आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

1. आयकरअपील सं. ITA No.684/Chny/2022
(निर्धारण वर्ष / Assessment Year: 2014-15)
&
2. आयकरअपील सं. ITA No.685/Chny/2022
(निर्धारण वर्ष / Assessment Year: 2015-16)

M/s Regen Renewable Energy Generation Global Limited New No.1, Pulla Avenue, Shenoy Nagar, Chennai-600 030.	बनाम / Vs.	**ACIT** International Taxation Circle-2(1), Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAFCR-0685-N**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी कीओरसे/ **Appellant by**	:	Shri B. Ramakrishnan (CA) – Ld.AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Mrs. Jyothi Lakshmi Nayak (CIT)-Ld. DR

सुनवाई की तारीख/**Date of Hearing**	:	03-06-2024
घोषणा की तारीख /**Date of Pronouncement**	:	10-07-2024

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years (AY) 2014-15 & 2015-16 arises out of final assessment orders both dated 07-07-2022 passed by Ld. Assessing Officer (AO) u/s 147 r.w.s.144, pursuant to the directions of Ld. Dispute Resolution Panel-2, Bengaluru (DRP) u/s 144C(5) dated 13-06-2022. Facts as well as issues are stated to be

identical in both the years. First, we take up appeal for AY 2014-15 wherein a draft assessment order was passed by Ld. AO on 29-09-2021 which was subjected to assessee's objections before Ld. DRP. Pursuant to the directions of Ld. DRP, final assessment order was passed against which the assessee is in further appeal before us. The assessee has filed revised / additional grounds of appeal and finally, filed consolidated grounds on 24-07-2023 which read as under: -

1. For that the re-opening the assessment u/s 147 of the Act is bad in law and invalid.
2. For that the Learned Assessing Officer had erred in holding that the appellant is not the 'beneficial owner' of the royalty received as per Article 12 of the Indo-Cyprus DTAA and consequently denying the treaty benefits, thereby taxing the Royalty Income of the appellant at 25% as per section 115A(1)(b) of the Act.
3. Without prejudice to the above, for that the Learned Assessing Officer, having held the appellant as the 'beneficial owner' of the royalty received, ought to have held the resident Holding company responsible for failure to deduct the due tax at source on payments made to the appellant being a foreign company and ought to have recovered the tax dues from them.
4. For that the Learned Assessing Officer, having treated the appellant as a conduit entity, ought to have taxed the royalty income at 10% as per Article 12 of India-Germany DTAA.
5. Without prejudice to the above, the Learned Assessing Officer, having held that the appellant is not the 'beneficial owner' of the royalty received, ought not to have taxed the royalty in the hands of the appellant.
6. Fro that the Learned Commissioner of Income-Tax (Appeals) erred in confirming the levy of interest u/s 234B of the Income Tax Act amounting to Rs.4,42,46,000/-.
7. For that the Learned Assessing Officer erred in invoking provisions of Sec.144C of the Act in the absence of any variation in the income or loss returned by the appellant and consequently passing the final assessment order after the due date prescribed u/s 153 of the Act. The order u/s 143(3) r.w.s. 144C of the Act is thus, void ab initio and time barred by limitation.
8. For that the Learned Assessing Officer erred in applying the amended provisions of Sec.144C of the Act, wherein the words 'in the income or loss returned' were omitted w.e.f. 01.04.2020, without appreciating the fact that the amended provisions are applicable for AY 2020-21 and subsequent Assessment Years.

2. The Ld. AR advanced arguments supporting the case of the assessee and drew our attention to the relevant agreements. The Ld. CIT-DR, on the other hand, advanced arguments and supported the orders of lower authorities. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The

assessee is a corporate entity based at Cyprus and is governed by India-Cyprus DTAA. It is 100% subsidiary of an Indian entity by the name M/s Regen Powertech Private Ltd. (RPPL) which is stated to be engaged in manufacturing of wind turbines.

Assessment Proceedings

3.1 While passing draft assessment order, on the basis of scrutiny proceedings for AY 2013-14, it was alleged by Ld. AO that the assessee was mere intermediary and not the beneficial owner of the royalty as received by it from RPPL. The assessee computed tax of 15% on its royalty income based on DTAA instead of 25% as prescribed under Income Tax Act. On the basis of findings in AY 2013-14, the case was reopened and notice was issued u/s 148 on 20-03-2020. However, the assessee did not file any return of income in response to notice u/s 148. The reasons for reopening were furnished to the assessee. The assessee did not respond to various notices issued by Ld. AO.

