax on Companies (STC) paid on the distribution of dividends, is a tax on "a company declaring the dividends and not on dividends". Hon'ble South African High Court has observed, inter alia, as follows:

> *In the case of STC, the entity liable for the dividend is the company declaring the dividend and the dividend declared is net of tax – on the other hand, a withholding tax such as non-resident shareholder's tax was a tax on the shareholder's dividend income. As far as STC is concerned, same is levied on all South African resident companies when they declare dividends. On the other hand, withholding tax such as non-resident shareholder's tax is applicable only to certain type of shareholders, for example a non-resident shareholder. Furthermore, STC is a tax levied with reference to the net amount of a company's total dividends during a particular period, and on the other hand, non-resident shareholder's tax*

was levied on the amount of the dividend declared to theaffected shareholder.

The above-mentioned differences between STC and a withholding tax negate the submission that STC is substantially similar to a withholding tax such as non-resident shareholder's tax.

STC is a taxation of the company declaring a dividend and is not a taxation of the recipient of the dividend, and consequently as stated earlier Article 7 of the DTA does not apply to STC.

The above conclusion is further supported by a proper reading and analysis of Article 7(2)(a) which refers to a recipient of dividends and not to a company declaring the dividend. The benefits conferred by the said Article are to be enjoyed by the recipients of the dividends and not the company declaring the dividends

(e) While the views so expressed by a foreign judicial body do not bind us, or, for that purpose, any judicial body in India, these views at least suggest that this school of thought reflected in the said decision deserves to examined in a fair, judicious and open-minded manner.

(f) Wherever the Contracting States to a tax treaty intended to extend the treaty protection to the dividend distribution tax, it has been so specifically provided in the tax treaty itself. For example, in India Hungry Double Taxation Avoidance Agreement [(2005) 274 ITR (Stat) 74; Indo Hungarian tax treaty, in short], it is specifically provided, In the protocol to the Indo Hungarian tax treaty it is specifically stated that "When the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend". That is a provision in the protocol, which is essentially an integral part of the treaty, and the protocol to a treaty is as binding as the provisions in the main treaty itself. In the absence of such a provision in other tax treaties, it cannot be inferred as such because a protocol does not explain, but rather lays down, a treaty provision. No matter how desirable be such provisions in the other tax treaties, these provisions cannot be inferred on the basis of a rather aggressively creative process of interpretation of tax treaties. The tax treaties are agreements between the treaty partner jurisdictions, and agreements are to be interpreted as they exist and not on the basis of what ideally these agreements should have been.

(g) A tax treaty protects taxation of income in the hands of residents of the treaty partner jurisdictions in the other treaty partner jurisdiction. Therefore, in order to

seek treaty protection of an income in India under the Indo French tax treaty, the person seeking such treaty protection has to be a resident of France. The expression 'resident' is defined, under article 4(1) of the Indo French tax treaty, as "any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Obviously, the company incorporated in India, i.e. the assessee before us, cannot seek treaty protection in India- except for the purpose of, in deserving cases, where the cases are covered by the nationality non-discrimination under article 26(1), deductibility non-discrimination under article 26(4), and ownership non-discrimination under article 24(5) as, for example, article 26(5) specifically extends the scope of tax treaty protection to the "enterprises of one of the Contracting States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State". The same is the position with respect of the other non-discrimination provisions. No such extension of the scope of treaty protection is envisaged, or demonstrated, in the present case. When the taxes are paid by the resident of India, in respect of its own liability in India, such taxation in India, in our considered view, cannot be protected or influenced by a tax treaty provision, unless a specific provision exists in the related tax treaty enabling extension of the treaty protection.

(h) Taxation is a sovereign power of the State- collection and imposition of taxes are sovereign functions. Double Taxation Avoidance Agreement is in the nature of self- imposed limitations of a State's inherent right to tax, and these DTAAs divide tax sources, taxable objects amongst themselves. Inherent in the self-imposed restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices. The dividend distribution tax, not being a tax paid by or on behalf of a resident of treaty partner jurisdiction, cannot thus be curtailed by a tax treaty provision".

9. Moreover, the Revenue in the case of Maruti Suzuki India Private Limited(in short 'Maruti Suzuki') in ITA NO.961/Del/2015 for Assessment Year 2010-11 also made an application for reference of a similar issue to the Special Bench. Similar request was made in the case of Gujarat Gas Co. Ltd. in ITA No. 123/Ahd/2012 for Assessment Year 2007-08. Hence, in the backdrop of above, a Special Bench was

constituted by the Hon'ble President for considering the question, which has been set out in the first paragraph of this order.

SUBMISSIONS ON BEHALF OF THE ASSESSEES:

10. Shri Ajay Vora appearing on behalf of the assessee (Maruti Suzuki) submitted that Maruti Suzuki is a subsidiary of Suzuki Motor Corporation, Japan, which holds 56.21% equity shares in the assessee company. During the period relevant to assessment year 2011-12, the assessee distributed dividend amounting to Rs.173 crores to its shareholders, on which DDT was paid @ 16.6087% aggregating to Rs.28 crores (approximately). The assessee /appellant had raised Additional Grounds before the Tribunal claiming, that the rate of DDT on the dividend distributed / paid to the non-resident shareholders(Residents of Treaty Countries) should be restricted to the rate of taxation of dividend provided in the respective tax treaty(as applicable to the non-resident shareholders) instead of the rate provided in section 115-O of the Act. The ld. Counsel for the assessee referring to the provisions of section 90(2) of the Act submits that DTAA would override the provisions of section 115-O of the Act. Therefore, the rate of tax contained in section 115-O would apply either to residents or non-residents, where there is no treaty.

11. The ld. Counsel for the assessee referred to the definition of 'Tax' u/s. 2(43) of the Act to contend that DDT is a tax as defined u/s.2(43) of the Act . He submits that DDT is a tax on distributable profits of the company and not a tax on company. Therefore, there is no co-relation to the tax on company. The provisions of section 115O were inserted by the Finance Act, 1997 w.e.f.

01/06/1997. Referring to Memorandum explaining the provision in Finance Act, 1997, the ld. Counsel submits that the provision of section 115-O were introduced to mitigate the cumbersome procedure for tax collection which involves lot of paper work. He further contended that Circular No.763 dated 18/02/1998 clarifies that DDT is a tax on the shareholders and not on the company. The provisions of section 115-O are to facilitate collection of tax. Further, the Finance Act, 2016 introduced new section i.e. section 115BBDA, which levies additional tax @10% on dividends received by certain category of tax payers. Such tax was brought to cover the disparity of effective DDT rate of20% approximately on dividend income as compared to headline tax rate of 30% on income other than dividend earned by tax payers. In Finance Bill 2020, the regime of DDT on dividend declared by Indian Companies have been done way with w.e.f. 01/4/2020. Henceforth, dividend to shareholders would not be subject to DDT u/s. 115-O of the Act, but would be taxable in the hands of the resident shareholders at the applicable rates.

12. Shri Ajay Vora explaining the nature of levy u/s. 115-O of the Act submitted, that genesis of the charge for additional income tax u/s. 115-O of the Act on the profits declared, distributed and paid by corporate assessee by way of dividends can be traced to the charging provisions of section 4 of the Act. From a bare perusal of section 4(1) of the Act, it would be seen that the said section provides for charging of tax including additional income tax on the total income. The term tax as defined u/s. 2(43) of the Act would also cover additional income tax levied u/s. 115-O(2) of the Act. He submitted that section 115-O(2) of the Act provides

that tax on distributed profits i.e. dividend shall be payable, notwithstanding that no income tax is payable by the domestic company on the total income. In other words, the tax paid on dividend declared has no connection whatsoever with the primary income tax liability in respect of profits of the company declared in the dividend.

13. The ld. Counsel for the assessee submits that the charge of additional tax u/s. 115-O, referred to as tax on distributed profits is income by way of dividend which forms part of the income of the shareholders. The aforesaid interpretation is supported by the language of section 10(33)/10(34) of the Act exempting the shareholders from tax on 'any income by way of dividend referred to section 115-O of the Act'. Further, referring to section 57(i) as it stood prior to amendment by the Finance Act, 2020 w.e.f. 01/04/2021, the ld. Counsel for the assessee submits that from the combined reading of section 115-O, section 10(34) and section 57(i) it is evident that legislature itself unequivocally construed the levy of tax u/s. 115-O of the Act as a charge on income by way of dividend declared, distributed and paid by the company. From the reading of Section 115-O of the Act it is clear that it is not a tax on corporate profits, but a tax levied on amount declared, distributed/paid by a company by way of dividend whether interim or otherwise. This is further reinforced from the provisions of sub-section(2) to section 115-O which requires a company distributing dividend to pay tax under the said section notwithstanding that the company may not have taxable income, on account of loss or claim of exemptions, etc. From the reading of provisions of section 115-O it can be safely deduced that income by way of

dividend is the income of the shareholder, section 115-O of the Act only seeks to shift the incidence of payment of tax thereon to the company. The income by way of dividend forms part of the income of the shareholder, it is immaterial as to who pays the tax to determine the nature of income. The ld. Counsel for the assessee referred to CBDT Circular No.763 dated 18/02/1998, Notes to the Finance Act, 1977 to show that tax u/s. 115-O of the Act is a tax payable by the domestic company, even if, there is no income tax liability on the company. The ld. Counsel for the assessee pointed that new corresponding clause i.e. clause-33 was inserted in section-10 to exempt the dividend income in the hands of shareholders.

14. The ld.Counsel for the assessee argued that provisions of section 115-O were inserted only to facilitate collection of tax. He asserted that constitutional validity of section 115-O of the Act was challenged before the Hon'ble Calcutta High Court in the case of Jayshree Tea & Industries Ltd. vs. Union of India, 253 ITR 608. The Single Judge of the Hon'ble High Court upheld constitutional validity of section 115-O of the Act. On appeal, the Division Bench of the Hon'ble Calcutta High Court upheld the decision of Single Bench holding the constitutional validity of section 115-O of the Act. It was further held that the tax payable ought to be restricted to 40% of dividend distributed, equal to the percentage of income liable to tax under the Act. The Revenue carried the latter part of judgment before the Hon'ble Supreme Court of India in the case of Union of India vs. Tata Tea Company Ltd., 398 ITR 260(SC). The Hon'ble Apex Court after examining the provisions of section 115-O, the scheme of the Act held that Division Bench was

not right in restricting the levy of tax under the said section to 40% of the dividend distributed. The Hon'ble Apex Court after considering the Finance Act, 1997, Article 246 of the Constitution of India, the concurrent list and the state list and various decisions held that DDT is on the shareholder and not on the company. For convenience of collection the charge has been shifted to the company. Thus, in the light of the aforesaid decision it can be concluded that the Legislative competence to enact section 115-O as part of the Act could only be upheld if the same is construed to be in the nature of tax on income by way of dividend, otherwise the levy would be unconstitutional, failing the test of legislative competence.

