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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Amarjit Singh (Judicial Member)]

ITA No. 6997/Mum/2019
Assessment year 2016-17

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

Vs

Total Oil India Pvt Ltd ……………………Respondent
3rd floor, The Leela Galleria
Andheri (East), Mumbai 400 059 [PAN: AAACE2175M]

CO No. 57/Mum/2021
Arising out of ITA No. 6997/Mum/2019
Assessment year 2016-17

Total Oil India Pvt Ltd ………………….Cross-objector
3rd floor, The Leela Galleria
Andheri (East), Mumbai 400 059 [PAN: AAACE2175M]

Vs

Deputy Commissioner of Income Tax
Circle 11 (3)(1), Mumbai ……………………Respondent

Appearances by

Sanjay Singh *for the Assessing Officer*
Niraj Sheth *for the assessee*

Date of concluding the hearing: June 15, 2021
Date of making the special bench reference: June 23, 2021

SPECIAL BENCH REFERENCE

Per Pramod Kumar, VP:

1. This appeal, as also the cross-objection, call into question the correctness of the order dated 29th August 2019 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2016-17.

2. One of the issues raised in this set of appeal and the cross-objection, by way of ground no. 4 in the cross-objections filed by the assessee, is as follows:

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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. Learned Departmental Representative has various preliminary objections to the above issue being raised before us. His first objection is that the cross-objection is time-barred inasmuch as while the appeal was filed by the Assessing Officer on 14th November 2019, the cross-objection is filed much after that date on 17th May 2021. It is contended that the time limit prescribed in section 253(4) of the Income Tax Act, 1961, has clearly lapsed, and, for this short reason alone, the cross-objection is liable to dismissed as time-barred. His second point is this claim about treaty protection, so far as the rate of dividend distribution tax is concerned, was never raised before any of the authorities below, and no fresh issue can be raised by way of a cross objection filed under section 253(4). Learned Departmental Representative relies upon the judicial precedents in the cases of **CIT Vs Begum Noor Banu [(1993) 204 ITR 166 (AP)], Ugar Sugar Works Ltd Vs CIT [1982) 141 ITR 326 (Bom)], Puranmal Radhakishan & Co Vs CIT [(1957) 31 ITR 294 (Bom)]** and **CIT Vs Cellulose Products of India Ltd [(1984) 151 ITR 499 (Guj-FB)].** In response to the issues so raised by the learned Departmental Representative, it is clarified by the learned counsel for the assessee that the copy of the departmental appeal was served on the assessee on 15th April 2021 by the speed post, and the last date of filing cross objection thus was 14th May 2021 which happened to be a public holiday, and the cross objection was thus filed on the very next working day, i.e. 17th May 2021. There was thus no delay in filing of the cross objection. It is further submitted that, in any event, in view of the judgment of Hon'ble Supreme Court's judgment dated 27th April 2021 in *suo motu* writ petition (civil) no. 3 of 2020, restoring the order dated 23rd March 2020 and in continuation of the order dated 8th March 2021, the period of limitation anyway stands extended. We are, therefore, urged to consider the cross-objection as having been filed in time, and deal with the same, in accordance with the law, accordingly. As regards the question as to whether a new issue can be raised in the cross-objections, learned counsel submits that in view of the express provisions of 253(4), read with rule 22 of the Income Tax Appellate Tribunal Rules, 1962, a cross-objection is to be treated at par with an appeal, and what applies to the appeals equally applies to the cross-objection as well. Learned counsel also refers to, and relies upon, judicial precedents in the cases of **CIT Vs Purbanchal Paribartan Gosthi [(1998) 234 ITR 663 (Gau)]** and **Tata Sponge Iron Limited Vs CIT [(2008) 307 ITR 441 (Orr)].** A reference is then made to a number of coordinate bench decisions wherein in materially similar situations, new issues are admitted by way of cross-objections.

