THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 7707/Mum/2019 (Assessment Year 2012-13)

The Tata Power Company Ltd. Corporate Centre B 34 Sant Tukaram Road Carnac Bunder, Mumbai-09 PAN : AAACT0054A	Vs.	DCIT, Circle 2(3)(1) Room No. 552 Aayakar Bhavan M.K. Road Mumbai-400020.
(Appellant)		(Respondent)

Assessee by	Shri Nitesh Joshi & Shri Sukhsagar Syal
Department by	Shri Vijaykumar Menon
Date of Hearing	08.06.2021
Date of Pronouncement	02.08.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 23.10.2019 pertains to A.Y. 2012-13.

2. The grounds of appeal read as under :

> The appellant objects to the order dated 23 October 2019 passed by the Commissioner of Income-tax (Appeals)-6, Mumbai [CIT(A)] on the following amongst other grounds:
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> 1. On the facts and circumstances of the case and in law, the CIT(A) erred in dismissing the appeal filed by the appellant before him by holding it to be dismissed on the ground that the refund under section 237 is not a mistake which could be considered as apparent from record identifiable under section 154 of the Act.
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> 2. The learned CIT(A) erred in dismissing the appeal by holding it to be not legally tenable ignoring the fact that the appeal was filed before him challenging the order dated 30 November 2018 passed by the Deputy Commissioner of Income-tax, Circle 2(3)(1), Mumbai (DCIT) under section 154 of the Act who was subordinate to him.
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> 3. The learned CIT(A) held in not directing the DCIT to grant refund of the additional DDT paid to the extent of Rs. 98,14,515. Alternatively, the learned

CIT(A) did not direct the DCIT to adjust the said refund against outstanding demand

4. On the facts and circumstances of the case and in law, the CIT(A) erred in not adjudicating the grounds of appeal raised before him on the merits of the issue

The appellant craves leave to add to, amend, alter, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal.

3. Brief facts of the case are that pursuant to the assessment order in this case, the assessee made an application under section 154 of the Act for refund of dividend distribution tax (DDT) paid. The Assessing Officer duly acknowledged that he finds the claim to be correct but refund actually was not granted.

4. Upon assessee's appeal learned CIT(A) found the claim not maintainable as in his opinion DDT was not to be equated to income tax paid. We may gainfully refer to the Assessing Officer and learned CIT(A)'s order on this issue as under:

The Assessing Officer's order is as under on this issue :-

"In this case order giving effect to order u/s 263 of the Act was passed on 29.06.2018 determining total income at Rs. 761,69,04,880/- under normal provision and at Rs, 1645,76,09,409/- u/s 115JB of the Act. Thereafter assessee's A.R. vide letter submitted in this office dated 08.10.2018, has mentioned the following issues,

i) DOT liability was Rs. 38,23,94,385/- and the assessee paid Rs. 39,22,08,900/-. Rs. 98,14,515/- has to be refunded instead of demand of Rs. 8,94,72,701/- as per order giving effect,

ii) Interest u/s 234C determined at Rs. 4,34,08,871/- instead of Rs. 23.41.949/-.

iii) Suo-moto disallowance u/s 14A of Rs, 64,45,473/- is not considered while making addition on account of disallowance u/s 14A.

iv) Short grant of TDS credit of Rs. 43,696/-.

On the issue of DDT liability, assessee has submitted copies of challans paid by its subsidiaries on the amount of dividend received from us subsidiaries After verification of challans, it is found that the contention of the assessee is correct. Since the mistake is apparent from record, the same is rectified in

this order. Give credit to total DDT paid by the assessee of Rs. 39,22,08,900/-.

The learned CIT(A)'s order is as under :-

"It is seen from the rectification order passed u/s.154 of the Act by the AO that an application was moved by the assessee for rectification wherein one of the issues related to excess DOT paid to the tune of Rs.98,14,515/-. It is seen from such order that the AO has mentioned that after verification, the contention of the assessee of having made payment of DOT at Rs.39,22,08,900/- was correct and the credit of the same was to be given. However, it is the contention of the assessee that such credit has not been given.

6 The assessee in their submission, have mentioned that they are entitled for refund of Rs.98,14,515/- (being the excess amount of DOT paid) in view of section 240 r.w.s.237 of the Act and therefore the AO should be directed to refund the excess DOT of Rs.98,14,515/- along with interest u/s.244 of the Act. On without prejudice, the appellant has submitted that DOT liability be adjusted against tax liability of Rs. 19,04,48,360/- determined in the impugned order in appeal. The appellant further placed reliance on the decision in the case of Gopalan Thygarajan v. CIT (89 taxmann.com 187) wherein it has been held that it is an obligation on the revenue to effect refund, without calling upon the assessee's to apply for refund claim. Accordingly, it was requested to refund the questioned amount together with interest u/s.244 of the Act.

6.3 I have carefully considered the facts of the case, discussion of the AO in the impugned order, oral contentions and written submissions of the appellant and material available on record. In the facts of the case, there is no dispute that appellant has paid the DOT at Rs.39,22,08,900/- and the AO in the impugned order has also stated to have verified it and found correct. The AO has also mentioned to grant credit for the same. The refunds given under the Chapter XIX of Income-tax Act and the provisions of section 237 which deal with refunds provides as under:

> *"If any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."*

6.3.1 The word "Tax" has been defined in sub-section 43 of section 2 of the Act 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*

assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA."