15. The ld. Counsel for the assessee further referred to Article-10 of India-Japan DTAA. He points that the term dividend is defined in clause (3) of Article-10. Referring to OECD Commentary on Article-10 the ld. Counsel for the assessee submits that the dividend income may be exempt in Indian Tax Laws but in the country of residence dividend income may be taxable. Further, referring to the decision in the case of CIT vs. Clive Insurance Co. Ltd., 113 ITR 636 (SC), he submits that mere collection of tax does not determine as to who has the liability to pay tax. In the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT,432 ITR 471 the Hon'ble Apex Court while dealing with dispute related to taxation of royalty, referred to and relied upon the OECD Commentary on the OECD Model Tax Convention. The ld. Counsel for the assessee submits that where section 115-O of the Act provides for levy of tax on dividend declared/distributed/paid at a rate higher than the rate of tax on dividend

provided in treaty applicable to the non-resident shareholder, then, the provisions of said section override the provisions of the applicable treaty. Therefore, provisions of section 115-O of the Act have to be read subject to Article-10 of the applicable treaty with regard to the rates at which DDT is payable, qua dividend paid to the non-resident shareholders. The Hon'ble Apex Court has observed that DTAA is an agreement between two sovereign states and it is not permissible for any nation to unilaterally amend the treaty by making amendment in the domestic tax laws. As per DTAA, two countries have agreed for taxation of dividend income in the source State @10%, and charge of a higher tax by way of introducing a different mechanism for collecting tax on such dividend income would be contrary to the principle of treaty override as enshrined in Article 26 and 27 of Vienna Convention. Such an approach cannot be countenanced and was held to be unacceptable in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (supra).

16. Referring to the decision of Delhi Bench of the Tribunal in the case of Giesecke & Devrient India Pvt Ltd vs. DCIT (supra), the ld. Counsel for the assessee submits that the Division Bench has rightly held that DDT levied in terms of section 115-O of the Act should be restricted to the rate of tax on dividend as provided in the applicable DTAA governing non-resident shareholders. Further referring to the decision of Kolkata Bench of the Tribunal in the case of India Oil Petrona Pvt. Ltd. (supra), he submitted that the Division Bench has held that DDT is a tax on dividend income and not on undistributed profits of the Company. It was also held that the company paying dividend is person responsible for

distributing dividend income among shareholders including non-resident shareholders. Hence, the rate of tax on such dividend income would be governed by the tax rate specified in DTAA, being more beneficial.

17. While summing up his submissions the ld. Counsel for the assessee argued that the Division Bench has made reference to the Special Bench by observing following issues, however the said observations are contrary to facts and settled law. Commenting on observations of the Division Bench in Total Oil, the ld. Counsel stated as under:

(i) The first reason for doubting the correctness of decision of the Co-ordinate Bench is based on the judgment of Hon'ble Apex Court in the case of Godrej & Boyce Mfg. Co. Ltd vs. DCIT, 394 ITR 449. The ld. Counsel for the assessee submits that the said judgment does not lay down any law on the issue in hand. Therefore, no reliance can be placed on the aforesaid judgement to disregard the decision of Division Bench in the case of Giesecke & Devrient India Pvt. Ltd (supra).

(ii) The next reason given by the Division Bench is that the Delhi Bench has erred in holding that the taxability is tax neutral vis-à-vis foreign resident share holders. It is submitted that the said observation is an economic determent as prejudice is caused to the assessees.

(iii) The Division Bench has placed reliance on the decision of South African High Court in the case of Volkswagen of South Africa (PTY) Ltd. vs. Commissioner South African Revenue Services (supra). It is submitted that the facts are distinguishable, more so, there is different tax regime

in South Africa, therefore, the same cannot be compared with India Tax Laws.

(iv) The Division Bench has made reference to India-Hungary DTAA. The Ld.Counsel submits that the Protocol is unique to Hungarian tax treaty and hence, cannot be applied in a blanket manner.

(v) With reference to the provisions of section 90(2), the ld. Counsel for the assessee submits that provisions of treaty applies where it is more beneficial to the tax payer. The Division Bench only refers to Article -26 ignoring all together the other Articles such as Article-19 and Article-23. The ld. Counsel for the assessee placed reliance on the decision in the case of DCIT vs. Turquoise Investments & Finance Ltd, 300 ITR 1, wherein the assessee an Indian resident company had received dividend income from a Malaysian Company, the Hon'ble Apex Court held that the dividend income received from Malaysian Company was not liable to tax in India in view of Article –XI of India Malaysia Tax treaty, according to which dividend was taxable only in Malaysia. In principle Hon'ble Supreme Court accepted that a resident of India could avail the benefits under a distributive role of tax treaty vis-à-vis taxation of income in India.

18. Without prejudice to the above submissions, the ld. Counsel for the assessee asserted that the rate of taxation of dividend paid to non-resident shareholders as provided in DTAA with Japan is required to be substituted and supplanted in section 115-O of the Act. Even if there were to be an ambiguity in

this respect and the same is open to two interpretations, the benefit of the same certainly flows to the tax payer. In support of his arguments the ld. Counsel for the assessee placed reliance on the decision in the case of Commissioner Customs (Imports), Mumbai vs. Dilip Kumar & Co.,95 taxmann.com 327.

19. Shri V. Sridharan, Senior Advocate appearing on behalf of Maruti Suzuki India Pvt. Ltd (in ITA No. 1953/Del/2022) submitted that the machinery provision for collection of tax does not change the nature of tax. The nomenclature given to levy tax u/s 115-O of the Act, is tax on distributed profits is in fact tax on dividend-income of the shareholders. It is not tax on the income of the company. The machinery adopted for collection of tax or shifting incidents of tax from shareholders to company cannot be determinative of the nature of tax. Levy of tax u/s 115-O of the Act, "on any amount declared distributed or paid by such company by way of dividend", such tax collected from domestic company distributing the dividend does not lead to the conclusion that it is a tax on distributed profits of the company.

20. The ld. Counsel submits that Article 248(1) grants exclusive powers to Parliament to make any law with respect to any matter not enumerated in the Concurrent List or State List. Article 248(2) enumerate that such power shall include the power of making any law imposing a tax not mentioned in either of those lists. Prior to abrogation of Article 370 on 06/08/2019, the taxing statutes enacted by the Parliament referable to Article 248 read with Entry 97 could not apply to the state of Jammu and Kashmir (except for three minor taxes) i.e. (1) taxes on Foreign Travel by Air or Sea; (2) taxes on England Air Travel; (3) On postal

articles including money order, phonographs and telegrams. However, the provisions of section 115-O of the Act, applied to the state of Jammu & Kashmir even prior to abrogation of Article 370. Thus, section 115-O of the Act is not referable to Entry 97. Consequently, it falls in Entry 82 as laid down in Union of India vs. Tata Tea Co. Ltd. 398 ITR 260 (SC).

21. The ld. Counsel asserted that a perusal of explanatory memorandum of Finance Bills, 1997 whereby provisions of section 115-O were introduced for the first time, (thereafter withdrawn in 2002 and reintroduced in 2003 and again withdrawn in 2020) would conclusively show that tax levied u/s 115-O is on the dividend income of shareholder albeit levied, assessed and collected only from the company. Explaining the rationale behind introduction of section 115-O with reference to memorandum to the Finance Bills, 1997. The ld. Counsel pointed that procedure prescribed u/s 115-O for collection of tax is to escape from the cumbersome process of tax collection which otherwise involves a lot of paper work. In order to encourage investments in the shares of domestic company, the bill proposes to exempt income tax on dividend received from domestic companies on or after 01/06/1997. The Bill also proposes to introduce new provisions for levying a moderate rate of distributed profits. The ld. Counsel referring to the Rule of contextual interpretation submits that a conjoint reading has to be made of all the amendments introduced in the other provisions on the Act, at the time when section 115-O of the Act was introduced/deleted. At the time when section 115-O of the Act was introduced corresponding amendments

were made in other relevant sections of the Act and some of the sections were simultaneous introduced.

22. The sections amended along with introduction of section 115-O were section providing for rate of tax on dividend or providing withholding tax on dividend. When the incident of taxation on dividend income was shifted from the shareholders to the company, there arose a need to exempt income from dividend referred to in section 115-O in the hands of the shareholder. Consequently, there was need to exclude dividend income referred to in section 115-O. A conjoint reading of the statute as a whole establishes that the tax referred to in section 115-O of the Act is on dividend income of the shareholder. When section 115-O was deleted by the Finance Act, 2002, the relevant sections amended/made at the time of introducing section 115-O were again amended to include all types of dividend, but in the reverse manner. When section 115-O was reintroduced by the Finance Act, 2003, all the corresponding sections wherein there was impact were again amended accordingly.

23. The ld. Counsel argued that as per section 115-O (2) of the Act, tax is to be paid even when no income tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act. This clearly shows that tax liability u/s 115-O is not in respect of distributed profits/income of the company. Referring to the provisions of section 115-O(3), the ld. Counsel argued that if it is a liability of company on its own income there was no need to separately insert sub-section (3), because such liability is already provided for in section 191 of the Act. Section 115-O(3) of the Act, is to the effect that the

Principal Officer of the domestic company and company shall be liable to pay tax on distributed profits to the credit of the Central Government. If levy u/s. 115-O is an additional tax on distributed profits of the company, the company would have been liable to pay such tax by virtue of mandate u/s 191 of the Act, no separate provision was required to be made the company liable to pay the tax vide section 115-O(3). The above analysis would make it clear that separate and distinct enactment of section 115-O(3) is the liability of the company but on dividend income of the shareholders. The ld. Counsel further argued that if the tax levied u/s 115-O of the Act is taxed on income of a company then the provisions of sub-section (1B) would be meaningless. Section 115-O(1B) deals with grossing up, similar grossing up provisions also exist in section 195A of the Act that deals with TDS liability when payment to a payee is on net of tax basis.

24. The ld. Counsel referring to the provisions of section 115-O(6) submits that sub-section (6) exempt a developer or enterprise of SEZ or the person receiving such dividend from the rigours of section 115-O(1) of the Act. The conferring of exemption in the hands of the person receiving the dividend is also required, since additional tax referred to in section 115-O(1) of the Act, is not on the profits of the developer or enterprise of SEZ but on divided income of the shareholder of such SEZ developer/enterprise. The ld. Counsel referring to the provisions of section 10(33) and 10(34) of the Act, submits that section 10(33) of the Act, as introduced by the Finance Act, 1997 refers to “income by way of dividends referred to in section 115-O”. The said section was subsequently repealed with the exit of section 115-O from the statute in 2002. The same section was

subsequently reintroduced as section 10(34) by the Finance Act, 2003. When section 115-O was reintroduced the language of section 10(33) as it stood from 01/06/1997 till 31/03/2002 and section 10(34) with effect from 01/04/2003 till 31/03/2020 shows that subject matter of section 115-O is "income by way of dividends". This is a clinching and decisive position to substantiate that subject matter of section 115-O is the dividend income of the shareholder. Similarly, amendments were made to section 115AC along with introduction of section 115-O. The said section also refers to "income by way of dividend". The language of exclusion in section 115AC also shows that subject matter of section 115-O is dividend income of shareholder. The proviso of section 10(34) relating to section 115 BBDA also shows that subject matter of section 115-O is dividend income of shareholder. The second proviso to Section 10(34) also proves that subject matter of section 115-O is divided income of shareholder.