4. In our considered view, there is a legal parity in the appeal and the cross-objection inasmuch as the issues which can be raised in an appeal can also be raised in a cross-objection. Section 253(4) specifically provides when a party to the appeal is put to notice about the appeal having been filed by the other party, notwithstanding the fact that such a party may not have filed an appeal against related order or any part thereof, within thirty days of being so put to notice, "file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3)". When this cross-objection is required to be treated as "an

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appeal presented", there cannot be any justification in restricting the scope of issues which can be raised in a cross-objection. Whatever issues, therefore, can be raised by way of an appeal are the issues that can be raised by way of a cross-objection. As learned counsel for the assessee aptly points out, as held by Hon'ble Gauhati High Court in the case of **Purbanchal Paribartan Gosthi** *(supra),* "**it can safely be held on a point of law that there is absolutely no difference between an appeal and a cross-objection. The only difference if at all one can be pointed out is that an appeal can be preferred within 60 days from the date of receipt of the order whereas a cross-objection can be filed within a period of 30 days of the date of service of appeal by the opposite party**". We are not aware of any judicial precedent contrary to this judicial precedent. As regards the decisions cited by the learned Departmental Representative, all these decisions are in the context of powers of the Tribunal while dealing with an appeal, and, in any event, these decisions are rendered prior to Hon'ble Supreme Court's judgment in the case of **National Thermal Power Corporation Ltd Vs CIT [(1998) 229 ITR 383 (SC)]** which did categorically observe that "**we fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier**" even though "**undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised**". Quite clearly, therefore, the powers of the Tribunal are not restricted to decide only the issues which have been considered by the authorities below. The narrower view of the powers of the Tribunal, as adopted in the judicial precedents cited by the learned Departmental Representative and particularly the full bench decision of Hon'ble Gujarat High Court in the case of **Cellulose Products of India Ltd** *(supra),* has been specifically disapproved by Hon'ble Supreme Court in NTPC's case *(supra).* As regards the claim of the learned Departmental Representative that the filing of this memorandum of cross-objection is time-barred, having perused the material on record, we are satisfied that the memorandum of cross-objections is filed within the time limit. When these facts and material on record were pointed out to the learned Departmental Representative, he did not press this objection any further and very graciously left the matter to us. None of the preliminary objections raised by the learned Departmental Representative merits our judicial approval. We reject these objections and proceed to deal with the issue in question as raised in the cross-objection.

5. So far as this issue is concerned, only a few material facts need to be taken note of. The assessee company has some non-resident tax holders fiscally domiciled in France. The assessee has paid dividend distribution tax under section 115 'O'. and the short case of the assessee is that since the shareholders of the assessee company are entitled to the benefits of the India France Double Taxation Avoidance Agreement [(1994) 209 ITR (Stat) 130; **Indo French tax treaty**, in short], the dividend distribution tax paid by the assessee, which is nothing but a tax on dividend income of the shareholders, cannot exceed the rate at which, under the Indo French tax treaty, such dividends can be taxed in the hands of the non-resident shareholders in question. In support of this line of reasoning, the assessee relies on a decision of the coordinate bench in the case of **Giesecke & Devrient India Pvt Ltd Vs ACIT [(2020) 120 taxmann.com 338 (Del)]** which has also been subsequently followed by several other coordinate benches as well. What this decision holds, according to a note filed by the learned counsel, can be summed up as follows:

- Memorandum to Finance Bill 1997 and 2003 clearly establish that levy of tax on the company was driven by administrative considerations rather than legal necessity and emphasises the fact that the levy is for all intents and purposes, a charge on dividends.

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- DDT levied 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 include section 90 of the Act.

- 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.

- 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, does not bar the application of tax treaties to DDT.

- The DDT provisions were first inserted by Finance Act, 1997 (i.e. after the India-Germany DTAA came into force) and the Hon'ble Jurisdictional High Court at Delhi in the case of New Skies Satellites 382 ITR 114 had an occasion to consider the amendment to the Act vis a vis treaty provisions, wherein the Hon'ble High Court held that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty.

- The Hon'ble Bench has considered the distinguished the decision of the Bombay High Court in Godrej and Boyce, which thereafter travelled to the Supreme Court.

- In view of the above, the Hon'ble ITAT held that tax rates specified in DTAA in respect of dividend must prevail over DDT.