6.3.2 On conjoint reading of section 237 and definition given of section 2(43) of the Act, it is clear that the word "tax" as has been mentioned in section 237 which has been defined in section 2(43) does not include the Dividend Distribution Tax paid u/s.115-O of the Act. Accordingly, the refund as has been sought by the assessee claiming the credit of such tax to be "income-tax paid in terms of section 2(43) of the Act and therefore u/s.237 of the Act" is not found to be acceptable. Whereas, giving the correct credit of any tax paid either within the meaning of section 2(43) of the Act or the Dividend Distribution Tax as per the provisions section 115-O is concerned, that could be a matter of fact, open to rectification u/s.154 of the Act but considering the excess amount of DOT paid to be the credit and part and parcel of assessee's liability towards the tax paid as defined in section 2(43) of the Act and therefore, the refund u/s.237 of the Act is not a mistake which could be considered as apparent from record rectifiable u/s.154 of the Act. As regards the assessee's contention regarding section 240 and reliance placed on the decision in the case of Gopalan Thygarajan v. CIT (supra), it is stated that there is no differing opinion or position in respect of the same if the refund is due to the assessee consequent to the appeal proceedings, they are to be granted without calling upon the assessee to apply for the refund. However, in the facts of the case as have been discussed hereinabove and in view of the provisions of section 237 of the Act r.w.s.2(43) of the Act, such propositions are not found to be legally tenable. In this view of the matter and under the facts and circumstances of the case and discussion hereinabove, the contentions and submissions of the assessee are not found to be acceptable and are therefore, rejected. Grounds No.1 & 2 of appeal raised by the assessee are accordingly, dismissed."

5. Against this order assessee is in appeal before us. Though the grounds of appeal are poorly framed but the crux is that assessee is aggrieved by learned CIT(A)'s action of denying the assessee's claim of refund of DDT paid, by holding that DDT is not income tax paid.

6. Learned Counsel of the assessee contends that assessee's claim is very much maintainable as the section 115O of the I.T. Act defines DDT as additional income tax and Hon'ble Gujarat High Court in Torrent (P) Ltd. Vs. CIT (35 taxmann.com 300) has held that DDT is to be treated as tax paid.

7. Per contra learned Departmental Representative relied upon the order of learned CIT(A). He further claimed that the claim can never be a subject matter of rectification of order under section 154 of the Act.

8. Upon careful consideration we note that it will be gainful to refer section 115O:-

> 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 April, 2003, 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 fifteen per cent.
>
> (1A) The amount referred to in sub-section (1) shall be reduced by,—
>
> [(*i*) the amount of dividend, if any, received by the domestic company during the financial year, if such dividend is received from its subsidiary and,—
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> (*a*) where such subsidiary is a domestic company, the subsidiary has paid the tax which is payable under this section on such dividend; or
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> (*b*) where such subsidiary is a foreign company, the tax is payable by the domestic company under section 115BBD on such dividend:
>
> Provided that the same amount of dividend shall not be taken into account for reduction more than once;]
>
> (*ii*) the amount of dividend, if any, paid to any person for, or on behalf of, the New Pension System Trust referred to in clause (*44*) of section 10.
>
> *Explanation.*—For the purposes of this sub-section, a company shall be a subsidiary of another company, if such other company, holds more than half in nominal value of the equity share capital of the company.

9. Hon'ble Gujarat High Court in Torrent (P) Ltd. in para 18 has observed as under :-

> "In the instant case, certain dividend was declared and tax thereon was actually paid, by virtue of the High Court sanctioning the amalgamation scheme, which took effect from a date anterior to the declaration of the dividend would change the very character of such payment and such payment ceased to enjoy the character of dividend. In that view of the matter, the petitioner was perfectly justified in seeking refund of the tax already paid. In the return filed, the petitioner had filed a detailed note explaining such position. Claiming refund, a separate application was also filed which unfortunately came to be rejected by the Assessing Officer. The Assessing Officer contended that there was no provision under which such refund can be claimed. Section 237, however, provides that if any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the excess amount. The case of the petitioner would, thus, be clearly covered under the said statutory provisions."

Hence, Hon'ble High Court has expounded that DDT is an amount of tax paid for which refund can be claimed.

10. Hence, we are of the opinion learned CIT(A) has erred in holding that DDT cannot be considered income tax paid and refund cannot be granted. As regards the plea that the claim is not maintainable under section 154 of the Act, we find that the Assessing Officer in his order has duly agreed and allowed the same. However, effect of the same has not been given. This is legally absolutely untenable. If the Revenue finds section 154 of the Act order erroneous the recourse cannot be denial of the said credit after passing an order under section 154 of the Act. Moreover, learned CIT(A) has rejected the claim in his order on merits of the issue and considering the provision of the Act. We have held above that learned CIT(A) misled himself and his order is not legally sustainable. Hence, we set aside the order of learned CIT(A) and decide the issue in favour of the assessee

12. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 2.8.2021.

Sd/-	Sd/-
(PAVANKUMAR GADALE)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 02/08/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

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