3.2 It was noted by Ld. AO that the assessee entered into an agreement with Vensys Energy AG, Germany (Vensys) for provision of know-how, license and technical assistance on certain terms and conditions. The assessee was to pay lump sum payment of Rs.6.5 million Euros and a variable payment per WEC produced by the licensee. The lump sum payment was paid by the assessee out of equity capital and share premium infused by RPPL. Similarly, the quarterly royalty was also paid by the assessee to Vensys out of royalty paid by the RPPL. Till 31-03-2015, RPPL paid royalty of 2,70,10,000 Euros to the assessee whereas the assessee paid royalty of 2,09,45,000 Euros to Vensys.

3.3 On these facts, Ld. AO noted that the assessee simply acted as an intermediary instead of RPPL who was ultimate beneficiary of such licensing agreement. The equity share capital and share premium invested by RPPL was nothing but royalty payment. The Ld. AO, referring to Article 12, held that such royalty may also be taxed in the contracting state in which the same arises. The OECD guidelines provide that a company of a member state shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary such as an agent, trustee or authorized signatory for some other person. Taking clue from the same, Ld. AO made following observations: -

* Almost all of the income, received by assessee was transferred to Vensys Energy AG, Germany.
* The RREGGL, Cyprus (assessee) who has received the income did not bear any business risks and does not perform any functions.
* The agreement with Vensys Energy AG (foreign rights holder) could have been directly concluded by RRPL, India (parent company) instead of through RREGGL, Cyprus.
* Back-to-back license and sublicense agreements has been concluded within a short span of time.
* The structure had no business purpose.
* The assessee had no employees but support services for Account, Administration etc. had been rendered by a secretarial service which incidentally is a director in the assessee company.
* There were no other significant business expenses incurred by the assessee.
* The place of effective management and control of Assessee is in fact in India.
* The assessee has paid almost the full amount of income received to other persons in the same form.
* Assessee has never possessed sufficient powers of enjoyment or disposition over the royalty income it received, and has not had an economic return from the income.

Accordingly, the assessee was not the beneficial owner of royalties and therefore, the same was to be taxed in contracting state i.e., in India according to prevailing income tax rates. Accordingly, the treaty benefit would not be available to the assessee. Finally, applying tax rate of 25%,

draft assessment order was passed. The assessee preferred objections against Ld. DRP which stood disposed-off on 13-06-2022.

3.4 The Ld. DRP confirmed the stand of Ld. AO on the ground that it was quite visible that the assessee merely acted as conduit for royalty payments to Vensys and to inflate the royalty expenses of RPPL. The assessee did not make any value addition or performed any services to get a marked-up price. Therefore, the treaty benefit would not be available to the assessee. Pursuant to the same, final assessment order was passed by Ld. AO on 07-07-2022 wherein total income was brought to tax @25%. Similar assessment was framed for AY 2015-16. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

4. The first legal argument of Ld. AR is that reopening is bad-in-law. However, it could be seen that the case has been reopened in view of the findings rendered in earlier year. The same, in our considered view, was good reason enough to reopen the case of the assessee. The reasons recorded by Ld. AO to reopen the case have been placed on page nos. 1 to 4 of the paper-book. During assessment proceedings, a view was formed that the assessee was only created to be a conduit entity for royalty payments and to inflate royalty expenses of RPPL. Therefore, it was not eligible for the benefit of DTAA. The assessee, in return of income, offered the income @15% instead of 25% in terms of Sec.115A of the act. On the basis of these facts, Ld. AO formed a belief that the assessee was granted excess relief in the form of lower rate of tax as per Explanation 2(b) of Sec.147 of the Act. The reopening has been done after taking due approval of appropriate authority. In our considered opinion, aforesaid reasons constitute sufficient material to

reopen the case of the assessee. The corresponding grounds stand dismissed.

5. Another legal ground as urged by Ld. AR is that there was no variation in the returned income and the assessed income and therefore, final assessment order was time-barred. The only dispute is qua the applicable tax rate only. The controversy is confined to the question as to what will be the rate on which income returned by the assessee is to be taxed. While the assessee has claimed taxation @ 15% under India Cyprus DTAA, Ld. AO has declined the said treaty protection on the ground that the assessee was not beneficial owner of the royalty income and accordingly, brought the income to tax @ 25% instead. There is, quite clearly, no variation in the quantum of income.