6. Shri Niraj Sheth, learned counsel for the assessee, contends that the matter is covered by the decision of the coordinate bench. A reference was also made to another decision of the coordinate bench in the case of **DCIT vs Indian Oil Petronas Pvt Ltd [(2021) 127 taxmann.com 389 (Kol)]**, which takes the same stand and rationalises the decision in the case **Giesecke & Devrient India Pvt Ltd** *(supra)* on the basis of more elaborate reasons for coming to the same conclusion. As for the issue of making a reference for the constitution of a special bench in case we have any reservations on the correctness of the decisions of the coordinate benches, learned counsel submitted that "the issue under consideration need not be referred to a special bench as the same is squarely covered by the aforesaid decisions and no contrary view has been taken to the best of our *(his)* knowledge" and that "following the principles of consistency, the issue does not require a reference to special bench". He thus urges us to follow the coordinate benches and remit the matter to the file of the Assessing Officer for reconsideration in the light of the same.

7. Shri Sanjay Singh, learned Departmental Representative, vehemently opposes the submissions of the assessee on merits as well. In a written note filed by the learned counsel, which sums up his arguments on this issue, the learned Departmental Representative has submitted as follows:

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3.1.1. The tax u/s. 115O is tax on distributed taxes of the domestic companies. The sec.115O sub clause 4 specifies that no further credit can be claimed by the company or by any other person in respect of the amount of tax so paid. Sub sec.1a and 1b of the sec.115O supports the view that sec.115O is tax on the distributed profit of the company and is not a tax on the income of the shareholder. Sub sec.5 of the sec.115O provides that no deduction vide any other provision of the act should be allowed to the company or a share holder in respect of the amount which has been charged to tax u/s. 115O. Further, sec.115O begins with a "not obstante clause" and therefore, the applicability of other sec. including sec.90 cannot be claimed.

3.1.2. The tax u/s. 115O is not a withholding tax or Tax deducted as source on the dividend distributed to the shareholder. It is a secondary tax on corporate profit distributed. The Finance Minister speech in parliament in 1997 at the time of institution of provision of sec.115O stated that " some company distribute exorbitant dividend, ideally they should return the bulk of profit and plough that into fresh investment. I intend to reward such companies to invest in future growth of the company. Hence, I propose to levy tax on dividend profit at the modest rated of 10% and the amount so distributed on this tax shall be on the incidence of the company and shall not be on the profit of the shareholder".

3.1.3. The apex court upheld the decision of the Hon'ble Bombay High Court in Godrej &Boyce Manufacturing Co. Ltd. by categorically dealing with sec.115O and holding that the tax is not paid by the company on behalf of the shareholder. It is categorically held that the deduction of income tax u/s. 115O is a tax on profit of the company and not a tax on dividend.

3.1.4. The assesse has referred to the decision of the apex court in the case of Union of India V/s. Tata Tea Ltd. 85 taxmann.com 346 (SC) . It may be noted that this was in respect of a writ petition filed where issue was the legislative competence of the parliament in enacting sec.115O. The assesse had contended that the sec.115O imposed income tax even on portion of the composite income which included agricultural income and therefore, were outside of legislative power of the parliament. Nowhere in this decision has the apex court held that the tax u/s. 115O is the tax on shareholder. All that it dealt with was that the dividend distributed to the shareholder does not bear the same character as the source of the income of the company distributing the dividend. The decision of the apex court in the Tata Tea Co. Ltd. does not even refer to the decision in the case of Godrej & Boyce Mfg. Co. Ltd. and rightly so since the issue involved in the two decisions are entirely different.

3.1.5. Before invoking the DTAA the question to be answered is who is to presently claiming the benefit of the DTAA . The assesse in this case is a resident company and cannot claim the benefit of any DTAA against taxes as per domestic tax statute. As regards the shareholder, details are not available on records. Further, the share holder cannot claim credit of any taxes from its Tax authority since no tax has been paid by it in India. Under various DTAAs that

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India has entered, the credit of the tax can be allowed by the countries whose resident is the assesse. Under the India France DTAA, France will allow credit to its French resident for taxes paid by it in India and vice versa. There cannot be a situation where either in the Tax Treaty or the Indian domestic tax law, India will be required to give the credit to resident of France of the taxes paid by an Indian resident.

3.1.6 The Hon'ble ITAT, Delhi Bench in the case of Giesecke & Devrient India Pvt. Ltd. have noted the decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd., which held that Section 115-O deals with tax "on the company" and not "on the shareholders". The Hon'ble ITAT has distinguished by treating the tax levied u/s 115-O as tax on income relying on the definition "income" which includes dividend. Thereafter, the Hon'ble ITAT have elaborated on their understanding that the amendment of the statute bringing Section 115-O is of administrative convenience and thereby implying the tax is on dividend. Thereafter, the Hon'ble ITAT have held that the liability u/s 115-O falls on the company is not relevant in respect of rates of dividend tax set out in the Tax Treaty. The Hon'ble ITAT has held that the enactment of Section 115-O was subsequent to the notification of the tax treaty and on this reasoning it was held that the tax rate specified in DTAA in respect of dividend must prevail on section 115-O. It is humbly submitted that this decision has not considered the aspects as to that dividend distribution tax is a species of tax on the profits of the company, who is claiming the benefits of tax treaty, whether he is entitled to the benefit, who would be the beneficiary of refund, whether the rate in the article dealing with dividend will apply when the recipient is not being taxed, the OECD commentary, elimination of juridical double taxation vs economic double taxation, decisions of other countries on this issue, have not been addressed adequately.

3.1.7 …………. It is humbly suggested that this issue may be referred to a Special Bench.

8. We have given our careful consideration to the rival contention, we have perused the material on record and we have duly considered the facts of the issue involved in the light of the applicable legal position.

9. While it cannot be, and is not, open to us to disregard the reason and the ground of a coordinate bench decision, lest such judicial inconsistency should shake public confidence in the administration of justice and lest one of the fundamental legitimate expectations of the stakeholders, i.e. those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters, will stand declined. "**It is, however, equally true**", to borrow the words of Hon'ble Supreme Courts as articulated in the case of **Union of India Vs Paras Laminates Pvt Ltd [(1990) 186 ITR 722 (SC)]**, "**that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings being to light what is perceived by them as an erroneous**

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decision in the earlier case" and that "**in such circumstances, it is but natural and reasonable and indeed efficacious that the case is referred to a larger bench**". Incidentally, these observations were made in the context of a two-member bench doubting the correctness of a three-member bench decision and referring the matter for the constitution of a five-member bench. Hon'ble President of Central Excise, Customs and Gold Control Tribunal (CEGAT), as it then was, accepted these recommendations, and the Hon'ble Supreme Court ultimately upheld the action of the Hon'ble President, CEGAT. There was no occasion for conflict of decisions of the coordinate benches, and yet, in the esteemed views of Hon'ble Supreme Court, the recommendation for constitution of the special bench, as indeed the constitution of the special bench itself, was held to be in order. In this view of the matter, learned counsel's submission that Hon'ble President cannot constitute a special bench in the absence of conflict of opinions by the division benches is incorrect and untenable in law. Of course, it is for the Hon'ble President to take a considered call on whether or not it is a fit case for constitution of a special bench, but, in the event of his holding the view that it is indeed a fit case for constitute of a special bench, he is not, in our humble understanding, denuded of the powers to do so on account of lack of conflict in the views of the division benches.

10. The reasons for our doubting the correctness of the decisions of the coordinate benches, on the dividend distribution tax rate being restricted by the treaty provision 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

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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 African**

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Revenue 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 the affected 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**".

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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.

(i) For all these reasons independently, as also taken together, we are of the considered view that it is a fit case for the constitution of a special bench, consisting of three or more Members, so that all the aspects relating to this issue can be

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considered in a holistic and comprehensive manner. In any case, it is a macro issue that touches upon the tax liability of virtually every company which has residents of a tax treaty partner jurisdiction as shareholders, and has substantial revenue implications. The question which may be referred for the consideration of special bench consisting of three or more Members, subject to the approval of, and modifications by, Hon'ble President, is as follows:

> **Whether the protection granted by the tax treaties, under section 90 of the Income Tax Act, 1961, in respect of taxation of dividend in the source jurisdiction, can be extended, even in the absence of a specific treaty provision to that effect, to the dividend distribution tax under section 115 'O' in the hands of a domestic company?**

11. The registry is directed to place the matter before the Hon'ble President for his kind consideration and for the appropriate orders.

Sd/xx	***Sd/xx***
Amarjit Singh	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 23rd day of June, 2021

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