25. The ld. Counsel submits that the scheme of section 115-O is analogus to section 115-R. The income from mutual funds is exempt from tax u/s 10(23D) of the Act. Section 115R(2) of the Act cast a liability on the mutual funds to pay tax in respect of income distributed to its unit holders. It would be absurd to suggest that u/s 115R, the income of mutual funds is subject to tax and u/s 10(23D), the income of mutual funds is exempt from tax. If both the provisions are read in conjoint the absurdity vanishes. The mutual funds are merely made to pay tax, not on their own income but on the dividend income of the unit holder. Thus, u/s. 115R(2) of the Act, the subject matter of tax is the income of the unit holder on which the Mutual Fund is liable to pay tax. Shifting of tax incidence to pay tax

does not change the subject matter of tax. Tax is all along on the income of respective shareholder/unit holder only, but to be levied, assessed and collected from the company/mutual funds. Thus, it is evident that the provisions of section 115R are akin to section 115-O of the Act.

26. The ld. Counsel submitted that in India-Japan and India-France DTAA, the definition of "dividend" is autonomous and is not linked to definition in the Income Tax Act. He referred to the definition of dividend in Article 10(3) of India-Japan DTAA and Article 11(3) of India-France DTAA. To further strengthen his arguments, he referred to the commentary by Klaus Vogel on Double Tax Conventions - 3rd Edition at page no. 649. He further submitted that Article 10(2) of India-Japan and Article 11(2) of India-France DTAA provides that such dividend may be taxed in the contracting states of which the company paying the dividend is a resident but if the beneficial owner of the dividend is a resident of the other contracting state, then tax of such dividend shall be levied at a rate as prescribed in the relevant DTAA. To further strengthen his arguments, the ld. Counsel referred to OECD Model Conventional commenting on Article 10 concerning the tax of dividend.

27. The ld. Counsel while concluding his arguments pointed that even if the propositions as put forward on behalf of the assessee in respect of section 115-O are rejected the dividend is taxable at the rate of 10% in terms of sub-section(3). He again reiterated that provisions of section 115-O are not to be read in isolation on general interpretation of statute, he referred to the decision in the case of M.K. Ranganathan vs. Government of Madras and others, AIR 1955 SC 604 para

23 and the decision in the case of Chairman, Railway Board and others vs. Chandrima Das and others (2000) 2 SSC 465 para 25.

28. The ld. Counsel further referred to India-Hungary DTAA that provides complete protection to the non-resident shareholders from provisions of the Act and submitted that such protection should also be extended to the domestic company paying dividend to non-resident shareholders of other countries as well.

29. The ld. Counsel further refers to the decision rendered in the case of Godrej and Boyce Manufacturing Co. Ltd. (supra) by Hon'ble Bombay High Court and to distinguish the decision in the case of Volkswagen of South Africa (PTY) Ltd. (supra).

30. The other submissions made by Sh. V Sridharan were similar to the submissions made by Sh. Ajay Arora and hence, they are not reiterated again.

31. Shri Neeraj Seth appearing on behalf of Total Oil India Pvt Ltd relied on the submissions made by Senior Counsel Shri Ajay Arora and Shri V. Sridharan. He filed written submissions reiterating the contentions earlier raised by Senior Advocates.

32. The Counsels appearing on behalf of the Interveners, Shri J. D. Mishra, Senior Advocate, Shri Rajan Vora, Ms. Fereshte Sethna and Shri Anup Sinha supported the submissions made by Shri Ajay Arora and by the Shri V. Sridharan. They have filed written submissions reiterating the submissions already recorded above.

SUBMISSIONS ON BEHALF OF THE DEPARTMENT:

33. Shri Vinod Tanwani representing the Department made exhaustive arguments interpreting the provisions of section 115-O of the Act under the domestic law and its application and understanding in the context of the provisions of the international tax laws. The ld. DR submits that a bare perusal of section 115-O of the Act would show that it over rides the charging provisions of section 4 of the Act. He pointed that section 115-O of the Act is a separate charging section and hence, it takes no support from section 4 of the Act. The ld. DR asserted that the observations of the Tribunal in Giesecke & Devirent (India) Pvt Ltd. (supra) and Indian Petronas (P.) Ltd. (supra) that the genesis of charge u/s 115-O of the Act lies in section 4 of the Act is erroneous. He submitted that the charge u/s 115-O of the Act is on distributable profits of the company and not on dividend. Section 115-O of the Act is not a procedural section but a charging section, it deals with undistributed profits and not accumulated profits. Referring to the decision rendered in the case of CIT vs. Elphistone Spg. &Wvg. Mills Co. Ltd. 40 ITR 142 (SC), the ld. DR submits that the additional tax levied under the section is on the distributable profits of the company.

34. On constitutional validity of section 115-O of the Act, the ld. DR placed reliance on the decision in the case of Tea Estate India (P.) ltd. vs. CIT 103 ITR 785 (SC) and submitted that the Hon'ble Apex Court in the aforesaid decision held that only 40% of profit made by a company engaged in growing and manufacturing tea is liable to be taxed as income but in the hands of the company those profits would retain the character of accumulated profits and such

accumulated profits when distributed as dividend by such company would be fully liable to tax in the hands of the shareholder. He further placed reliance on the decision of Hon'ble Jurisdictional High Court in the Case of Small Industries Development Bank of India (SIDBI) vs. CBDT 133 taxmann.com 158 to contend that the Hon'ble High Court has categorically held that charge u/s 115-O(1) of the Act is on the company's profits, more specifically on that part of the profits which is declared, distributed or paid by way of dividend. The charge u/s 115-O(1) of the Act is not on income by way of dividend in the shareholders hands. He further pointed that the Hon'ble Apex Court in the case of Godrej and Boyce Mfg. Co. ltd. vs. DCIT has not found fault with the observations of the Hon'ble Bombay High Court. The Hon'ble Apex Court has merely decided the writ petition on different facet without reversing the findings of the Hon'ble Jurisdictional High Court. Thus, the observations of the Hon'ble Bombay High Court in the Case of Godrej and Boyce Mfg. Co. ltd. are still relevant and hold good.

35. Explaining the nature of levy, the ld.DR submitted that a levy is explicitly on the company and so is the incidence. Further, referring to the decision in the case of Mathuram Agrawal vs. State of Madhya Pradesh, (1999) 8 SSC 667, the ld. DR submits that the Court recognized three essential elements of taxation:

1) the subject of the tax;

2) the person who is liable to pay the tax;

3) the rate at which the tax is to be paid.

In the context of section 115-O of the Act, if the above three parameters are to be answered, the same would be:

1) The subject of tax – amount declared, distributed or paid by such company by way of dividends.
2) Who is liable to pay tax – domestic company declaring, distributing or paying an amount by way of dividends.
3) The rate of tax – specified in section 115-O(1) of the Act.

The ld. DR pointed that above parameters have been reiterated by the Apex Court in the case of Gobind Saran Ganga Saran vs. CST, AIR 1985 SC 1041.

36. The ld. DR submits that measure of tax levy or taxable event do not decide nature of levy. For this proposition, he placed reliance on the decision in the case of Smith Kline & French (India) Ltd. vs. CIT 85 Taxman 683 (SC). He argued that word 'profit' preceding the expression 'tax on distributed profits' and 'tax on undistributed profits' is derived from the tax event/measure of the tax and the same does not modify the subject of levy, which is profits of the company.

37. The ld. DR further argued that statutory incidence of tax levy, once complete, leaves no scope of intendment. Once the tax is levied on a particular specie of profits of the company, then, no scope is left for an argument that the tax so levied is in fact paid by the company either on behalf of the shareholders or has in fact being paid on the dividend income of shareholders. The perceived split between the economic incident on shareholders and statutory levy on companies as made out in the decision in the case of Giesecke & Devirent (India) Pvt. Ltd. (supra) and Indian Petronas (P.) Ltd. (supra) is unknown to tax jurisprudence, both in domestic law as well as in the international law. The ld. DR placed reliance on the decision in the case of Turner Morrison and Co. Ltd. vs. Hungerford

Investment Trust Ltd. 85 ITR 607 (SC) to support his contentions that tax u/s 115-O of the Act is a tax that is statutorily levied on the company on its profits wherein both the statutory levy and the statutory incident is on the company. Hence, in respect of tax paid on distributed profits u/s 115-O of the Act, the assessee can have no claim against Revenue for refund as the liability was that of the assessee company.

38. The ld. DR further submitted that section 115-O of the Act levies tax on the amount declared, distributed or paid by a domestic company by way of dividends. The tax levied u/s 115-O of the Act both in law and in time precedes the actual accrual as it gets crystallized at earlier stage of declaration on dividends. The ld. DR submitted that when the interim dividend is declared all the shareholders entitled to receive dividend are not identifiable. The shareholders will keep on changing between the date of declaration and distribution. Thus, identity of shareholder is not defined on the date of payment. Whereas, tax liability crystallizes as soon as the dividend is declared. The ld. DR placed reliance on the decision in the case of Pfizer Corpn vs. CIT, 129 Taxman 459 (Bombay), for the proposition that accrual of dividend income in the hands of the non-resident is governed by section 9 and not by section 8. Section 8 is merely a procedural law. He pointed that words “declared or distributed” in section 8 do not find place in section 9(1)(iv) of the Act. Therefore, dividend income paid to a non-resident is deemed to accrue in India only on payment and not on declaration. The ld. DR further referred to the decision in the case of Punjab Distilling Industries Ltd. vs.

CIT, 57 ITR 1 (SC) to strengthen his argument that declaration is a stage, both in law and in time, which precedes accrual of income.

39. The ld. DR submits that the Companies Amendment Act, 2000 defines dividend in section 214A of the Act to mean “dividends includes interim dividend”. Once the dividend is declared (including interim dividend) the amount of profits to be distributed go out of the lien of the company into a separate bank account and then these funds cannot be used by the company for any purpose other than payment of dividend. At this stage, the distributed profits are an obligation due to the company but this obligation is still owed to shareholders as a class and not to a particular shareholder per se. The levy of tax u/s 115-O of the Act is completed at this stage itself. He referred to the provisions of section 115-O(3) of the Act which specifies the time of levy to pay the tax on distributed profits to the Government Exchequer that is within 14 days from the date of – a) declaration of dividend; b) distribution of dividend; c) payment of dividend, whichever is earlier. The ld. DR pointed that from shareholder’s point of view, the dividend becomes a debt due only when it is distributed and the individual shareholder account is credited with the amount due to them. It is at this stage that the income for non-resident shareholders gets accrued in terms of section 9(1)(iv) of the Act. From the point of view of tax treaty, definition of dividend in DTAA also used the word “paid”.

40. The ld. DR submits that at the declaration stage when charge u/s 115-O of the Act crystalizes, the key elements for the crystallization of levy u/s 4 are missing. From perusal of section 4, it is evident that for charge to crystalize, first,

there has to be deemed approval of dividend income. Secondly, the charge is with respect to an identified person. Both these elements are missing at the declaration stage u/s 115-O of the Act. Thus, the assertions made on behalf of the assessees that the tax u/s 115-O of the Act is on the dividend income of the shareholders and only incident of this tax has been shifted to the company is legally untenable. On the proposition that once a particular tax levy has crystallized, the future events cannot effect or change the tax place or taxable person, reliance is placed on the decision in the case of Kishinchand Chellaram vs. CIT, 46 ITR 640 (SC).

41. With respect to grossing up, the ld. DR submits that section 115-O(1B) of the Act with effect from 01/10/2014 provides for grossing up of net distributed profits, so that after reduction of tax levied u/s 115-O of the Act on the increased amount at the rates specified in sub-section (1) of section 115-O of the Act. The same is equal to the net distributed profits. Such grossing up is mathematically equal to the grossing up of the tax rate specified in section 115-O(1) of the Act.

42. The ld. DR submits that an argument has been raised from assessees' side that it is for the sake of administrative convenience, that the incidence of tax u/s 115-O of the Act has been shifted to the payer company. This proposition has been supported by Tribunal order in the case of Giesecke & Devirent (supra) and Indian Petronas (P.) ltd. (supra). The concept of administrative convenience is beyond the scope of statutory interpretation especially when the language used in the statute is clear and unambiguous. Even otherwise these findings are based on selective reading of the aids to the interpretation of the statute. In this regard,

the ld. DR referred to para 101 of the speech by the Finance Minister made while presenting the Finance Bill, 1997. He thus contended that the concept of mere administrative convenience for shifting the incidents on payer company for collection of tax u/s 115-O of the Act is wrong.

43. The ld. DR submitted that insofar as interplay of section 115-O of the Act with the provisions of international tax laws and DTAA, for the purpose of section 10(34) of the Act, there is no distinction between resident and non-resident shareholder. Section 10(34) of the Act does not distinguish on the basis of the residential status of the person in receipt of income. In the absence of any intelligible differentia based on residential status of shareholders there can be no basis to segregate the case of non-resident shareholders. With reference to application of DTAA, the ld. DR submits that tax u/s 115-O of the Act is a tax on the company and not on the shareholder. Hence, its levy does not give any rise to double taxation. The ld. DR submits that invariably in all the DTAAs the words used are “dividends paid by a company”. The treaty has to be interpreted as a whole and no clause of it should be read and/or interpreted in isolation. The DR concluded by stating that under the scheme of section 115O, the provisions of international tax laws are not attracted.

REBUTTAL BY THE ASSESEE:

44. Rebutting the submissions made by ld. Departmental Representative, Shri Ajay Vora submitted that charge of Income-tax u/s. 4 of the Act evenly applies

to levy of additional Income-tax u/s. 115-O of the Act. The provisions of section 115-O of the Act cannot be seen in an isolation. In case section 115-O of the Act was to stand on its own without reference to its genesis in section 4, then the levy of tax under former section would not be constitutionally valid. Section 4 of the Act provides for levy of additional Income-tax, including tax u/s.115-O of the Act.

45. The ld.Counsel for the assessee vehemently submitted that the reliance on the decision in the case of Tea Estates Pvt. Ltd. (supra) does not help the Department. There is no dispute to the proposition set out in the aforesaid judgment, however, the said judgment is of no relevance to the present controversy in view of the specific language of section 115-O(2) of the Act, which provides for levy of tax under such section on dividend declared, distributed, paid by the company notwithstanding that the distributing company has no taxable income. He further asserted that in the case of Godrej & Boyce Mfg. Co. Ltd.(supra), the Hon'ble Apex Court did not finally pronounce on the nature of levy u/s. 115-O of the Act but held the same could not be regarded as tax paid by the shareholder. Referring to the observations of the Hon'ble Court in para 31 of the said judgment the ld. Counsel for the assessee submitted that there is no conflict between the decision in the case of Tata Tea Ltd.(supra) and the decision in the case Godrej & Boyce Mfg. Co. Ltd.(supra). The Tribunal in the case Indian Oil Petrona Pvt. Ltd. (supra) has analysed both the judgments and held that the same are not contradictory to each other.

46. The ld. Counsel for the assessee further submitted that the decision rendered by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg.

Co. Ltd., 394 ITR 449 has not been reversed by the Hon'ble Apex Court. The view taken by the Hon'ble Apex Court is in line with the ultimate conclusion arrived at by Hon'ble Bombay High Court. The reasoning of Hon'ble Bombay High Court did not receive the *imprimatur* of the Hon'ble Apex Court. Hence, the observations made by Hon'ble Bombay High Court still hold good.

47. The ld. Counsel for the assessee further asserted that the decision rendered by Hon'ble Bombay High Court in the case of Small Industries Development Bank of India (supra) on which the ld. Departmental Representative has placed heavy reliance is distinguishable on facts and, hence, reliance on the said case is misplaced. In the said case the Hon'ble High Court taking note of the non-obstante clause in section 50 of the SIDBI Act, which has an overriding effect over the provisions of the Act and it was held that SIDBI is exempted from paying DDT on dividends u/s.115-O of the Act and thus, was not liable to pay DDT on dividends, thus, SIDBI is outside the purview of section 115-O of the Act. Without prejudice to the aobe primary contention, the ld. Counsel for the assessee argued that the findings of the Hon'ble High Court run counter to the ratio laid down in Tata Tea Ltd. (supra). Hence, the decision rendered in the case of SIDBI does not support the case of Revenue.

48. The ld. Counsel for the assessee further argued that in the case of Union of India vs. Azadi Bachao Andolan, 263 ITR 706(SC), the Hon'ble Apex Court has observed that the principles adopted in interpretation of treaties are not the same as those in interpretation of statutory legislation and must be to the context and the intention of the contracting parties in entering the Treaty. Further, the

provisions of the Treaty, are to be given a literal interpretation to implement the treaty intentions of the parties i.e. the two sovereign nations. The word "paid" is not defined under the provisions of the Treaty, hence, the definition of "paid" as in section 43(2) of the Act has to be adopted (Re. Article 3(2) of the Treaty). Thus, in view of the above, it is incorrect to say that the liability for DDT is discharged prior to accrual of income in the hands of the shareholders. The accrual in the hands of the shareholders is simultaneous with the declaration of dividend and in view of the above there is no mismatch.

49. The learned counsel for assessee, to counter the submissions of the Revenue on the other issues viz. economic double taxation covered under the Treaty; split rate company tax; the decision rendered in the case of Volkswagen of South Africa (Pty) Ltd. (supra)by South African High Court and Doctrine of Pith and Substance, filed written submissions. The same are noted.

DECISION:

50. Before we proceed to answer the question that has been referred for consideration of the Special Bench, it would be necessary to set out certain fundamental aspects of taxation of dividend so as to appreciate and understand the rival contentions put forth by the parties.

Meaning of the word "Dividend":

51. The word "Dividend" has its origin from the Latin word "Dividendum". It means a thing to be divided. Dividend means the portion of the profit received by

the shareholders from the company's net profit, which is legally available for distribution among the members. Therefore, dividend is a return on the share capital subscribed for and paid to its shareholders by a company. Dividend defined under section 2(35) of the Companies Act, 2013, includes any interim dividend.

52. Under the Act, dividend is defined in Sec.2(22) of the Act. The definition is an inclusive definition. Therefore dividend would mean the natural meaning of the term Dividend, meaning portion of profits received by the shareholder out of the company's profits as return on the share capital subscribed by the shareholder. If one says Dividend is share of profits declared as distributable among the shareholders, it does not mean that the character of the profits distributed by the company as dividend retain the same character when it reaches the hands of the shareholders. For example, a company grows and manufactures tea. In terms of Rule 8(1) of the Income Tax Rules, 1962 (in short 'the Rules'), income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were an income derived from business, and forty per cent of such income shall be deemed to be income liable to tax. It involves composite activity of (i) growing tea, which involves carrying on Agricultural operations, and (ii) manufacturing tea which involves processing tea leaves fit for use by ultimate consumers, which is a non agricultural activity. If Rs.100 is income derived by the company from the composite activity, only Rs.40 is taxed as income attributable to non agricultural activity and the remaining Rs.60 is not taxed as it involves agricultural activity. But when the company distributes profit

of Rs.100 as dividend, the dividend so received in the hand of the shareholder is fully taxable. The shareholder cannot be heard to say that the dividend it receives is partly income from agriculture and to that extent it is not taxable.

53. As already stated definition of Dividend is an inclusive definition. Apart from what company declares and distributes money to its shareholders by the name dividends (which we may call as real dividend, which also is paid only out of accumulated profits of the company) certain other instances are also included in the definition of dividend under Sec.2(*22*) clauses (a) to (e) of the Act. Like in clause (a) of Sec.2(22), if instead of distribution money to shareholders, company distributes assets of the company, it is treated as dividend, to the extent the company possesses accumulated profits. Likewise in Clause (b) of Sec.2(22) if debentures are given to shareholders, it is treated as payment of dividend, to the extent the company possesses accumulated profits. In clause (c) to Sec.2(22) of the Act, any distribution to a shareholders by a company in liquidation, to the extent it possesses accumulated profits, it is treated as dividend. In clause (d) of Sec.2(22) of the Act, any payment distributed to a shareholder by way of reduction in share capital to the extent it possesses accumulated profits, is treated as dividend. In clause (e) of Sec.2(22) of the Act, loan or advance to a shareholder is treated as dividend, to the extent the company possesses accumulated profits.

54. The point of time at which Dividend income is taxed is laid down u/s.8 of the Act, and it says that what the company declares and pays as real dividend is taxed when it is declared. Dividend u/s.2(22)(a) to (d) is taxed when it is

distributed. Dividend u/s.2(22)(e) is taxed when it is paid. Dividend is taxed under the head "Income from other sources" as laid down in Sec.56(2)(i) of the Act.

55. Though dividend is income in the hands of the shareholder, its taxability need not necessarily be in the hands of the shareholder. The sovereign has the prerogative to tax dividend, either in the hands of the recipient of the dividend or otherwise. This takes us to the mode in which Dividend is taxed. Modes of taxing dividend income are (i) classical/ Progressive system; (ii) Simplistic system. Under the Act, upto the year 1997, the classical system of taxing dividend income prevailed. Under the classical system, the dividend would be taxed in the hands of the recipients at rates applicable to them. Simplistic system would mean a system by which the company which distributes the dividend is required to discharge the tax liability on the sum distributed by way of dividend as an additional income tax on the company itself and consequently such dividend income was exempt in the hands of shareholders under section 10(34).

Section115-O of the Act:

56. By the Finance Act, 1997, the Government introduced simplistic system by introduction of Chapter XII-D to the Act, comprising of Sec.115-O, 115-P and 115Q. The tax so paid was treated as the final tax on dividends and the dividends were exempt from any further incidence of tax in India in the hands of the shareholders. The Memorandum to the Finance Act, 1997, explaining the reasons for introduction of Sec.115O specifies two fold objectives (i) procedure for tax collection in the form of Tax Deduction at Source (TDS) was cumbersome and

involves a lot of paper work and collection from the company would be much easier. (ii) Since there was no tax incidence in the hands of the shareholder that would encourage investment in the shares of domestic companies. Sec.115O so introduced in Chapter XII-D of the Act reads thus:

> **"115-O.** *(1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of June, 1997, whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of ten per cent.*
>
> *(*1A*) Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on distributed profits under sub-section (*1*) shall be payable by such company.*
>
> *(2) The principal officer of the domestic company and the company shall be liable to pay the tax on distributed profits to the credit of the Central Government within fourteen days from the date of—*
>
> *(*a *)* *declaration of any dividend; or*
> *(*b *)* *distribution of any dividend; or*
> *(*c *)* *payment of any dividend,*
>
> *whichever is earliest.*
>
> *(3) The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid.*
>
> *(4) No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been charged to tax under sub-section (1) or the tax thereon."*

57. Section 115-P provided for levy of interest where the DDT is not paid within the time specified by Sec.115-O. Sec.115-Q provided that the Principal Officer of

the domestic company and the company shall be deemed to be an Assessee in default in respect of the amount of tax payable and all the other provisions of the Act for collection and recovery of income tax shall apply.

58. A plain reading of the provisions of Sec.115O shows that it creates a charge to additional income tax on any amount declared, distributed or paid by domestic company by way of dividend for any assessment year. The tax so charged is "*in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year"*. The additional income tax is referred to as "tax on distributed profits" commonly referred to as "Dividend Distribution Tax". It is a tax on "distributed profits" and not a tax on "dividend distributed". The point of time at which the additional income tax is payable by the domestic company is laid down in Sec.115O, viz, within fourteen days from the date of—

(a) declaration of any dividend; or
(b) distribution of any dividend; or
(c) payment of any dividend,

whichever is earliest. The person liable for payment of such additional tax is "principal officer of the domestic company and the company". The payment has to be made to the credit of the Central Government. Sec.115O is thus, a code by itself, in so far as levy and collection of tax on distributed profits. The non obstante clause in Sec. 115O "notwithstanding anything contained in this Act but subject to the provisions of this section (i.e., Sec.115O)" is an indication that the charge under the said section is independent and divorced from the concept of "total income" under the Act. The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount

declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid. No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been charged to tax under sub-section (1) of Section 115 O or the tax thereon. This scheme of Sec.115-O was abolished by the Finance Act of 2002. Section 115-O was reintroduced by Finance Act, 2003 reverting to the simplistic system. Ultimately, DDT was abolished by the Finance Act, 2020 and the Government reverted to the classical system of taxation of dividend.

59. During existence of Sec.115-O between 1997 to 2020, one of the amendments to Sec.115-O by the Finance Act, 2014 was by insertion of sub-section (1B) to Sec.115-O w.e.f. 1.10.2014. The amendment was significant, as it provided for grossing up of rate at which the sum paid was taxed in order to ensure that Dividend Distribution Tax (DDT) is levied on a proper base. Sec.(1B) to Sec.115-O so introduced read as follows:

> *"(1B) For the purposes of determining the tax on distributed profits payable in accordance with this section,* ***any amount by way of dividends referred to in sub-section (1)*** *as reduced by the amount referred to in sub-section (1A) [hereafter referred to as net distributed profits],* ***shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in sub-section (1), be equal to the net distributed profits:"***

60. In Circular No.1/2015 dated 21.1.2015, the CBDT has explained the purpose of introduction of these provisions, as follows:

"35.3 Prior to introduction of dividend distribution tax (DDT), the dividends were taxable in the hands of the shareholder. The gross amount of dividend representing the distributable surplus was taxable, and the tax on this amount was paid by the shareholder at the applicable rate which varied from 0 to 30%. However, after the introduction of the DDT, a lower rate of 15% was applicable but this rate was being applied on the amount paid as dividend after reduction of distribution tax by the company.

35.4 Therefore, the tax was computed by the company with reference to the net amount. Similar was the case when income was distributed by mutual funds. Due to difference in the base of the income distributed or dividend on which the distribution tax is calculated, the effective tax rate was lower than the rate provided in the respective sections.

35.5 In order to ensure that tax is levied on proper base, the amount of distributable income, and the dividends which are actually received by the unit holder of the mutual fund or shareholders of the domestic company, as the case may be, were required to be grossed up for the purpose of computing the additional tax.

35.6 Accordingly, section 115-O has been amended so as to provide that for the purposes of determining the tax on distributed profits payable in accordance with the provisions of section 115-O, any amount by way of dividends referred to in subsection (1) of the said section, as reduced by the amount referred to in sub-section (1A) [referred to as net distributed profits], shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in sub-section (1), be equal to the net distributed profits. Thus, where the amount of dividend paid or distributed by a company is Rs.85, then DDT under the amended provision would be calculated as follows:

Dividend amount distributed = Rs. 85

*Increase by Rs. 15 [i.e. (85*0.15)/(1-0.15)]*

Increased amount = Rs. 100

DDT @ 15% of Rs. 100 = Rs. 15

Tax payable u/s 115-O is Rs. 15

Dividend distributed to shareholders = Rs. 85"

Hitherto, the domestic companies did not raise any dispute with regard to the rate of tax applicable for DDT and were paying DDT at the rate prescribed under

the Act. After the 2014 Amendment, domestic companies paying DDT took a stand that since dividend was ultimately taxable in the hands of the shareholder and since Sec.115-O merely shifts the burden on the domestic company distributing dividend, the rate at which tax has to be deducted, wherever dividend is paid to non-resident shareholders who are tax resident of a country with whom India has Treaty for Avoidance of Double Taxation (DTAA), it would be the lower rate of tax, if so provided in the relevant DTAA. It appears that it was only in October, 2020 that such a point came up in the case of Giesecke & Devrient India Pvt. Ltd. Vs. ACIT (supra) before the Tribunal, where the tax payer company sought to raise the plea for adopting lower rate of tax on dividend payout based on corresponding Treaty provisions; this is indicative of the fact that, perhaps the trigger for debate on adopting the lower rate of taxation on dividend as provided in the DTAAs in preference to the rate prescribed u/s. 115-O of the Act was the amendment of grossing up made by the Finance Act, 2014 w.e.f. 01/10/2014. Be that as it may, we do not delve much on this aspect.

Double taxation of Dividends and DTAA:

61. Certain fundamental aspects of taxation of income should be recapitulated. Sovereign Power to tax income can be either be source based or based on residential status of the person sought to be taxed. A source based right to tax is the right of the state to tax all income that is generated within its territory. A source or territorial based taxation system therefore seeks to compensate the source country for its contribution to sustenance of the economic activity. Residence based taxation is the power to tax a person resident in a country,

regardless of his/its source of income. Each country has its own rules of determining residential status of the person sought to be taxed.

62. The provisions of sections 5, 6 and 9 of the Act enumerate the residence based and source based taxation principles. To put it in simple terms, Section 5 provides that Residents are taxed on their worldwide income; Non- Residents are taxed on India - sourced income (i.e. income received or deemed to be received in India and income accrued or deemed to have accrued in India).

63. Residential Status of a person is determined in terms of the provisions of section 6 of the Act. Section 9 of the Act provides for source based taxation on the basis of characterization of income, for example, Income from business connection or property or assets in India or from the transfer of capital asset situated in India is deemed to have their source in India. Likewise, another genre of income e.g. dividend paid by an Indian company is always treated as having source in India; similarly, interest payments received by a non-resident will have its source in India if it relates to a debt incurred in connection with payer's business or profession in India; royalty and fees for technical services, is also treated as having Indian source as long as underlying right, information, property or service is used in connection with the payer's business or profession carried on in India.

64. Income or profits which result from international activities such as cross border investment may be taxed where the income is earned (i.e.source country) or where the person who receives it is normally based (i.e. Country of residence). Same income could be taxed twice, once by the source country, based on source

rule and the country of residence, based on residence rule. To prevent this double taxation, countries enter into bilateral double taxation avoidance treaties. Fundamentally, the treaties strike a compromise between source and residence taxation. Some rights to tax are given to the source, and the residence country is required to relieve double taxation either by giving a credit for such source taxes paid, or by exempting the relevant income from its taxes. Generally, source jurisdictions retain their right to tax active (business) income, except for short-term activities, but give up some of their right to tax passive (investment) incomes.

65. Shorn of other aspect of Section 90 of the Act, clause (b) of its sub-section (1) enables the Central Government to enter into an agreement with the Government of any nation outside India or specified territory outside India for the avoidance of double taxation of income under the Act and under the corresponding law in force in that other nation or specified territory, as the case may be.

66. Often, double taxation is conceivable when one nation is utilizing residence rule to tax and the other nation is utilizing source rule to tax the very same income. Section 90(2) of the Act specifically provides that where the Central Government has entered into an agreement with the Government of any country outside India under sub- section (1) of Sec.90 of the Act for granting relief of tax, or as the case may be, for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee. If there is no DTAA between

India and another country, Section 91 allows relief from double taxation, in the form of foreign tax credit.

67. Following Model forms of DTAA exist viz.,

I. OECD Model Tax Convention – Based on Residence principle.

II. UN Model Double Taxation Convention – Based on combination of Residence and Source. Principle with key emphasis on the latter.

III. US Model Income Tax Convention – Followed for entering into DTAAs with the US

IV. Andean Community Income and Capital Tax Convention – Adopted by Member State, namely, Bolivia, Chile, Ecuador, Columbia, Peru and Venezuela.

It is for the two Sovereign nations entering into a DTAA to decide which model(s) or hybrid of the model(s) has to be adopted for a particular character of income.

68. As we have already seen, DTAAs are treaties signed by Government of India with other countries in order to obviate double taxation which arises from the same income being taxed in both the countries. The bargain between the countries in a DTAA is limited and is generally specified in “taxes covered” clause. For example, Article 2 of the Organization for Economic Cooperation and Development (OECD’s) Model Double Taxation Convention (OECD DTC) states that it “shall apply to taxes on income and on capital”, besides specifying special provision in respect of certain species of income. Article 10 of the OECD DTC provides that “dividends paid by a company which is a resident of a contracting

State to a resident of the other contracting State may be taxed in that other States". If DTAA between India and another country, say country X provides for taxation of dividend income based on Article 10 of OECD model, then that would mean that dividend paid by an Indian company to a shareholder who is resident of Country X – may be taxed in Country X. Simultaneously, Article 10 permits that "dividends paid by a company which is a resident of a contracting State may also be taxed in that State according to the laws of that State. This would mean that dividend paid by an Indian company may be taxed in India based on source rule and again taxed in country X based on residence rule. In such a scenario Article 10 of the OECD DTAA stipulates a limit upon the rate of tax in the source state by restricting the rate of tax to a specified percentage of tax. The relevant clause of model OECD if read together will clarify the position and it reads thus:

"ARTICLE 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);

b) 15 per cent of the gross amount of the dividends in all other cases. The competent authorities of the Contracting States shall by mutual agreement

settle the mode of application of these limitations. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. ……….”

This limit of tax rate depends upon the individual DTAA which India has signed with other countries. In most Indian DTAAs, this limit is of 10% and by implication it means that the levy of tax by India on dividend paid by Indian companies to shareholders resident in those DTAA countries cannot exceed 10%. The DDT tax rate is 15% + grossing up u/s.115O and this is the reason, perhaps, why domestic company paying DDT to Non-Resident shareholders claim that the rate of DDT in such cases has to be only at 10% based on the lower limit tax rate on dividends under the DTAA.

Nature of DDT: Is it tax on the company or the shareholder?

69. The first aspect that we need to decide is as to whether DDT is a tax on the company or the shareholder. Can one say it is a tax payable by the shareholder, whose liability is discharged by the domestic company in the form of payment of DDT? The nature of DDT first came for consideration before the Hon’ble Calcutta High Court in the case of Jayshree Tea and Industries Ltd. v. Union of India, (supra) and in the case of George Williamson (Assam) Ltd. v. Union of India, 292 ITR 322 (Gauhati). The assessee in these cases were companies engaged in the business of growing and manufacturing tea. The petitioners challenged the constitutional validity of Section 115-O introduced by the Finance Bill 1997. In terms of Rule 8(1) of the Rules income derived from the sale of tea grown by the assessee and

manufactured by the seller in India shall be computed as if it were income derived from business, and forty per cent of such income shall be deemed to be income liable to tax. It involves composite activity of, (i) growing tea, which involves carrying on Agricultural operations; and (ii) manufacturing tea which involves processing tea leaves fit for use by ultimate consumers, which is a non agricultural activity. If Rs.100 is income derived by the company from the composite activity, only Rs.40 is taxed as income attributable to non agricultural activity and the remaining Rs.60 is not taxed as it involves agricultural activity. But when the company distributes profit of Rs.100 as dividend, the dividend so received in the hand of the shareholder is fully taxable. It was the case of the assessee in the aforesaid cases that since 60% of Rs.100 is agricultural income, the provisions of Sec.115 O to the extent it obliges the domestic company to pay DDT at 15% on Rs.100/- is unconstitutional, as by way of the said provision income from agriculture of Rs.60 is also taxed, which is beyond the legislative competence of the Parliament to tax Agricultural income, being a State subject. The Hon'ble High Court accepted the view of petitioners i.e. only 40% of the income is liable to additional tax u/s.115-O and rejected the contentions challenging the vires of section 115-O of the Act. In other words, constitutional validity of Section 115-O was upheld but the applicability of section as confined to the component of non-agricultural income. The Revenue challenged the order of Hon'ble Calcutta High Court before the Hon'ble Supreme Court of India qua the restriction of charging of additional income tax u/s115-O of the Act on 40% of income which was taxable under the Act, in the case of Tata Tea Co. Ltd. (supra). The Hon'ble Apex Court, upheld the constitutional validity of section 115 O of the

Act and held that the power to levy DDT on domestic company was well within the scope of List I Entry 82 "tax on income". The Hon'ble Court observed that what is excluded is only tax on agricultural income which is contained in List II Entry 46. "Income" as defined in Section 2(24) of the 1961 Act is the inclusive definition including specifically "dividend". Dividend is statutorily regulated and under the Articles of Association of companies, it is required to be paid as per the rules of the companies to the shareholders. Section 115-O pertains to declaration, distribution or payment of dividend by domestic company and imposition of additional tax on dividend is thus clearly covered by subject as embraced by Entry 82. The provisions of Section 115-O cannot be said to be directly included in the field of tax on agricultural income. The Hon'ble Court referred to its earlier decision in the case of Mrs. Bacha F. Guzdar, Bombay Vs. CIT AIR 1955 SC 74 wherein identical contention was raised by an assessee shareholder in a tea manufacturing company to the effect that only 40% of dividend received should be taxed as the remaining 60% was Agricultural income. The argument was rejected by the Hon'ble Supreme Court by observing that when such company decides to distribute its profits to the shareholders and declare dividends to be allocated to them, such dividends in the hands of the shareholders do not partake the character of revenue derived from land which is used for agricultural purposes. The Hon'ble Supreme Court also referred to its earlier decision in the case of CIT Vs. Nalin Behari Lal, 1969 (2) SCC 310, wherein it was held that dividend distributed by a company being a share of its profits declared as distributable among the shareholders, is not impressed with

the character of profits from which it reaches the hands of the shareholder.

70. On behalf of the assessee, it was argued that Supreme Court has laid down the principle that DDT u/s.115-O is nothing but a tax in the hands of the shareholder because they have gone by the nature of income in the hands of the shareholder and not in the hands of the Domestic Company paying dividend. This argument in our view is devoid of any merit. As was submitted by the learned DR, the Supreme Court while dealing with the constitutional validity of Sec.115 O of the Act has held that under section 2(24)(ii) dividend is included in 'income' and is thus covered by Entry 82 of List I to Seventh Schedule, "taxes on income, other than agricultural income". The argument on behalf of the assessee was that in "pith and substance" DDT was a tax on Agricultural income, which was rejected by the Hon'ble Supreme Court. The law is well settled that a judicial precedent is only "an authority for what it actually decides and not what may come to follow from some observations which find place therein". The Hon'ble Supreme Court was not dealing with the nature of DDT as to whether it is tax on the company or a tax on the shareholder. Thus, in our considered view the decision rendered in the case of Tata Tea Co. Ltd. (supra) does not support the cause of assesses.

71. The Hon'ble Bombay High Court in Godrej & Boyce (supra), had an occasion to deal with the nature of DDT in the context of the provisions of Sec.14A of the Act. Sec.14A of the Act, lays down that any expenditure incurred in any income which does not form part of the total income under chapter III of the Act, cannot be allowed as deduction in computing total income. Dividend earned by

companies were not charged to tax in the hands of the shareholders but the domestic company distributing dividend paid tax on amounts declared, distributed or paid, as dividends out of the accumulated profits, u/s.115 O of the Act. The Assessee argued that dividend income cannot be said to be not charged to tax because dividend income suffered DDT u/s.115-O, albeit in the hands of the domestic company distributing dividend. The Hon'ble Bombay High Court rejected the argument and held that the legal characteristics of DDT is tax on a company paying the dividend and "is chargeable to tax on its profits as a distinct taxable entity. The domestic company paying DDT does not do so on behalf of the shareholder. The company does not act as an agent of the shareholder in paying the tax under Section 115-O. In the hands of the recipient shareholder dividend does not form part of the total income. On the contrary, Section 10(33) clearly evinces parliamentary intent that incomes from dividend (and from mutual funds) are not includible in the total income". Thus, the Hon'ble Bombay High Court held that DDT was not a tax on income of the shareholder but was instead a tax on the company. The following were the relevant observations of the Court:

> *"30. The submission which has been urged on behalf of the assessee is that the expression "income which does not form part of the total income" under the Act should be interpreted to mean income which is exempt from tax, On this hypothesis, it has been urged that Section 14A will not apply to dividend income because the Revenue has already received its share of tax.*
>
> *31. The submission cannot be accepted. The expression "income which does not form part of the total income" under the Act must receive its plain and grammatical construction. Such income is income which is not includible in computing the total income of the assessee under the provisions of the Act for a previous year. Now it is trite law that under the Act, "it is income that is taxed but it is not taxed in vacuum. It is taxed in the hands of a person."12 Section 2(45) defines the expression "total income" to mean*

the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 4 charges the total income "of the previous year" of every person to income tax. Section 5 makes a reference to the scope of the total income of any previous year of a person who is the recipient. This is defined to include all income, from whatsoever sources derived, which is received or deemed to be received or which accrues or is deemed to have accrued in India or which accrues or arises outside India during the previous year. Section 10 defines those categories of income which shall not be included in computing the total income of the previous year of any person. Income tax is a tax on income in the hands of the assessee. Hence, when Section 14A disallows expenditure incurred by the assessee in relation to income which does not form part of the total income, it would include categories 12 CIT vs. Indian Bank Limited, AIR 1965 SC 1473 at paragraph19 page 1476 of income such as dividend from shares and income from mutual fund which under Section 10 are not to be included in the total income. Since dividend income and income from mutual funds are not included in the total income of the assessee, no deduction of expenditure is permissible under Section 14A(1). Sub-section (5) of Section 115-O stipulates that no deduction under any other provisions of the Act shall be allowed to the Company or to a shareholder in respect of the amount which has been charged to tax under sub-section (1) or the tax thereon.

32. The tax which is paid by the Company on profits declared, distributed or paid by way of dividend is not a tax which is paid on behalf of the shareholder. The company is liable to pay income tax in respect of its total income. In addition to the income tax chargeable in respect of its total income, a domestic Company is charged with the payment of additional income tax, called a tax on distributed profits on any amount declared, distributed or paid by the Company by way of dividend. The charge under sub-section (1) of Section 115-O is on the profits of the Company; more specifically on that part of the profits which is declared, distributed or paid by way of dividend. The charge under sub-section (1) of Section 115-O is not on income by way of dividend in the hands of the shareholder.

The additional income-tax payable on profits of a domestic company under Section 115-O is not a tax on dividend

33. Section 115-O provides that a domestic company which declares, distributes or pays dividend out of current or accumulated profits, shall, apart from paying tax on its total income, pay additional income-tax on the amount of profits declared, distributed or paid as dividend or after 1 April 2003.

34. To illustrate, if Rs.1,000/- is the total income of a domestic company and out of the total income of Rs.1,000/-, Rs.300/- is declared, distributed or paid as dividend, then that domestic company is liable to pay income tax on the total income of Rs.1,000/- at the

rate specified under the relevant Finance Act and is further liable to pay additional income-tax at the rate prescribed under Section 115-O on the amount of profits declared, distributed or paid as dividend.

35. Section 115-O has been enacted with a view to exempt dividend income. Prior to the insertion of Section 115-O, domestic companies were liable to pay tax on the total income (including profits distributed as dividends) and shareholders were liable to pay tax on dividend income received. Domestic companies distributing profits as dividends were liable to deduct tax at source and shareholders receiving the dividend were entitled to take credit of such tax deducted at source. As this method was found to be cumbersome, Parliament chose to exempt dividend income in the hands of the shareholder and chose to levy additional income-tax on the amount of profits declared, distributed or paid as dividend by the domestic companies. Thus, by inserting Section 115-O, additional income-tax is levied on the amount of profits declared, distributed or paid as dividend and by inserting Section 10(33) it is made clear that the dividends referred to in Section 115-O would be exempt from tax.

36. In Purushottamdas Thakurdas Vs. CIT 48 ITR 206 (SC) the Supreme Court construed the provisions of Section 16(2) and Section 49B of the Indian Income Tax Act, 1922. Sub-section (2) of Section 16 provided that any dividend shall be deemed to be income of the year in which it is paid regardless of the question as to when the profits out of which the dividend is paid were earned. By a deeming fiction introduced by Section 49B, when a dividend was paid to a shareholder by a Company which was assessed to tax, the income tax in respect of such dividend was deemed to have been paid by the shareholder himself. The Supreme Court observed that the position as a matter of general law was as follows:

> *"In general law, the Company is chargeable to tax on its profits as a distinct taxable entity and it paid tax in discharge of its own liabilities and not on behalf of or as an agent for its shareholders".*

This principle of general law was overridden by the deeming fiction that was created by Section 49B in the Act of 1922.

37. Significantly, in the Income Tax Act, 1961, Parliament has not made such a deeming provision as was enacted in Section 49B of the act of 1922. On the contrary, sub-section (4) of Section 115-O has the effect of providing that the shareholder cannot claim any credit for the amount paid by the Company under Section 115-O(1). There is, therefore, merit in the submission of the Additional Solicitor General that dividend received by the shareholder is not tax paid. Similarly, as noted earlier, under sub-section (5), a shareholder is not entitled to claim any deduction in respect of the amount which has been charged to tax under sub-section (1) of Section 115-O or the tax thereon. ***Hence,***

viewed from the perspective of Section 115-O as well as Section 14A, it is evident that the tax on distributed profits is a charge on the Company. The Company is chargeable to tax on its profits as a distinct taxable entity. It does not do so on behalf of the shareholder. The Company does not act as an agent of the shareholder in paying the tax under Section 115-O. In the hands of the recipient shareholder dividend does not form part of the total income. On the contrary, Section 10(33) clearly evinces parliamentary intent that incomes from dividend (and from mutual funds) are not includible in the total income.

38. Counsel appearing on behalf of the Assessee sought to place reliance on a circular issued by the CBDT on 18 February 1998, explaining the provisions of the Finance Act of 1997, which introduced the provisions of Section 115-O. The circular notes that according to the existing provisions of the Act, corporate dividends were taxed in the hands of shareholders under the head of income from other sources. Companies while paying dividend deducted tax at source at the rate in force and issued certificates of tax deduction to their shareholders. The shareholders, in turn, showed dividend income in their returns of income and claimed credit for tax deducted on the basis of these certificates. The existing method was found to involve "a lot of paper work" and there were demands that tax on dividend should be abolished as it would tantamount to double taxation, once in the hands of the Company and again in the hands of the shareholders. The Circular states that the Finance Act of 1997, therefore, introduced a new system of collecting tax on profits distributed by the Company by way of dividend, which was to be in addition to the income tax chargeable in respect of the total income of the Company.

39. The circular issued by the CBDT as a matter of fact clearly establishes that prior to the introduction of Section 115-O of the Finance Act of 1997, corporate dividends were taxed in the hands of shareholders as income from other sources. This provision was abolished by the introduction of Section 115-O.Under sub-section (1) of Section 115-O, an additional income tax was imposed on profits distributed by a Company by way of dividend and a new clause, clause 33 was inserted in Section 10 to exempt dividend income in the hands of the shareholder.

40. We have also been fortified in the conclusion which we have drawn, by the judgment of the Supreme Court in Walfort (supra). The Supreme Court has in the following observation expressly held that since dividend income does not form part of the total income, the expenditure that is incurred in the earning of such income cannot be allowed even though it is of a nature specified in Sections 15 to 59:

> *"If an income like dividend income is not a part of the total income, the expenditure/deduction though of the nature specified in Sections 15 to 59 but related to the income not forming part of the total income could not be allowed*

> *against other income includible in the total income for the purpose of chargeability to tax."*

Having observed thus, the Supreme Court held that the theory apportioning expenditure between taxable and non-taxable income has now, in principle, been widened under Section 14A. Hence, for the reasons that we have indicated earlier, we hold that income from dividend on shares is, in the hands of the recipient shareholder, income which does not form part of the total income. Hence, Section 14A would apply and the expenditure incurred in earning such income would have to be disallowed. Income from mutual fund stands on the same footing."

72. On appeal against the decision of the Hon'ble Bombay High Court, the Hon'ble Supreme Court, in the judgment reported as Godrej & Boyce Mfg Co Ltd Vs DCIT (supra), has observed that "the fact that section 10(33) and section 115 O of the Act were brought in together; deleted and reintroduced in a composite manner, also, does not assist the assessee" and that "if the argument is that tax paid by the dividend paying company under section 115-O is to be understood to be on behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid" which is wholly incongruous in view of the provisions of Section 10(33). The payment of dividend distribution tax under section 115 O does not discharge the tax liability of the shareholders. It is a liability of the company and discharged by the company. Whatever be the conceptual foundation of such a tax, it is not a tax paid by, or on behalf of, the shareholder.

73. It was canvassed on behalf of the assessee that the Hon'ble Supreme Court has reversed the conclusion of the Hon'ble Bombay High Court on the nature of DDT. The questions considered by the Hon'ble Supreme Court in the case of Godrej & Boyce Mfg. Co. Ltd. were:

"9. Aggrieved, the instant appeal has been filed raising two questions in the main which have been summarized by the appellant, and we may say accurately, as follows :

(a) Irrespective of the factual position and findings in the case of the Appellant, whether the phrase "income which does not form part of total income under this Act" appearing in Section 14A includes within its scope dividend income on shares in respect of which tax is payable under Section 115-O of the Act and income on units of mutual funds on which tax is payable under Section 115-R.

(b) Whatever be the view on the legal aspects, whether on the facts and in the circumstances of the Appellant's case and bearing in mind the unanimous findings of the lower authorities over a considerable period of time (which were accepted by the Revenue) there could at all be any question of the provisions of Section 14A in the appellant's case."

74. Dealing with the first question, the Hon'ble Supreme Court made the following observations:

"30. While it is correct that Section 10(33) exempts only dividend income under Section 115-O of the Act and there are other species of dividend income on which tax is levied under the Act, we do not see how the said position in law would assist the assessee in understanding the provisions of Section 14A in the manner indicated. What is required to be construed is the provisions of Section 10(33) read in the light of Section 115-O of the Act. So far as the species of dividend income on which tax is payable under Section 115-O of the Act is concerned, the earning of the said dividend is tax free in the hands of the assessee and not includible in the total income of the said assessee. If that is so, we do not see how the operation of Section 14A of the Act to such dividend income can be foreclosed. ***The fact that Section 10(33) and Section 115-O of the Act were brought in together; deleted and reintroduced later in a composite manner, also, does not assist the assessee. Rather, the aforesaid facts would countenance a situation that so long as the dividend income is taxable in the hands of the dividend paying company, the same is not includible in the total income of the recipient assessee. At such point of time when the said position was reversed (by the Finance Act of 2002; reintroduced again by the Finance Act, 2003), it was the assessee who was liable to pay tax on such dividend income. In such a situation the assessee was entitled under Section 57 of the Act to claim the benefit of exemption of expenditure incurred to earn***

such income. *Once Section 10(33) and 115-O was reintroduced the position was reversed. The above, actually fortifies the situation that Section 14A of the Act would operate to disallow deduction of all expenditure incurred in earning the dividend income under Section 115-O which is not includible in the total income of the assessee.*

31. ***So far as the provisions of Section 115-O of the Act are concerned, even if it is assumed that the additional income tax under the aforesaid provision is on the dividend and not on the distributed profits of the dividend paying company, no material difference to the applicability of Section 14A would arise. Sub-sections (4) and (5) of Section 115-O of the Act makes it very clear that the further benefit of such payments cannot be claimed either by the dividend paying company or by the recipient assessee****. The provisions of Sections 194, 195, 196C and 199 of the Act, quoted above, would further fortify the fact that the* ***dividend income under Section 115-O of the Act is a special category of income which has been treated differently by the Act making the same non-includible in the total income of the recipient assessee as tax thereon had already been paid by the dividend distributing company. The other species of dividend income which attracts levy of income tax at the hands of the recipient assessee has been treated differently and made liable to tax under the aforesaid provisions of the Act. In fact, if the argument is that tax paid by the dividend paying company under Section 115-O is to be understood to be on behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid. Such a position in law would be wholly incongruous in view of Section 10(33) of the Act.***

32. A brief reference to the decision of this Court in Commissioner of Income-Tax vs. Walfort Share and Stock Brokers P. Ltd. (supra) may now be made, if only, to make the discussion complete. In Walfort Share and Stock Brokers P. Ltd.(supra) the issue involved was: "whether in a dividend stripping transaction the loss on sale of units could be considered as expenditure in relation to earning of dividend income exempt under Section 10(33), disallowable under Section 14A of the Act?"

33. While answering the said question this Court considered the object of insertion of Section 14A in the Income Tax Act by Finance Act, 2001, details of which have already been noticed. Noticing the objects and reasons behind introduction of Section 14A of the Act this Court held that: "Expenses allowed can only be in respect of earning of taxable income." In paragraph 17, this Court went on to observe that: "Therefore, one needs to read the words "expenditure incurred" in section 14A in the context of the scheme of the Act and, if so read, it is clear that it disallows certain

expenditure incurred to earn exempt income from being deducted from other income which is includible in the "total income" for the purpose of chargeability to tax." The views expressed in Walfort Share and Stock Brokers P. Ltd. (supra), in our considered opinion, yet again militate against the plea urged on behalf of the Assessee.

34. For the aforesaid reasons, the first question formulated in the appeal has to be answered against the appellant-assessee by holding that Section 14A of the Act would apply to dividend income on which tax is payable under Section 115-O of the Act."

[Emphasized by us]

The aspect which weighed with the Hon'ble Supreme Court was the fact that the payment of DDT was not a payment on behalf of the shareholder. Leaving aside the question whether it is a tax on company or shareholder, the position that remains undisturbed is the conclusion that "DDT is not a payment on behalf of the shareholder" by the domestic company. The observations of the Hon'ble Bombay High Court regarding the legal characteristics of DDT that it is tax on a company paying the dividend and "is chargeable to tax on its profits as a distinct taxable entity and that the domestic company paying DDT does not do so on behalf of the shareholder nor does it act as an agent of the shareholder in paying the tax under Section 115-O, cannot therefore be said to have been diluted or overruled by the Hon'ble Supreme Court. It can be said that the Hon'ble Supreme Court has taken a different basis to reach the same conclusion but without diluting the reasoning of the Hon'ble Bombay High Court that DDT is not a tax paid by the domestic company on behalf of the shareholder. The additional reasoning in the Hon'ble Bombay High Court's judgment is the conclusion that it is a tax on domestic company on its profits/amount payable on declaration, distribution or payment, as the case may be, of amount as dividend out of accumulated profits. Therefore

the argument that DDT is paid on behalf of the shareholder and has to be regarded as payment of liability of the shareholder, discharged by the domestic company paying DDT, is neither correct nor does it flow from the ratio laid down in the decision by the Hon'ble Apex Court in the case of Godrej & Boyce (supra).

75. In the case of Small Industries Development Bank of India Vs Central Board of Direct Taxes (supra) the Hon'ble Bombay High Court had an occasion to consider the question whether charge u/s.115 O of the Act is on the company's profits and not income in the hands of the shareholder. The Assessee in this case was a statutory corporation that came into existence by virtue of the Small Industries Developments Bank of India Act, 1989 (hereinafter referred to as the SIDBI Act). Sec.50 of the said Act, exempts, the Assessee from payment of income tax on any income, profits or gains derived or any amount received by it. Section 50 of the SIDBI Act reads as under:

> *"Notwithstanding anything to the contrary contained in the Income-tax Act, 1961 or in any other enactment for the time being in force relating to income-tax or any other tax on income, profits or gains, the Small Industries Bank shall not be liable to pay income-tax or any other tax in respect of:- (a) any income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that Fund, and b) any income, profits or gains derived or any amount received by the Small Industries Bank." 10. Section 50 of the SIDBI Act contains non-obstante clause giving overriding effect over provisions of Income Tax Act in respect of any income, profits, gains derived or any amount received by the company. It is well settled that a provision beginning with non-obstante clause must be enforced and implemented by giving effect to the provisions of the Act and by limiting the provisions of other laws*."

The assessee paid dividend to it's shareholders. The question before the Court was whether it has to pay DDT u/s.115O of the Act. If Dividend was to be

regarded as, "*(a) any income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that Fund, and b) any income, profits or gains derived or any amount received by the Small Industries Bank........"* tax u/s. 115-O was not payable. The assessee relied on the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Mfg. Co. Ltd. (supra) and contended that the court in Godrej and Boyce case (supra) held that the charge under sub-section(1) of Section 115-O of the said Act is on the profits of the domestic company and more specifically on that part of the profits which is declared and distributed by way of dividend. Therefore, it was submitted that the Bank was entitled to refund of the tax amount paid under protest by it. The Court after discussing the effect of the non-obstante clause in Sec.50 of SIDBI Act, and holding that those provisions will override Sec.115O of the Act, further went on to hold that dividend is distributed from and out of the accumulated profits and therefore would fall within the ambit of the expression "income, profits or gains accruing or arising to the Small Industries Development Assistance and or any amount received in that fund, and be any income profits or gains derived or any amount received by the Small Industries Bank". The following were the relevant observations by the Hon'ble High Court:

> *"14. Dividend is defined in Section 2(22) of the IT Act to, inter alia, include any distribution by a company of accumulated profits, which entails releasing any assets by the company to its shareholders. In terms of Explanation 2 to Section 2(22) of the said Act, the expression accumulated profits includes all company profits up to the date of distribution or payment thereof. It appears that the transfer of profits of Petitioner to IDBI in terms of Section 29(2) of SIDBI Act entails payment by Petitioner to IDBI. This payment or distribution of Petitioner's liquid assets constitutes dividend distributed by Petitioner out of its accumulated profits as envisaged under Section 2(22)(a) of the IT Act.* ***<u>It needs to be noted that the charge under sub-section (1) of Section 115-O of the said Act is on the company's profits, more specifically on that part of the profits which</u>***

> ***is declared, distributed or paid by way of dividend. The charge under sub-section (1) of Section 115-O of the said Act is not on income by way of dividend in the shareholder's hands. Therefore, the additional income-tax payable on profits of a domestic company under Section 115-O of the said Act is not a tax on dividend. In our considered opinion, the amount distributed or paid by way of dividend falls in the category of income, profit or gains derived***.
>
> *15. Once it is held that the amount distributed or paid by Petitioner by way of dividend falls in the category of profits under Section 50 of the SIDBI Act, on any income, profits, gains derived or any amount received, Petitioner shall not be liable to pay income tax or any other tax in the relevant years. Therefore Petitioner was not liable to pay additional income tax under Section 115-O of the said Act. In the circumstances, Petitioner's payments under protest need to be refunded to the Petitioner."*
>
> ***[Emphasized by us]***

It is thus clear from the aforesaid decision that charge u/s.115 O of the Act is on the company's profits and not income in the hands of the shareholder.

76. The aforesaid decision by Hon'ble Jurisdictional High Court has also taken note of the decision of Hon'ble Supreme Court of India in the case of Godrej & Boyce (supra). We have already expressed the view that the decision of the Hon'ble Supreme Court in the case of Godrej & Boyce (Supra) does not dilute the principle laid down by the Hon'ble Bombay High Court in the case of Godrej & Boyce (supra). The decision in the case of SIDBI (supra) reiterates this position.

77. The charge u/s.115O is on the amount declared, distributed or paid as dividend out of accumulated profits. Intrinsic evidence is available in the form of the structure of the section. The section starts with a non-obstante clause overriding the other provisions of the Act, including Sec.4. The provisions of Secc.115 O are subject to the other provisions of the Section. Section 115 O fixes responsibility for compliance on the domestic company and its Principal Officer.

Sec.115 P and 115 Q provide for machinery provisions for recovery. The chapter XII D is a complete code in itself on DDT. The provisions of TDS and TCS specifically provide that tax deducted at source and tax collected at source are payments on behalf of the payee i.e., the person liable to pay income tax on the sum paid. It provides for discharge for the payer on payment to the credit of central government of the amounts due to the payee. In the event the payer pays excess over and above what he has to pay the payee, he gets a right to recover the TDS or TCS and gets rights of subrogation. Such provisions are absent in the entire scheme of Chapter XII D of the Act. These features are again an indication that DDT is a charge to tax on the profits of the company and not a charge in the hands of the shareholder or tax paid on behalf of the shareholder by the domestic company. Further, it is also seen from the provisions of Sec.115-O (3) and (4) the tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid and no deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been charged to tax under sub-section (1) or the tax thereon. These provisions also show that shareholder does not enter the domain of DDT at all.

78. Another argument that was advanced was that the incidence of tax in the form of DDT is on the domestic company but in effect it is a tax paid on behalf of the shareholder and it is income of the shareholder that is sought to be taxed

albeit in the hands of the domestic company. In this regard, the proposition advanced by the learned DR was that in fundamental concept of income-tax there is nothing which prevents imposition of immediate and apparent incidence of tax on a person other than person whose income is to be assessed, i.e., the legislature has power to enact provisions imposing tax liability on domestic company on income of shareholder (even if it is construed as income of shareholder without conceding that it was tax on income of the domestic company). In this regard he relied on decision of Hon'ble Madras High Court in the case of B.M. Amin Umma Vs. ITO 26 ITR 137 (Mad). In the aforesaid case the constitutional validity of the provisions of Section 16(3)(a)(ii), of Income Tax Act, 1922 (equivalent to Sec.64 of the Act), was challenged. The said provision provided for inclusion of the income of wife or minor child of an individual in the income of the individual. It was challenged on the ground that it was beyond the legislative powers of the Central Legislature conferred on it by entry 54 of List 1 of the Seventh Schedule of the Government of India Act, 1935. The Hon'ble Madras High Court held that the incidence of the tax whether it is the immediate and apparent incidence, or whether it is the ultimate or real economic incidence, does not, limit the taxing power given to the Central Legislature by entry 54 of list 1. All that entry 54 requires is that the tax must be a tax on Income other than agricultural income. The impugned provision in Section 16(3) (a) (ii), Income-tax Act, 1922 provides only for a tax on income. It does not cease to be a tax on income either in form or in substance, though it provides for the incidence of the tax not on the person whose income is assessed to tax, but on another. In this case that incidence of the tax on the minor child's income falls under the statute

on a parent of that minor. The Hon'ble Court went on to hold that there is nothing in the fundamental concepts of income-tax even to prevent the imposition of the immediate and apparent incidence of the tax on a person other than the person whose income is to be assessed. This decision was approved by the Hon'ble Supreme Court in the case of Balaji Vs. ITO 1962 AIR 123 (SC). These decisions again point to the fact that DDT is a tax on the distributed profits of a domestic company and is a tax on profits of the domestic company and not on the shareholder.

Applicability of DTAA:

79. As we have discussed earlier, the purpose of DTAA is to avoid double taxation/allocation of taxing rights between two Sovereign nations. When we hold that DDT is a tax not on the shareholder but on the amount declared, distributed, paid as the case may be, by way of dividend and being a tax on income of the company, there is no double taxation of the same income. DTAAs seek to reduce the impact of double taxation which has harmful effects on the international exchange of goods and services and cross-border movements of capital, technology and persons. Bilateral tax treaties address instances of double taxation by allocating taxing rights to the contracting states. Most existing bilateral tax treaties are concluded on the basis of a model, such as the OECD Model Tax Convention or the United Nations Model, which are direct descendants of the first Model of bilateral tax treaty drafted in 1928 by the League of Nations. As a result, while there can be substantial variations between one tax treaty and another, double tax treaties generally follow a relatively uniform structure, which

can be viewed as a list of provisions performing separate and distinct functions: (i) Articles dealing with the scope and application of the tax treaty, (ii) Articles addressing the conflict of taxing jurisdiction, (iii) Articles providing for double taxation relief, (iv) Articles concerned with the prevention of tax avoidance and fiscal evasion, and (v) Articles addressing miscellaneous matters (e.g. administrative assistance). Article 23A and 23B of the OECD model convention give methods to eliminate double taxation.

80. A reading of Article 10 of the model OECD DTAA shows that Dividends paid by a company which is a resident of a Contracting State, say India to a resident of the other Contracting State (say France) may be taxed in that other State (France). However, if the beneficial owner of the Dividend is a resident in France, the tax so charged shall not exceed specified percent. The first condition is that the non-resident in France should be taxed in India. We have to look at the DTAA from the receipients taxability perspective. DDT is paid by the domestic company resident in India. It is a tax on its income and not tax paid on behalf of the shareholder. In such circumstances, the domestic company u/s.115O does not enter the domain of DTAA at all.

81. If domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect. In the Treaty between India and Hungary, the Contracting States have extended the Treaty protection to the dividend distribution tax. It has been specifically provided in the protocol to the Indo Hungarian Tax Treaty that, when the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the

hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend. While making Reference in the case of Total Oil (supra), the ld. Division Bench has made the following observations on this aspect:

> ***"(f) Wherever the Contracting States to a tax treaty intended to extend the treaty protection to the dividend distribution tax, it has been so specifically provided in the tax treaty itself. For example, in India Hungry Double Taxation Avoidance Agreement [(2005) 274 ITR (Stat) 74; Indo Hungarian tax treaty, in short], it is specifically provided, In the protocol to the Indo Hungarian tax treaty it is specifically stated that "When the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend". That is a provision in the protocol, which is essentially an integral part of the treaty, and the protocol to a treaty is as binding as the provisions in the main treaty itself. In the absence of such a provision in other tax treaties, it cannot be inferred as such because a protocol does not explain, but rather lays down, a treaty provision. No matter how desirable be such provisions in the other tax treaties, these provisions cannot be inferred on the basis of a rather aggressively creative process of interpretation of tax treaties. The tax treaties are agreements between the treaty partner jurisdictions, and agreements are to be interpreted as they exist and not on the basis of what ideally these agreements should have been.***
>
> ***(g) A tax treaty protects taxation of income in the hands of residents of the treaty partner jurisdictions in the other treaty partner jurisdiction. Therefore, in order to seek treaty protection of an income in India under the Indo French tax treaty, the person seeking such treaty protection has to be a resident of France. The expression 'resident' is defined, under article 4(1) of the Indo French tax treaty, as "any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Obviously, the company incorporated in India, i.e. the assessee before us, cannot seek treaty protection in India- except for the purpose of, in deserving cases, where the cases are covered by the nationality non-discrimination under article 26(1), deductibility non-discrimination under article 26(4), and ownership non-discrimination under article 24(5) as, for example, article 26(5) specifically extends the scope of tax treaty protection to the "enterprises of one of the Contracting States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State". The same is the position with respect of the other non-discrimination provisions. No***

such extension of the scope of treaty protection is envisaged, or demonstrated, in the present case. When the taxes are paid by the resident of India, in respect of its own liability in India, such taxation in India, in our considered view, cannot be protected or influenced by a tax treaty provision, unless a specific provision exists in the related tax treaty enabling extension of the treaty protection.

(h) Taxation is a sovereign power of the State- collection and imposition of taxes are sovereign functions. Double Taxation Avoidance Agreement is in the nature of self-imposed limitations of a State's inherent right to tax, and these DTAAs divide tax sources, taxable objects amongst themselves. Inherent in the self-imposed restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices. The dividend distribution tax, not being a tax paid by or on behalf of a resident of treaty partner jurisdiction, cannot thus be curtailed by a tax treaty provision."

82. We are of the view that the above exposition of law is correct and we agree with the same. Therefore, the DTAA does not get triggered at all when a domestic company pays DDT u/s.115O of the Act.

CONCLUSION:

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of

DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly.

84. We wish to place on record our appreciation for the assistance provided by the ld. counsels for the parties and the interveners and the ld. DR for the assistance provided to the Bench in deciding the issue referred to the Special Bench.

84. These appeals/COs are restored to the respective Division Benches for deciding the issues raised in the respective appeals, accordingly.

Order pronounced in the open court on Thursday the 20th day of April, 2023.

Sd/-	Sd/-	Sd/-
(G.S. PANNU)	(N.V.VASUDEVAN)	(VIKAS AWASTHY)
अध्यक्ष / PRESIDENT	उपाध्यक्ष/VICE PRESIDENT	न्यायिकसदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 20/04/2023

VM /Sr.PS

<u>प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)
ITAT, Mumbai