6. The question whether it was a case in which Ld. AO could have issued the draft assessment order, on the facts of this case, needs to be examined in the light of provisions of section 144C(1) which essentially provide that Ld. AO, in the first instance, has to forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee. The assessee before us is a non-resident company incorporated, and fiscally domiciled, in Cyprus. Accordingly, in terms of Section 144C(15)(b)(ii), the assessee is an eligible assessee but then there is no change in the figure of income returned by the assessee vis-a-vis the income assessed by Ld. AO. Clearly, there is no variation in the income returned by the assessee.

7. However, we find that Finance Bill, 2020 has amended the law and propose issuance of draft assessment orders in the case of eligible

assessees mandatorily even when there is no variation in the income or loss returned by the assessee. This amendment is effective from 01-04-2020 which is clear from explanatory memorandum as under: -

Amendment in Dispute Resolution Panel (DRP).

Section 144C of the Act provides that in case of certain eligible assessees, viz., foreign companies and any person in whose case transfer pricing adjustments have been made under sub-section (3) of section 92CA of the Act, the Assessing Officer (AO) is required to forward a draft assessment order to the eligible assessee, if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Such eligible assessee with respect to such variation may file his objection to the DRP, a collegium of three Principal Commissioners or Commissioners of Income-tax. DRP has nine months to pass directions which are binding on the AO.

It is proposed that the provisions of section 144C of the Act may be suitably amended to:-

(A) include cases, where the AO proposes to make any variation which is prejudicial to the interest of the assessee, within the ambit of section 144C;

(B) expand the scope of the said section by defining eligible assessee as a non-resident not being a company, or a foreign company.

This amendment will take effect from 1st April, 2020. Thus, if the AO proposes to make any variation after this date, in case of eligible assessee, which is prejudicial to the interest of the assessee, the above provision shall be applicable.

From the above, it is quite clear that w.e.f. 01-04-2020, Ld. AO is quite empowered to issue draft assessment order even in cases where Ld. AO proposes to make any variation which is prejudicial to the interest of the assessee. The application of higher rate of tax is certainly prejudicial to the assessee and the same, in fact, is the grievance of the assessee. We also find that case was reopened and notice has been issued on 20-03-2020. The Ld. AO has passed draft assessment order on 29-09-2021 which is after the aforesaid amendment has taken place. Therefore, no jurisdictional error could be found as urged by Ld. AR. The corresponding grounds stand dismissed.

8. On merits, Ld. AR has drawn our attention to various clauses of agreement dated 05-11-2017 entered between the assessee and

Vensys and subsequent agreement entered into by the assessee with RPPL on 20-11-2017 to support the case of the assessee that it was not acting as conduit between German entity and RPPL. The Ld. AR submitted that royalty was received by the assessee in its own right as an independent entity notwithstanding the fact that funding for the same came from RPPL. The Ld. AR also submitted that considering the various clauses of relevant agreement, the assessee has to be treated as beneficial owner of royalty income and the income should be subjected to tax at rates specified in DTAA.

9. In the alternative, Ld. AR also submitted that even if it was to be assumed that the royalty was paid by RPPL to Vensys, the applicable rate as specified in India-Germany Treaty would be 10% which is less than 15% as offered by the assessee. For this, our attention has been drawn to the relevant terms of DTAA.

10. We find that all the substantial submissions and arguments, on merits, have been made before us for the first time. For the same, the assessee has filed additional grounds of appeal also. These grounds were not taken up before lower authorities and there is no adjudication on these points. Considering the entire facts and circumstances of the case, we aside the order of lower authorities, in both the years, and restore the matter back to the file of Ld. AO for re-adjudication on merits with a direction to the assessee to substantiate its case. The Ld. AO may re-examine the grounds on merits viz. whether the assessee could be considered as beneficial owner of the royalty in its own right as well as alternative argument that the rate as specified in India-Germany DTAA was lower than the offered rate. All the issues, on merits, are kept open.

11. Both the appeals stand allowed for statistical purposes.

Order pronounced on 10th July, 2024

Sd/-	**Sd/-**
(MANU KUMAR GIRI)	**(MANOJ KUMAR AGGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated :10-07-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF