

# Colorcon Asia Pvt. Ltd. Thr. vs The Joint Commissioner Of Income Tax And

ID: F2J-C-2190 Court: Bombay High Court  
Case: TAX APPEAL NO.5 OF 2024 Date: 2025-11-28

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Bombay High Court Colorcon Asia Pvt. Ltd. Thr. ... vs The Joint Commissioner Of Income Tax And ... on 28 November, 2025 Author: Bharati Dangre Bench: Bharati Dangre 2025:BHC-GOA:2418-DB 2025:BHC-GOA:2418-DB

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IN THE HIGH COURT OF BOMBAY AT GOA TAX APPEAL NO.5 OF 2024

M/s. Colorcon Asia Pvt. Ltd. Plot NO.M14-M18, Verna Industrial Estate, Verna, Goa, India - 403 722. PAN : AAACC228IQ Through Authorized Representative Mr.Vinay Potdar. ... Appellant Versus 1 The Joint Commissioner of Income Tax, Special Range Aayakar Bhawan, Patto, Panji, Goa 403 001. 2 The Principal Commissioner of Income-Tax, Aayakar Bhavan, EDC Complex, Patto Plaza, Panaji, Goa 403 001. 3 The Deputy Commissioner of Income Tax Circle 1(1), Aayakar Bhavan, EDC Complex, Patto Plaza, Panaji, Goa 403 001. ... Respondents.

Mr.Porus Kaka, Senior Advocate a/w Manish Kanth and T. Sequira for the Appellant. Digitally Ms.Amira Razaq for the Respondent. signed by RAJSHREE RAJSHREE KISHOR KISHOR MORE MORE Date: 2025.12.08 CORAM : BHARATI DANGRE & 20:14:06 +0530 NIVEDITA P. MEHTA, JJ

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RESERVED ON : 13th AUGUST 2025 PRONOUNCED ON : 28th NOVEMBER 2025

JUDGMENT (PER BHARATI DANGRE, J) : - 1 M/s.Colorcon Asia Pvt. Limited, a Private Limited Company, incorporated under the Companies Act, 1956 and wholly owned subsidiary of Colorcon Limited, United Kingdom (Colorcon UK) , engaged in the business of manufacturing, supply and technical support of formulated ilm, coating systems, modied release technologies, and functional excipients for the pharmaceutical industry, has iled the present Appeal under Section 245(w) of the Income Tax Act, 1961 (for short "Act"), to assail the ruling dated 27/06/2024 (impugned ruling) passed by the Board for Advanced Rulings - I, New Delhi ( in short "BFAR") in Unique No.of the case : AAACC2281Q/2019/0020/0306 (Old No.L AAR/446/2019). The impugned ruling according to the Appellant has erroneously decided against the questions raised by it seeking an advance ruling to restrict the rate of Dividend Distribution Tax (DDT) to the extent of withholding tax rate on Dividend Income as prescribed under Article 11 of India - UK Tax Treary ( DTAA). A : THE CHALLENGE IN THE APPEAL 2 The brief background in which the challenge is raised is set out in the Appeal and is also presented before us by the learned Senior Advocate Mr. Porus Kaka, assisted by Mr. Manish Kanth, and in a brief manner, we would refer to the same. a) Colorcon UK is a foreign company formed and

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registered under the laws of United Kingdom, having its registered office at Flagship House, Victory Way Crossways, Dartford Kent, DA2 6QD, United Kingdom and it is not an Indian company within the meaning of section 2(26) of the Act. It is a tax resident of United Kingdom with a valid Tax Residency Certificate issued by the Government of United Kingdom. b) During AYs 2016-17, 2017-18, and 2018-19, the Appellant has paid dividend to Colorcon UK and also paid DDT thereon at the rate specied under Section 115-O of the Act. The Appellant also paid interim dividend for AY 2019-20. c) The Appeal has set out the details of the dividend paid by the Appellant and the effective rate of DDT to the following effect :

Financial Dividend Number of Amount of Effectiv Amount of Date of year for Shares held Dividend Paid e Rate DDT Payment which by Colorcon (in INR) of DDT (in INR) dividend UK in has been Colorcon declared India 2015-16 INR 448 16,34,449 54,42,71,850 20.36% 11,08,00,943 29 per share December 2015 22 March 2016 5 October 2016 2016-17 INR 460 16,34,449 81,23,21,650 20.36% 16,53,69,575 29 June per share 2016 15 December 2016 22 March 2017 4 October 2017 2017-18 INR 636 16,34,449 116,86,31,750 20.42% 23,86,19,855 27 June per Share 2017 19 January 2018 28 March 2018 28 3/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc September 2018 2918-19 INR 690 16,34,449 112,77,70,500 20.56% 23,18,16,544 28 June (Interim per Share 2018 Dividend) 26 December 2018 28 March 2019 365,29,95,750 74,66,06,917

d) The Appellant having made the cumulative dividend pay out in excess of INR 100 crores, iled an application under Section 245Q of the Act on 20/05/2019 seeking an advance ruling on the following questions before BFAR :

1) On the facts and circumstances of the case and in law, whether Colorcon Asia Private Limited ('Colorcon India' or 'the Applicant' or 'Company') would be entitled to restrict the tax rate on dividends distributed or distributable by it to Colorcon Limited, United Kingdom UK), at 10 per cent under Article 11 (Dividends) of the India-UK Tax Treaty ("Tax Treaty").

2) If answer to question no.(1) is in the affirmative, whether in the facts and circumstances of the case and in law, the tax rate of 10 per cent under the Tax Treaty needs to be further grossed-

up. The above application for advance ruling was admitted under section 245R(2) of the Act, vide its order dated 18/11/2019. 3 The hearing was scheduled before the BFAR and the Appellant was directed to ile written submissions incorporating its propositions on question under consideration and the 4/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc Appellant complied with the said direction.

Similarly, the Respondent also filed its report under Section 245 R (4) of the Act on 16/01/2020, wherein it specifically pleaded that the Appellant did not satisfy the conditions of Paragraph 1 and 2 of Article 11 of India - UK DTAA and, therefore, it is not eligible to apply the rate of 10% to DDT on the amount of dividends paid to Colorcon, UK. The Appellant clarified that the dividend as provided in application is on the basis of the financial year for which the dividend was declared irrespective of the time when such dividend was declared by the Appellant and it also furnished the updated data of dividend declared and DDT paid basis as against the financial year in which the dividend was declared to align the amounts of dividends declared and paid with the Income Tax Returns (ITRS). The following details were furnished by the Appellant :-

| FY in which Dividend is | Amount of dividend (in INR) | Amount of DDT (in INR) declared/paid |
|-------------------------|-----------------------------|--------------------------------------|
| 2015-16                 | 73,22,33,600                | 15,11,05,614                         |
| 2016-17                 | 75,18,47,000                | 15,30,58,358                         |
| 2017-18                 | 1,03,95,10,200              | 21,16,19,818                         |
| 2018-19                 | 1,48,89,83,950              | 30,60,65,031                         |
| <b>Total</b>            | <b>4,01,25,74,750</b>       | <b>82,18,48,821</b>                  |

4 On the arguments being advanced, the BFAR passed the impugned ruling on 27/06/2024 while it answered the questions raised therein as below :-

The impugned rulings answer the points as below :

■ The Dividend Distribution Tax (DDT) paid by the Appellant to its shareholder is squarely outside the scope of DTAA between India and the United Kingdom. 5/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 ::

income tax.doc ■ It follows Mumbai Tribunal Special Bench in Total Oil Pvt. Ltd. Without dealing with the detailed distinctions filed by the Appellant.

■ DDT does not fall within "Taxes covered" under Article 2 of India - UK DTAA.

■ Concludes that the appellant's contention to restrict the tax rate of DDT to the extent of withholding tax rate on dividend income under Article 11 of the India-UK DTAA has no merit."

#### B. RIVAL SUBMISSIONS ADVANCED

5 We have heard the learned senior counsel Mr. Porus Kaka for the Appellant who would submit that the Appellant is a resident of India within the limit of Article 4 India-UK Double Taxation Award and Agreement (DTAA) (hereinafter referred to as 'Tax Treaty'), whereas, Colorcon UK is a foreign company formed and registered under the Law of United Kingdom and it is a tax resident of United Kingdom with a valid tax residency certificate issued by the Government of United Kingdom. The Appellant is a 100% subsidiary of the UK Company. 6 During the assessment years 2016-17, 2017-18 and 2018-19, the Appellant paid dividend to Colorcon UK and also paid Dividend Distribution Tax (DDT) at rates specified under Section 115-O of the Act of 1961. It also paid interim dividend for assessment year 2019-20. It is, in this background the Appellant sought an advance ruling under Section 245Q and approached the Board and Advance Ruling by preferring an Application on 20/05/2019 when it postulate a clear issue as to whether Colorcon India would be entitled to restrict the tax rate on the dividends distributed by it to Colorcon UK to 10% under Article 11 of the 6/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc India UK Double Taxation Avoidance Agreement i.e. the Tax Treaty and if the answer is in affirmative whether the tax rate of 10% under the tax duty needs to be further grossed up. 7 Our attention was invited to the statutory scheme contained in the Income Tax Act, 1961, which has included Dividend in the income and has deined 'Tax to be income tax chargeable' under the Act. By submitting that the term 'Dividend' is deined under Section 2(22) to include any distribution by a Company of accumulated profits to its shareholders Mr. Kaka has taken us through the legislative history of dividend under the Act when Section 115-O was first time introduced by the Finance Act, 1997, which shifted the incidence of collection of tax on dividend from shareholders to dividend declaring company. Taking us through various changes effected therein with the purpose and object, when the provision underwent amendment from time to time, it is the submission advanced before us that the incidence of tax shifted hands, but there is no change in the substantial provision. We will be dealing with various amendments to the provision as we proceed to analysis the arguments, but at present we deem it appropriate to turn our attention to the India UK Treaty, a bilateral arrangement to encourage cross border business. The tax treaty between India and UK for avoidance of double taxation and prevention of physical evasion with respect to taxes of income and capital gains was entered into on 7/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc 26/10/1993 on completion of the procedure required by the respective laws, and as required by Article 30 of the Vienna Convention. In exercise of the powers conferred by Section 90 of the Act, the Central Government directed that the provisions of the said convention shall be given effect to in the Union of India and the Notification in that regard was published on 11/02/1994. The Treaty was titled thus :-

"Convention between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of iscal evasion with respect to taxes on income and capital gains."

Article 1 of the convention categorically declare that it shall apply to the persons who are residents of one or both of the contracting parties and it extends to the territory of each of the contracting State. Article 2 of the Convention highlighted the taxes which would be subject matter of the convention and this included the "Income Tax" including any surcharge thereon. The convention also contain a declaration as below :

"This convention shall also apply to any identical or substantially similar taxes which are imposed by either contracting State after the date of signature of this convention in addition to, or in place of, the taxes of that contracting State referred to in Para 1 of this Article. The Competent Authorities of the contracting States shall notify each other of any substantial changes which are made in their respective taxation laws."

8 The relevant clause in the convention which is the subject matter of the present Appeal is Article 11 pertaining to dividends 8/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc and since the arguments of the respective counsel are focused upon the said Article we deem it appropriate to reproduce the same :-

#### "ARTICLE 11 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, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and 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) 15 per cent of the gross amount of the dividends where those dividends are paid out of income (including gains) derived directly or indirectly from immovable property within the meaning of Article 6 by an investment vehicle which distributes most of this income annually and whose income from such immovable property is exempted from tax;

(b) 10 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. The provisions of this paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, or other rights, not being debt-claims, participating in profits, as well as any other item which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business profits) or Article 15 (Independent personal services), as may be the case, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except 9/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in that other State.

6. No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid to take advantage of this Article by means of that creation or assignment.]"

9 Juxtaposing the convention as against the statutory scheme prevailing in the country, pertaining to dividends under the Income Tax Act and by tracking the history of Section 115(O), included in Chapter XII-D in form of 'Special Provisions' relating to tax on distributed profits of domestic companies, Mr. Kaka has urged before us that in light of the definition of the term 'Dividend' under the Act and by taking into consideration the legislative history surrounding the change insertion and repeal of Section 115-O on multiple occasions read alongwith the memorandum, offering the justification for such amendment, make it evident that DDT is nothing but tax on dividend, which is income of the shareholder, whose incidence has been shifted to the Company, but there is no change in its substantive concept or definition, but all the while shifting has occurred for 'Administrative convenience'.

It is his specific contention that in light of the domestic law provision, DDT is levied on the dividend distributed by the Company, which is income of the shareholders and being an 'Additional tax' covered by the definition of 'tax' as defined in 10/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Section 2(43) of the Act, which fall within the ambit of charging Section 4 of the Act, it is covered by provisions of the Act including Section 90.

10 Mr. Kaka would submit that Section 90 of the Act empower the Central Government to enter into any 'Double Tax Avoidance Agreement' with another country and sub section (2) thereof provide that where such an Agreement has been entered into, 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 the Assessee. In support of this provision, he would place reliance upon the decision of the Apex Court in case of Union of India vs. Azadi Bachao Andolan<sup>1</sup>, and in specific observation to the following effect :

"28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of Income Tax Act. We approve of reasoning in decisions which we have noticed. If it was not intention of the legislature to make departure from general principle chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable Central Government to issue a notification under Section 90 towards implementation to the terms of DTACs which would automatically override provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC."

According to him, the above principle was accepted and 1 2003[263 ITR 706 (SC) 11/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc confirmed by various Judgments of the Apex Court including the recent Judgment in case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT<sup>2</sup>. He would also place reliance upon the decision of Andhra Pradesh High Court in case of Sanoi Pasteur Holding SA vs. Department of Revenue<sup>3</sup>, which has referred to and relied upon the decision of the Apex Court in Ram Jethmalani vs. Union of India<sup>4</sup> when the Supreme Court approvingly referred to the interpretation of Vienna Convention on the Law of Treaties (1969)' and held that though India is not a party to the same, the convention contain many principles of Customary International Law and the principles of interpretation in Article 31 provide broad guidelines as to what should be the appropriate manner of interpreting a Treaty, in Indian context as well. 11 Focusing his attention on the Treaty, Mr.Kaka has submitted that the impugned order has ruled against the Appellant on an erroneous premise, that the Appellant being a resident of India cannot seek relief under India -UK DTAA, which is contrary to the plain reading of Article 1 of the Treaty, which categorically state that the convention shall apply to persons who are resident of one or both of the contracting States and the Appellant being resident of one of the contracting State, under Article 4 is entitled to seek relief under the Treaty, whereby the 2 [2021 432 ITR 471 3 [2013] 354 UTR 316 4 (2011) 9 SCC 751 12/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc payment is made to the resident of another contracting State. He would also submit that Article 2 of the DTAA has enlisted the taxes covered and it covers 'Income Tax' including any surcharge thereon under the definition of 'Tax for the purpose of 'Taxes covered in India''. In light of Article 11, he would submit that there are four elements to trigger its application viz ; i) the payment must be the dividend as defined under Article 11(3); ii) such dividend shall be by the resident of another State; iii) such dividend shall be paid to a resident of other State; and iv) such dividend, if beneficiary own by the resident of other State (UK) the rate of tax in accordance with Article 11 (2)(b) cannot exceed 10%. The submission advanced on behalf of the Appellant is that all four criteria are fully made out in the present case, as Dividend has been paid by resident of India "the Appellant" to a resident of other contracting State (Colorcon UK), which satisfy the definition of term 'Dividend' both under DTAA and under the domestic law and Colorcon UK admittedly being beneficiary owner of dividend, India is obliged not to tax this category of income at a rate greater than 10%. It is urged that it is not in dispute that payments made by the Appellant to Colorcon UK are covered by the definition of dividend provided under the Treaty and if the payment is 'dividend' under the Treaty, then the taxability thereof has to be under Article 1(2)(b) of the Treaty and shall be at the rate of 10%. Summing up his submission, it is urged that if

the payment made by the Appellant to Colorcon UK is in the nature of dividend both under the definition of 'dividend' provided under Section 13/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc 2(22) of the Act and under Article 11(3) of the Treaty, and as a concept, since dividend has remained unchanged under the Act of 1961 or under the Treaty, but there is merely the change in the incidence of tax under the domestic law for administrative convenience, the benefit under the Treaty cannot be denied to the Appellant and it would be governed by Article 11 of the Treaty. It is also urged that if some changes are made in the domestic law qua tax on dividend by merely shifting the incidence of tax from shareholders to the company, for administrative purpose, the nature of levy/payment has not changed and is still covered under the term 'Dividend' under Section 2(22) of the Act and also under Article 11(3) of India UK DTAA. In any case, it is submitted that any unilateral change made in the Domestic Law over the years merely in relation to the incidence of tax cannot alter or overwrite the beneficial provision of the Treaty. 12 The learned senior counsel would draw benefit from the observations of the Apex Court in Engineering Analysis (supra), when a similar situation, wherein substantial unilateral changes made to the definition of the term 'Royalty' under the Income Tax Act was sought to be applied, to negate the Treaty benefit to the tax payers under various treaties, although Royalty was already defined in the manner favourable to tax payers. The Hon'ble Supreme Court according to Mr. Kaka accepted the plea of resident tax payers, who were obliged to deduct taxes at an appropriate rate on payment of such royalty to the counterparts 14/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc outside India and noted the absurdity in denying the tax rates under Treaty and it was held that the person liable to tax is only liable to deduct tax first and foremost, if the non resident person is liable to pay tax and if he is so liable, then he is liable to deduct tax depending upon the rate mentioned in the DTAA. It is thus the submission of the learned senior counsel, that if India is permitted to charge a rate of tax in excess of the rate permitted under the Treaty on items of income, such as dividend as defined under the Treaty, it would not be in accordance with Article 24 and the credit would not be available, resulting in double taxation, which would defeat the object and purpose of the DTAA and will be contrary to the object and purpose of Dividend Distribution Tax. 13 The Respondent being represented by Ms. Amira Razaq supported the Ruling dated 27/06/2024 by the BFAR.- New Delhi, as she would submit that Colorcon Asia paid dividend to Colorcon UK and also paid Dividend Distribution Tax (DDT) thereon at the rate specified in Section 115-O of the Income Tax Act 1961 for FY 2015-16, 2016-17, 2017-18 and interim dividend for 2018-19. She would submit that as far as India's Double Taxation Avoidance Agreement (DTAA) is concerned, the dividend distribution tax is explicitly excluded from the scope of taxes covered under the agreement and in the wake of this being urged before us at the outset, she would submit that since DDT is not classified under the heading "Tax", and hence the 10% withholding tax rates stipulated under Article 11 (2) would not apply and in such scenario, the dividend would be governed by 15/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Indian Tax Laws. According to Ms. Razaq the Hon'ble ITAT Mumbai Special Bench in case of DCIT versus Total Oil India Private Ltd. (ITA No. 6997/MUM/2019) dated 20/04/2023, after the analysis of the relevant statutory provisions, and treaties has arrived at the conclusion that the tax paid under Section 115-O is an additional tax on the Domestic Company and it is not a tax in respect of non residence income in India and, therefore, the provisions of DTAA are not attracted. She would specifically contend that on reading of Section 115-O of the Income Tax Act, it is evident that the incidence as well as charge in respect of DDT is only on the domestic company that declares, distributes or has paid the dividend. On reading of the provision, it is her contention that the tax under section 115- O is an additional income tax, on the domestic company and by no stretch of imagination, DDT could be construed to mean as a tax on non resident dividend income, which is collected by domestic company. Reliance is also placed upon a decision of the Apex Court in case of Orissa State Warehouse Corporation vs. CIT 5 where it is held that, "a fiscal statute shall be interpreted on the basis of the language used therein and no words are to be added, as only the language used is to be considered, so as to ascertain the proper meaning and also the intent of the legislature". Drawing benefit from the aforesaid, it is her contention that the submission advanced that, the legislative intent of such Treaty towards dividend income of the recipient, must receive 5 (SC) 237 ITR 589 16/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc force in law, is therefore, unacceptable. According to her, the BFAR has relied upon the decision of ITAT Special Bench in Deputy Commissioner of Income Tax vs. Total Oil India (P) Ltd. 6 which has decided the issue, which was placed before it for reference being formulated as "If the domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect." Based on it, it is Ruled by BFAR that Appellants question to restrict the tax rate on dividend income under Article 10 of India UK DTAT has no merit. 14 In support of the Ruling of the BFAR, Ms. Razaq would submit that DTAA between India and UK is not triggered, as admittedly DDT is a tax on domestic company and not on just shareholder and since the interpretation of international treaties between signatory nations is confined to its express terms and cannot be super-added to or interpreted in the manner governing statutes, and the terms of one treaty cannot be used to interpret another treaty unless discussed, deliberated and documented in express terms in a manner known to law. According to her, even assuming for a moment that dividend is covered under the treaty, it will be triggered the moment, the dividend is declared, distributed or paid, whether out of the current or accumulative profits to be charged to the additional income tax at the rate of 50%. She has placed heavy reliance on the decision in case of Godrej and Boyce Manufacturing Company Limited vs. DCIT 7, 6 [2023]149taxmann 332 7 [2010] 194 Taxman 203 (Bombay), 17/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc where the Bombay High Court had an opportunity to deal with the nature of DDT, and held that 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, and she rely on the following observation of the Law Report :-

"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 115-0 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 115-0 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 115-0 is not a tax on dividend

33. Section 115-0 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 after 1-4-2003."

She would also invite our attention to the decision of the Apex court, when the decision of the Bombay High Court was challenged and it is her submission that the Apex Court has returned the findings on Issue No.1 framed by it in favour of the department and against the assessee and the finding rendered by the Bombay High Court that the tax which is paid by a company or out of its profits declared, distributed or paid by way of dividend is an additional income, payable from the profits of domestic company under Section 115-O and is not a tax on dividend paid on behalf the shareholders is not disturbed. She 18/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc would further submit that BFAR has answered the questions formulated for its decision by appreciating the definitional and conceptual framework of DDT by holding that DDT paid by the Petitioner to its shareholders fall outside the scope of DTAA as it is an additional income tax payable over and above the income chargeable in respect of the total income of such company. 15 Ms. Razaq would emphasize upon the terminology used in Article 11(2)(b)

in the treaty, which, according to her, is a great significance "The competent authorities of the contracting States shall by mutual agreement settle the mode of application of these limitations. The provisions of this paragraph shall not affect the taxation of the company in respect of the profits out of which dividends are paid". Submitting that, there are no further terms or mutual agreement settling the mode of application of the limitations imposed in Article 11 by the DTAA itself, she would submit that the contention of the appellant that the rate of tax provided under Article 11(2)(b) of DTAA will supersede that provided by Section 115-O of the 1961 Act, is misconceived. Reliance upon the Vienna Convention, according to her is also not of any relevance because India is not signatory to it, though India follows and subscribes the inherent principles of international law, it has been noted by the Apex Court in case of Assessing Officer, Circle (International Taxation) 2(2)(2), New Delhi vs. Nestle SA 8. 8 (2024) 14 SCC 703 19/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc 16 Ms. Razaq would also disagree with the reliance placed by the appellant on the decisions of the Hon'ble Delhi Bench of ITAT in case of Giesecke & Devrient (India) (P.) Ltd. V. Additional Commissioner of Income Tax, Special Range-4, New Delhi 9 and Deputy Commissioner of Income Tax vs. Indian Oil Petronas (P) Ltd. 10, wherein the view taken is that the rate of tax prescribed in DTAA has to be applied in preference to higher rate of tax prescribed in Section 115-O. According to her, the decision of Delhi Bench of ITAT in Giesecke and Devrient India came up for consideration before the regular bench of Mumbai ITAT in Total Oil DCIT vs. Total Oil India Pvt. Ltd., (the reference to Special Bench) and the Larger Bench of the Tribunal of ITAT has doubted the correctness of the same, on the dividend distribution tax rate being restricted by treaty provisions dealing with taxation of dividends in the hand of shareholders without there being any expressed mention in the DTAA itself. On the contrary, she would place reliance upon the decision of the Supreme Court in Godrej and Boyce Mfg. Co. Ltd., holding that, under the scheme of tax treaties, no tax credit are envisaged in the hands of shareholders in respect of dividend distribution tax payable to company in which shares are held and that DDT thus cannot be equated with a tax paid by or on behalf of the share holder in receipt of such a dividend and the specific observation as under :-

"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 foreign 9 [2020] 120 taxmann.com 338 (Delh-Trib.) 10 [2021] 127 taxmann.com 389 (Kolkata - Trib.) 20/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc shareholder resident in the treaty partner jurisdiction. This tax-ability is wholly tax-neutral vis-a-vis foreign residential holder 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 tax treaties".

She would submit that after the decision of Special Bench of Mumbai ITAT in Total Oil the Delhi Bench of ITAT in case of INTERTEC India (P) Ltd vs CIT [2025] 176 taxmann.com 186 followed the Special Bench decision, and declined to follow the decision of coordinate bench in Giesecke and Devrient India. In short, the submission of Ms. Razaq is that bilateral treaty between India and UK is silent and do not contemplate, DDT as a tax on shareholders similar to Indo-Hungarian Treaty and therefore the prayer to be governed by tax rate contemplated in Article 11 is completely misconceived. 17 Ms. Razaq has also advanced her arguments upon the interpretation of international treaties between the signatory nations, and submitted that it must be confined to expressed terms of the treaty, and unless discussed, deliberated, and documented in expressed terms, nothing is permitted to be inferred therein. Thus according to her, the findings rendered by the BFAR is just and proper based on settled principle of interpretation of international treaties and as per the settled law by the Supreme Court. The gist of her submission is DDT is a tax on domestic resident company in India/ the appellant and not on the shareholder/resident of UK, and its levy does not give rise to any "Juridical double taxation" 21/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 :::

#### income tax.doc ( C ) ANALYSIS OF COUNTER SUBMISSIONS

18 The Appellant/the Assessee who has filed the Appeal has raised the following points for determination :

Whether in the facts and circumstances of the case and in law :

(a) BFAR has erred in not restricting tax rate to 10% as prescribed under Article 11(2) of the India-UK DTAA, on dividends paid/distributed by the Appellant ?

(b) BFAR has erred in holding that DDT paid by Appellant is outside scope of India -UK DTAA ?

( c ) BFAR has erred in not following the binding dictum of the Supreme Court in case of Union of India vs. Tata Tea and Another [2017] 398 ITR 260? (d) The tax rate of 10% prescribed under Article 11 (2) of India-UK DTAA need to be further grossed up to compute the tax liability on dividends paid/distributed by the Appellant/ Assessee? 19 In the wake of the rival contentions advanced, the points arise for consideration before us can be precisely formulated as below :

"Whether the Dividend Distribution Tax (DDT) paid by the Colorcon Asia Pvt. Ltd, Verna, Goa, is to be governed by Double Tax Avoidance Agreement between (DTAA) between India and United Kingdom or it is to be dealt with in accordance with Section 115-O of the Income Tax Act, 1961?

The aforesaid issue arises in the factual background of Colorcon Asia, a private limited company which is wholly owned subsidiary of Colorcon UK, registered under the Laws of UK and is a tax resident of United Kingdom, having paid dividend to Colorcon UK and also paid DDT at the rates specified in Section 115-O of the Act for three financial years commencing from 2015 and interim dividend for the year 2018-19. 22/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 :::

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20 As per Section 245(H)(a)(ii)(a) and 245(N)(b)(A) (iii) of the Act read with CBDT Notification dated 28/11/2014, a resident in relation to its tax liability, arising out of one or more transactions valuing INR 100 crores or more in total qualifying for the purposes of Chapter XIX-B and since the cumulative dividend pay out of Colorcon India exceed 100 Crores, it sought an advance Ruling from the BFAR, to ascertain whether based on relevant provisions of the Act of 1961 and DTAA between India and UK, it is allowed to pay DDT at the rate specified in Article 11 of the Treaty i.e. 10% of the amount of dividend, since Colorcon UK owns 100% of equity shares of Colorcon India. ( C ) (1) THE GAMUT OF SECTION 115-O OF THE ACT OF 1961, THE DOMESTIC LAW 21 Before we proceed to pronounce upon the legality of the impugned Ruling, it is necessary for us to make reference to the Domestic Law in form of Income Tax Act, 1961. Section 2(24) defines the term "Income" and it includes dividend. Section 2(43) defines "Tax" as Income chargeable under the Act. Dividend is defined in Section 2(22), as any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by Company to its shareholders of all or any part of the assets of the Company, but it shall not include distribution made in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in surplus assets and also when such distribution is attributable to the capitalised 23/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc profits of the company representing bonus shares allotted to its equity shareholders. Chapter

XII - D comprise of special provisions relating to 'Tax on distributed profits of Domestic Companies' and relevant provision in term of Section 115-O reads thus :

Tax on distributed profits of domestic companies.

"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 1 st day of April, 2003 [ but on or before the 31st day of March, 2020], whether out of current or accumulated profits shall be charged to additional income-tax (hereinafter referred to as tax on distributed profits) at the rate of [fifteen] per cent.

(2) 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.

(3).....

(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.

(5) 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."

22 At this stage, we must refer to the changes effected in the aforesaid provision from time to time, the provision itself being introduced by Finance Act, 1997 with effect from 01/06/1997. The Memorandum explaining the Finance Bill, while it suggested measures for development of capital market and it also aimed at abolition of tax on dividend and introduced tax on distributed profits by clearly stipulating thus :

"Under the existing system of collection of tax on dividends, every company, at the time of paying dividend to a shareholder in excess of 24/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Rs.2500, is required to deduct tax at the specified rate and deposit it in the Central Government account. The company is also required to issue TDS Certificates to all shareholders in whose cases the tax has been deducted. The shareholders, in turn, have to show the dividend in their return of income and pay the tax at the rate applicable in their case. They also have to enclose the TDS Certificates alongwith the return and claim credit for the tax deducted at source. Many a time, the tax deducted or a part thereof is required to be refunded to the assessee. Thus the procedure for tax collection is cumbersome and involves a lot of paper work.

In order to encourage investment in the shares of domestic companies, the bill proposes to exempt from income tax, dividends received from domestic companies on or after 1st June, 1997. Consequently, deduction under Sections 80L and 80M in respect of corporate dividends have been discontinued. The provisions relating to tax deduction at source from dividends have also been suitably modified. The bill also proposed to introduce new provisions for levying a moderate tax on distributed profits. Under the new provisions, the amounts declared, distributed or paid on or after 1st June, 1997, by a domestic company by way of dividends shall be charged to additional income tax at a rate of 10%, in addition to the normal income tax chargeable on the income of the company."

The above provision was proposed, on the amounts declared, distributed or paid as dividends, on or after 01/06/1997 where a new system of collection of taxes was introduced which shifted point of collection from shareholders to domestic company. However, vide Finance Act, 2002, the tax on distributed profits, introduced by Finance Act, 1997 was abolished and the point of collection of tax was shifted back to the shareholders and the explanatory memorandum to the Finance Bill 2002, stated thus :

"WIDENING OF TAX BASE Taxation of Dividends Under the existing provisions contained in section 115-O, in addition to the income-tax chargeable in respect of the total income of a domestic company, any amount declared, distributed or paid by way of dividends is charged to additional income-tax at the rate of 10 per cent. The tax so paid by the company is treated as the final payment of tax in respect of the amount declared, distributed or paid by way of dividend. Such dividend referred to in section 115-O is exempt in the hands of the 25/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc shareholders under sub-clause (i) of clause (33) of section 10. The incidence of tax is, thus, on the payer company and not on the recipient, where it should normally be.

The dividend is income in the hands of the shareholders and not in the hands of the company. The incidence of the tax should therefore, be on the recipient. Moreover, the present provisions levy tax at a rate of 10% on the distributed profits, across the board, irrespective of the marginal rate at which the recipient is otherwise taxed. The provisions are hence, considered, inequitable also. It is, therefore, proposed to revert to the earlier system of taxing dividend and shift the incidence of tax on to the shareholder receiving the dividends, by omitting sub- Clause (i) of clause (33) of section 10 and amending section 115-O so as to make the provisions of this section applicable only in respect of the profits distributed by the domestic companies before the 31st day of March, 2002. "

With this shifting of tax incidence to the recipient, it also proposed to revive the provisions of tax deduction at source. The Indian Company who distribute dividend to a shareholder in India was required to deduct Income tax from it, at the rate in force. As per the second proviso to sub-section (1) of Section 195, no tax is required to be deducted at source in the case of a shareholder, who is a non resident, or a foreign company, in respect of dividends referred to in Section 115-O. Consequent upon the change in the scheme of taxation of dividend, it is also proposed to revive Section 195. Thus, any person responsible for paying to non resident, not being a company or a foreign company at the time of credit of income by way of dividend also, to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, would be required to deduct tax at the rates in force. These rates are specified in part II of the first schedule to the Finance Act. Since provisions of Section 115-O would now be inoperative, it is also proposed to omit references to "other than dividends referred to in Section 115-O". In Sections 10 (23FA), 10(23G), 115-A, 115AC, 26/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc 115-ACA, 115AD, 115C. It is further proposed to omit the provisions to Sections 196-C and 196-D, so that the tax shall be deducted at source with respect of incomes referred to in Sections 115-AC and 115AD, where the income is received in the form of dividends referred to in Section 115-O also. By the aforesaid memorandum, the dividend which was considered to be income of shareholders, the incidence of tax was shifted back to the shareholders. 23 By Finance Act, 2003, the incidence of tax on dividend was once again shifted to the company and the explanatory memorandum to Finance Bill 2003, stipulated thus :

"It has been argued that it is easier to collect tax at a single point i.e. from the company rather than compel the company to compute the tax deductible in the hands of shareholders.

It is, therefore, proposed to substitute sub-section (1) of section 115-O of the Income tax Act to provide that the amounts declared, distributed or paid on or after 1 st April, 2003 by a domestic company by way of dividends shall be charged to additional income-tax at the rate of twelve and one-half per cent, in addition to the normal income-tax chargeable on the income of the company. It is also proposed, to exempt from income-tax, dividends received from domestic companies on or after 1 st April, 2003. Consequently, deductions under sections 80L and 80M in respect of dividends are proposed to be discontinued. The provisions relating to tax deduction at source have also been suitably amended so as to provide for no deduction of tax at source from income by way of dividends."

This was based on 'convenience', as tax from company is easier to collect. Section 115-O was again subjected to amendment by way of Finance Act 2014 and reading of the Memorandum appended to the same, reveal that the shareholders were taxed in the range of 0% to 30%, on the gross amount of dividend and existing 27/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc provision provides for taxation on dividends on net basis and reduced tax, is collected to that extent. The explanatory note to the provision of Finance Act, 2014 while introducing the concept of grossing up in connection with taxation of dividends stated thus :

"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% is currently applicable but this rate is being applied on the amount paid as dividend after reduction of distribution tax by the company. Therefore, the tax is computed with reference to the net amount. Similar case is there when income is distributed by mutual funds.

Due to difference in the base of the income distributed or the dividend on which the distribution tax is calculate, the effective tax rate is lower than the rate provided in the respective sections. 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 mutual fund or shareholders of the domestic company need to be grossed up for the purpose of computing the additional tax. "

[Emphasis supplied] 24 The Appellant has also relied upon the Speech of the then Finance Minister in Budget 2014-15, where it was mentioned thus:-

"In the year 2003 the tax liability on income by way of dividends was shifted from the shareholder to the Company. The shareholder was required to pay tax on gross dividends, but now the company pays the tax on the dividend amount net of taxes. Similarly, in case of mutual fund income distribution tax is paid on the income distributed net of taxes. I propose to remove this anomaly, both in case of company and mutual fund."

25 The amendment introduced by Finance Act of 2016 also make it apparent that the additional income tax in form of DDT is nothing but a tax on dividend income of shareholder and the explanatory memorandum to the Finance Bill of 2016, clearly 28/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc noted as below :-

"Under Section 115-O dividends are taxed only at the rate of 15% at the time of distribution in the hands of company declaring dividends. This creates a vertical inequity amongst tax payers as those who have high dividend income are subject to tax only at the rate of 15%, whereas, such income in their hands would have been otherwise chargeable to tax at the rate of 30%. With a view to rationalise the tax treaty, it is proposed to amend the Income Tax Act so as to provide that any income by way of dividend in excess of Rs.10 Lakh shall be chargeable to tax in the case of an individual, HUF or a firm who is resident of India at the rate of 10%. The taxation of dividend income in excess of Rs.10 Lakh shall be on gross basis."

26 The aforesaid amendment to Section 115-O make it clear that DDT is not the tax on income of the dividend declaring company, but it is ultimately a tax on the dividend income of shareholders. The provision of Section 115-O, though prescribe the tax on distributed profits of domestic companies to be in addition to the income tax chargeable in respect of the total income of a domestic company for any assessment year, declared or distributed by way of dividends, with effect from 01/04/2003, was charged to additional income tax. Sub-Section (2) made it evidently clear that though a domestic company had not paid any income tax on its income in accordance with the Act , the tax on distributive profits shall be payable by such company and it shall be paid to the credit of the Central Government within 14 days from the declaration of dividend or its distribution or payment whichever is the earliest. Sub-Section (1)(b) of Section 115-O, is the provision for grossing up of the dividend income of the shareholder for the purpose of computing DDT, but it always remain a tax on dividend, which can be declared out of companies reserves and it 29/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc is not an additional income tax on profits of the company as even if the company is subject to loss during the financial year and do not pay income tax, but upon declaration of the dividend it is still required to pay DDT under sub-section (2), which make it clear that it is not a tax on profits of the company, but is tax on dividend. From the above alchemy of Section 115-O, shifting the incidence of DDT, in light of the definition of the term 'Dividend' under the Income Tax Act with the legislative history referred to above, the provision in form of Section 115-O, being amended on more than one occasion, we safely lead to an inference that DDT is a tax on dividend , which is income of the shareholder, but its incidence has been shifted to the company purely for administrative convenience though there is no change in the substantive Rule or concept of 'Dividend'. Since under the Income Tax Act, DDT is levied on Dividend distributed company, which amounts to income in the hands of shareholder and being "additional tax" it covered within the definition of Tax as defined in Section 2 (43) of the Act and since it is covered by Charging Section 4, it must be necessarily subservient to the provisions of the Act which include Section 90. ( C ) (2) LEGAL EFFECT OF AN INTERNATIONAL TREATY IN TERMS OF AVOIDANCE OF DOUBLE TAXATION TREATY, AS PER SECTION 90 OF INCOME TAX ACT, 1961 27 In terms of Section 90 of the Income Tax Act, 1961, the 30/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc Central Government is authorized to enter into an Agreement with the Government of any country outside India (or specified territory) :-

"(a) for the granting of relief in respect of \_

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or (it) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [without creating opportunities for non-

taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory)]. ..... The Central Government shall notify in the official gazette, about the implementation of the Agreement. The relevant provision in form of Sub-Section (2) of Section 90, reads as below :-

"(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are, more beneficial to that assessee."

28 The subject matter of proceedings before us is the "Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion appended with the "Convention between the Government of Republic of India and the Government of United Kingdom of Great Britain and Northern Ireland for Avoidance of 31/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Double Taxation and Prevention of Fiscal Evasion with respect to taxes on income and capital gains." In the wake of the two countries desiring to conclude a new convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion, the said convention was declared to be applicable to persons who are residents of one or both of the Contracting States. The term 'a Contracting State' and 'the other Contracting State', being defined to mean India or United Kingdom as the context require. Similarly, the term 'Government' is defined in the Treaty in clause 2(k) to mean the Government of a Contracting State or a political sub-division or local authority thereof. Clause 3 of the Treaty, is the application of the convention by a Contracting State any term not otherwise defined shall, unless the context otherwise required, shall have the meaning which it has under the laws of that Contracting State relating to the taxes which are to be subject of the Convention. It is in this Treaty, Article 11 under the caption "Dividends", contemplate that the dividends paid by a company, resident of a Contracting State to a resident of other Contracting State may be taxed in that other State and taking benefit of the provision in form of clause (2) of Article 11, it is the claim of the Appellant, a resident of Contracting State that it is entitled for the benefit of 10% of the gross amount of dividends as contemplated in clause (b). 29 In order to ascertain the effect of this Convention in form of 32/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc a Treaty, at the outset, it is necessary to understand the purport of such a Treaty. Section 90 of the Income Tax Act, 1961 is intended to enable and empower the Central Government to issue a Notification for implementation of the terms of a Double Taxation Avoidance Agreement (DTAA). With a specific provision in form of Sub-Section (2) of Section 90, it is made clear that once such a Treaty exist in form of an Agreement, then provisions of such an Agreement with respect to cases to which they apply would operate even if inconsistent with the provision of Income Tax Act. 30 In *Azadi Bachao Andolan* (supra), where the Apex Court was concerned with the Indo Mauritius Double Taxation Avoidance Convention, 1983, which was brought into force on 06/12/1983 by a Notification issued in exercise of the powers of GOI under Section 90 of the Income Tax Act, 1961, to avoid double taxation and to encourage mutual trade and investment between the two countries. It is held that in the wake of the provisions of Section 4 and 5 of the Act of 1961, income tax shall be charged for any Assessment Year at any rate/rates for that year in accordance with and subject to the provisions (including provisions for levy of additional income tax) of this Act would include Section 90. It would be more appropriate to reproduce the relevant observations of the Apex Court, throwing light on the purport of Section 90 :-

"20. The purpose of Section 90 becomes clear by reference to its legislative history. Section 49-A of the Income Tax Act, 1922 enabled the Central Government to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income on which, both income tax (including supertax) 33/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc under the Act and income tax in that country, under the Income Tax Act and the corresponding law in force in that country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the Official Gazette. When the Income Tax Act, 1961 was introduced, Section 90 contained therein initially was a reproduction of Section 49-A of the 1922 Act. The Finance Act, 1972 (Act 16 of 1972) modified Section 90 and brought it into force with effect from 1-4-1972. The object and scope of the substitution was explained by a circular of the Central Board of Direct Taxes (No. 108 dated 20-3-1973) as to empower the Central Government to enter into agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing Section 90 was renumbered as sub-section (1) and sub-section (2) was inserted by the Finance Act, 1991 with retrospective effect from 1-4-1972. CBDT Circular No. 621 dated 19-12-1991 explains its purpose as follows:

"43. Taxation of foreign companies and other non-resident taxpayers. Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.

43.1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, Section 90 of the Income Tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial."

21. The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued under Section 90, is no longer *res integra*." 31 Reliance is placed upon the decision in case of *CIT vs. CIT v. Davy Ashmore India Ltd.* [1991] 190 ITR 626 (Cal.), dealing with 34/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc a question as to, what the Assessing Officer would have to do when he find that the provision of the double taxation was not inconsistent with the Income Tax Act, 1961, with reference to the circular and it was observed thus :

23. The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.

Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law i.e. the Income Tax Act, that will govern the taxation of income." Noting that with reference to the circular, the Calcutta High Court held that when the Convention or Agreement is arrived at by two contracting States, "in deviation from the general principle of taxation applicable to the contracting States", it was held that the circular selected the correct legal position, otherwise the Double Taxation Avoidance Agreement will have no meaning at all. 32 When it comes to the execution of DTAA between India and Government of Malaysia in *CIT vs. R.M. Muthiah*, the Karnataka High Court had held that, under the terms of the Agreement, if there was a recognition of the power of taxation with the Malaysian Government, by implication it took away the corresponding power of the Indian Government and the Agreement was held to operate as a bar on the power of the 35/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Indian Government to tax and that bar would operate on Sections 4 and 5 of

the Income Tax Act, 1961, and take away the power of the Indian Government to levy tax on the income in respect of certain categories referred to in certain articles of the Agreement. Focusing upon the effect of such an 'Agreement' entered by virtue of Section 90 of the Act, the High Court had summed up the situation in the following words :-

"The effect of an 'agreement' entered into by virtue of Section 90 of the Act would be: (i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the Appellate Authorities and the court."

33 Azadi Bachao Andolan (supra) underline the importance of Section 90, when it observed thus :-

"28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC.

29. The contention of the respondents, which weighed with the High 36/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc Court viz. that the impugned circular No.789 is inconsistent with the provisions of the Act, is a total non-sequitur. As we have pointed out Circular No.789 is a circular within the meaning of Section 90, therefore, it must have the legal consequences contemplated by sub-section (2) of Section 90. In other words, the circular shall prevail over if inconsistent with the provisions of the Income Tax Act, 1961 insofar as assessee covered by the provisions of DTAC are concerned."

34 The observations in Azadi Bachao Andolan (supra) are also relevant as it throw light upon the principle to be adopted in interpretation of the treaty, which are held to be not the same as those in interpretation of statutory legislation. By quoting the following passage of Francis Bennion, it is held that, an important principle which needs to be kept in mind in interpreting the provisions of an international treaty, including the one for double taxation relief is, that treaties are negotiated and entered at political level and have several considerations as their basis. A Double Taxation Avoidance Treaty, should be seen in the context of aiding commercial relations between treaty partners as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. David R. Davis in Principles of International Double Taxation Relief was quoted with approval :-

"The benefits and detriments of a double tax treaty will probably only be truly reciprocal where the flow of trade and investment between treaty partners is generally in balance. Where this is not the case, the benefits of the treaty may be weighed more in favour of one treaty partner than the other, even though the provisions of the treaty are expressed in reciprocal terms. This has been identified as occurring in relation to tax treaties between developed and developing countries, where the flow of trade and investment is largely one-way.

Because treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often 37/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides.

And, finally, in paragraph 1.08 it is held:

"Apart from the allocation of tax between the treaty partners, tax treaties can also help to resolve problems and can obtain benefits which cannot be achieved unilaterally."

35 Mr. Kaka has also relied upon the decision of Andhra Pradesh High Court in Sanoji Pasteur Holding SA (supra) and we have perused the same, which deal with an Agreement between India and France for avoidance of double taxation at its forefront, duly notified for effectuation in India referred to as "DTAA". Focusing upon the purport of such an international double taxation treaty and the relevant observations as regards nature of such Treaties, from which we can derive benefit record thus :

"3. International juridical double taxation could generically be defined as imposition of comparable taxes in two or more States on the same tax-bearer in respect of the same subject matter and for identical periods. In recognition of the pejorative effect on exchange of goods and services and movement of capital, technology and persons, agreements/ treaties/ conventions/ protocols evolved for removing obstacles that double taxation presents to development of economic relations between nations. Current international law permits taxation of foreign economic transactions when a sufficient nexus exists between the taxpayer and the taxing State, such as through residence, citizenship, habitual abode, situs of capital and the like. Normatively, customary international law does not forbid double taxation, resulting from the interaction of the domestic laws of two or more States, as long as the legislation of each of the concerned States is consistent with international law.

6. Double tax treaties are international agreements, their creation and consequences determined according to the rules contained in the Vienna Convention on the Law of Treaties, 1969 (VCLT). The conclusion of a treaty/ convention is preceded by negotiations. States intending to conclude a treaty are represented by the appropriate level of executive, political or diplomatic expertise according to individual practices and judgment of the participant States. There are several steps in the 38/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc negotiations phase eventually leading to conclusion of the treaty.

7. Treaties or conventions are thus instruments signaling sovereign political choices negotiated between States. The efficacy of a treaty over domestic law turns upon either State-specific conventions operating to govern the sovereign practices, or where there is a written Constitution provisions of that Charter.

8. Double taxation treaty rules do not "authorize" or "allocate"

jurisdiction to tax to the Contracting State nor attribute the "right to tax". As is recognized by public international law and constitutional law, States have the original jurisdiction to tax, as an attribute of sovereignty. What double taxation treaties do is to establish an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible. Essentially therefore, through the mechanism of a treaty, the Contracting States mutually bind themselves not to levy taxes, or to tax only to a limited extent, in cases where the treaty reserves taxation for the other Contracting States, either wholly or in part. The Contracting States thus and qua treaty provisions, waive tax claims or divide tax sources and/or the taxable object." 36 With reference to Article 253 of the Constitution of India, which conferred Parliament, the power to make any law for the whole or any part or territory of India for implementing any Treaty, Agreement or Convention with any other country or countries or any decision at international conference, association or other body, it is noted that the said Article read with Entry 13 and 14 of Seventh Schedule, would imply that in implementing a treaty, the limitations imposed by Article 245 and 246 (3) are eclipsed and the total field of legislation is open to Parliament enabling it to explore fields of legislation. Noting that regard must be had to international conventions and norms while interpreting domestic law provisions, when there is no inconsistency between them and there is a void in the domestic law; the Courts are under 39/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc obligation within legitimate limits to interpret the municipal law to avoid confrontation with the comity of nations or well- established principles of international law and where municipal law is not in variance with international treaty. With this paraphrasing, the scope of Section 90 was highlighted in following words :- "14. Section 90 of the Act, in particular sub-section 2 thereof is a law made by Parliament referable to article 253 read with entries 13, 14 and 82 of List I of the Seventh Schedule. The provision (sub-section (2)) enacts that where the Central Government has entered into an agreement with the Government of any other country under sub- section (1) for grant-of relief of tax or avoidance of double taxation, then, in relation to the assessee to whom such grant applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee.

15. From the above very brief and broad-strokes analyses of the origins, evolution and trajectory of tax treaties and the modus vivendi of treaty provisions and domestic laws, we infer that the DTAA and the applicable domestic law--the Act are overlapping and competing magisteria. This would imply that full faith and credit (article 261) and identity/respect [article 51(c)] must be accorded to the provisions of the DTAA, in as full a measure as to provisions of the Act. How that critical and delicate balance is achieved in the facts of the case before us, is the generic and substrating issue that is presented for consideration in these writ petitions." 37 The Petitions before the Court involved a tax dispute between the Petitioners and Revenue in relation to acquisition by M/s.Sanoi Pasteur Holding SA France of the entire share capital of M/s.ShanH SAS, France a Joint Venture Company from its constituents M/s.Marieux Alliance, France (for short "MA") and one more company M/s. Groupe Industriel Marcel Dassault (for short "GIMD"). The subject matter of challenge was an order passed by the Revenue which determined the Petitioner to be an "Assessee in default", in respect of the payments made by it to 40/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc MA and GIMD for acquisition of the majority control stake in Shanta Biotechnics Ltd (SBL) through transfer of ShanH shares, determining the long term capital gains and consequent tax liability. The order also determined the liability to interest, on the default of tax deduction under Section 201 (1A). The other set of Petition, GIMD and MA, challenged the ruling of Authority of Advance Tax, which had ruled that the capital gain arising from the sale of ShanH shares (a French incorporated entity) by the Petitioners( also French incorporated entities), to Sanoi (French incorporated entity as well) is taxable in India in terms of Article 14(5) of DTAA. 38 The Hon'ble Andhra Pradesh High Court in Sanoi was dealing with an issue of transfer of shares of a joint venture French subsidiary Company which was owned by two different French companies, to a third French company. The joint venture, subsidiary in France, in-turn held shares of an Indian company, located in Hyderabad. On transfer of shares of the joint venture French company to another French company outside France, the Indian revenue sought to tax the capital gains arising out of such transfer in India on the basis of retrospective amendments brought under the Income-tax Act to cover indirect transfers which otherwise was exempt from tax in India under Article 14(5), Article 14(6) in India -- France DTAA. Pertinent observation of the said decision is in Para 150:-

"150. Strained construction of the treaty provisions, where not authorized by the settled principles of statutory construction, either by the tax administrator or by the judicial branch at the invitation of the Revenue of one of the Contracting States to a treaty would also transgress the inherent and vital constitutional scheme, of separation 41/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc of powers. Treaty-making power is integral to the exercise of sovereign legislative or executive will according to the relevant constitutional scheme, in all jurisdictions. Once power is exercised by the authorized agency (the Legislature or executive, as the case may be) and a treaty entered into, the provisions of such treaty must receive good faith interpretation by every authorized interpreter, whether an executive agency, quasi-judicial authority or the judicial branch. The supremacy of the tax treaty provisions duly operationalised within a contracting State (which may (theoretically) be disempowered only by explicit and appropriately authorized legislative exertions), cannot be eclipsed by employment an interpretive stratagem, on misconceived and ambiguous assumption revenue interests of one of the Contracting States. Where the operative treaty's provisions are unambiguous and their legal meaning clearly discernible and lend to an uncontested comprehension on good faith interpretation, no further interpretive exertion is authorized; for that would tantamount to usurpation (by an unauthorized body--the interpreting agency/tribunal), intrusion and unlawful encroachment into the domain of treaty-making under article 253 (in the Indian context), an arena off-limits to the judicial branch;

and when the organic charter accommodates no participatory role, for either the judicial branch or the executors of the Act." 39 The argument of the Revenue was noted as below :-

"There is no conflict between the provisions of the Act pursuant to the retrospective amendments carried out by the Finance Act, 2012, and the DTAA. The provisions of the Act, on the facts of the case are squarely applicable to the transaction in terms of the provisions of the DTAA itself, as the right to tax the transaction is allocated to India in terms of article 14(5).

Inferences from SPA, ShanH and SBL's amended AOA

- (i) ShanH is a company of no substance;
- (ii) is neither the legal nor beneficial owner of SBL shares
- (iii) is not an assignee of MA in respect of SBL shares;
- (iv) ShanH made no payments for acquisition of SBL shares ;

subsequent accounting of the purchase consideration as a loan from MA, at a later date is of no consequence ; (v) ShanH had no control over SBL management nor enjoyed any rights and privileges in SBL as a shareholder ; The Double Taxation Avoidance Agreements allocate taxing rights to the country of residence or of source ; or to both. Once the source country gets the right of taxation, domestic law provisions operate to bring to tax, reference income in the source country." 40 In the wake of the competing contentions and the orders of 42/69 :: Uploaded on - 08/12/2025 ::

Downloaded on - 12/12/2025 21:34:47 :: income tax.doc the Revenue, several issues were set up for determination and the relevant one reads to the following :-

"(3) Is the transaction (on a holistic and proper interpretation of relevant provisions of the Act and the DTAA), liable to tax in India? (4) Whether the retrospective amendments to the provisions of the Act (by the Finance Act, 2012) alter the trajectory or impact provisions of the DTAA and/or otherwise render the transaction liable to tax under the provisions of the Act?"

By referring to the precedents cited in order to determine the other issues, we find reference to Azadi Bachao Andolan (supra). In Para 66 of the law report, with reference to the Agreement entered between Government of India and Mauritius for avoidance of double taxation and prevention of fiscal evasion with emphasis on observation in the said decision to the following effect:

66. "When a double taxation avoidance treaty, Convention or Agreement (for short 'treaty') become operational and is notified by Central Government for implementation of its terms under Section 90 of the Act, provisions of the treaty with respect to cases to which they would apply, would operate even if inconsistent with the provisions of the Act. As a consequence, if a tax liability is imposed by the Act, the treaty may be referred to for negating or reducing it. In case of conflict between the provisions of the Act and of the treaty, the provisions of treaty would prevail and are liable to be enforced."

41 In the wake of Section 90 of the Act, which empowers the Central Government to enter into any Double Taxation Avoidance Agreement and once such Agreement is entered into, in the wake of sub-section (2) in relation to the Assessee to whom such Agreement applies, the provisions of the Act shall apply only to the extent that they are more beneficial to the Assessee. With a clear pronouncement flowing from the decision in case of Azadi Bachao Andolan (supra), with the principle flowing to the effect 43/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc that Section 90 of the Act empowers the Central Government to issue a Notification for implementation of the terms of DTAA and when it is read with Section 4 and 5, the DTAA shall automatically override the provisions of the Income Tax Act when it comes to the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAA. 42 Article 31 of the Vienna Convention on Law of Treaties (1969) (VCLT) also require that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose. Article 31 of the General Rule of interpretation of VCLT when made applicable, to the case before us, when the question arises as to how the treaty shall be interpreted we get a clear answer in favour of the Appellant. General Rule of interpretation in form of Article 31 reads thus :-

#### "INTERPRETATION OF TREATIES"

##### Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context 44/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended." 43 The Andhra Pradesh High Court in Sanoji Pasteur Holding SA (supra), has referred to the general interpretation on interpretation of VCLT, and held that, though India is not party to the same, the convention contains many principles of customary international law and the principles of interpretation in Article 31 provide broad guidelines as to what should be an appropriate manner of interpreting the treaty in the Indian context. Holding that regard must be had to international conventions and norms while interpreting domestic law, a principle of law is laid to the effect that courts are under obligation within the legitimate limits to interpret the principle laws so as to avoid confrontation with the treaties. (C) (3) INTERPLAY BETWEEN TREATY AND SECTION 115-O INCOME TAX ACT, 1961 44 What is relevant is Sub-Section (2) of Section 90, of the Act of 1961, which in view of the Article 253 of the Constitution of India, which provide that the Parliament has the power to make any law for the whole or any part of the territory of India, it must exercise the said power for implementing any Treaty, Agreement or Convention with any other country, or any decision made at any International Conference, Association or other body. Therefore, the effect of an International Treaty must 45/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc override any provision in the domestic law and admittedly, Section 115-O being a part of domestic law, it must act as subservient to the treaty between India-UK (DTAA). This issue is already focussed upon in the past and we refer to some of the rulings in that regard. In ITA Delhi Bench in Giesecke & Devrient (India) (P.) Ltd. (supra), a pure legal issue was adjudicated being whether Dividend Distribution Tax (DDT) in terms of Section 115-O should be restricted to the rate of tax on dividend as provided in applicable DTAA governing non resident shareholders. What was examined was the interplay between Section 115-O of the Income Tax Act and Article 10 of the DTAA governing taxation on dividend on the other. With reference to the genesis of the charge for levy of additional income tax under Section 115-O on the profits declared/distributed and paid by the Corporate Assessee by way of dividend which was traced to the charging provision of Section 4 of the Act, it was held that the Section provides for charge of tax including additional income tax on the total income of every person and the definition of the term 'Income' under Section 2(24) include A) Profits and gains and B) Dividend. 45 By taking into consideration definition of the term 'Tax' in Section 2(43) which cover additional income tax levied under it as per Section 115-O of the Act, it is held thus: "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 & Boyce Mfg. Co. Ltd. v. Dy. CIT [2010] 194. ■■■man 203/328 TIR 81 46/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc though the same was rendered in the context of section 14A r.w.s 115-O 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."

With specific reference to the legislative history of Section 115-O, commencing from Memorandum to the Finance Bill 1997 and subsequent Finance Bill 2003, it is held thus :-

"55. 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 further emphasis on the fact that levy is for all intents and purposes a charge on dividends. Even if we go by economical considerations, the burden of DDT falls on the shareholders rather than on the company, as the amount of distributed profits available for shareholders stands reduced to the extent of DDT levied.

56. As mentioned elsewhere, section 4 provides for charge of Income- tax and Section 5 provides that total income of resident includes all income which is:

(a) received or is deemed to be received in India.

(b) accrues or arises or is deemed to accrue or arise in India.

(c) accrues or arises outside India during the previous year.

57. In the case of non-resident, total income includes all income from whatever source derived, 47/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc (a) received or is deemed to be received or (b) accrues or arises or is deemed to accrue or arise in India during such year.

58. The provisions of section 4 and 5 of the Act are expressly made "subject to the provisions of this Act" which would include section 90 of the Act. Section 90(2) of the Act provides "Where the central government has entered into an agreement with the government of any country outside India or specified territory outside India" as the case maybe, under sub-section (1) for granting relief of tax or as the case maybe, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, provisions of this Act shall apply to the extent they are more beneficial to the assessee." The observations of the Supreme Court in Azadi Bachao Andolan (supra) were invoked to note that the wording of Section 4 and 5, by specifically introducing the term "Subject to the provisions of the Act", was to enable the Central Government to issue a Notification under Section 90 towards implementation of the term of 'DTS' which would automatically override the provisions of Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income to the extent of inconsistency with the terms of DTS. 46 On a conjoint reading of Memorandum to Finance Bill 1997, 2003 and 2020, it is noted that the levy of DDT was for administrative conveniences keeping in mind that the revenue was across the board irrespective of marginal rate, at which the recipient otherwise tax. DDT was held to be a levy on dividend distributed by the parent company being an additional tax covered by the definition of 'tax' as defined under Section 2(43) of the Act which is covered by the charging Section 4 and 48/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc charging section itself is subject to the provisions of the Act including Section 90 of the Act. Drawing benefit from the observations in Azadi Bachao Andolan (supra) to the effect that States are expected to fulfill obligations under the treaty in good faith and this includes the obligation not to defeat the purpose and object of the treaty as the obligations are rooted in customary international law codified that Vienna convention on the law of treaties especially Article 26 (binding nature of the treaties and the obligation to perform them in good faith and Article 27 (internal law and observance treaties - provisions of internal or municipal law of a nation cannot be used to justify omission to perform treaty), it was held that the tax specified in DTAA in respect of dividend must prevail over DDT. As regards clause 10.4, it was conclusively held thus :

"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."

47 In Union of India vs. Tata Tea Company Limited, 11 when the constitutional validity of Section 115-O of the Act came before the Court, as the Calcutta High Court upheld the validity, but a rider was put that additional income tax to be charged under Section 11 (2017) 398 ITR 260 49/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc 115-O can be only 40% of the income which is taxable under the Income Tax Act. By referring to the Petition filed by a Tea Company, cultivating tea in gardens and processing it in its factory/plants for marketing the same, the argument was put forth that cultivation of tea is an agricultural process although the processing in the factory is an industrial process and agricultural income is within legislative competence of the State and not within the legislative competence of Parliament. Section 115-O imposed tax on dividend distributed by company which is nothing but imposing tax on agricultural income of the Petitioner and it is in this background, the validity of Section 115-O was challenged. The Division Bench held Section 115-O to be constitutional and being aggrieved the Union of India approached Apex Court. The argument advanced on behalf of the Petitioners that Section 115-O imposes additional tax on the dividend distributed by the company which distribution arises out of the income received from agriculture and 60% of the income is exempt from tax. Parliament has no legislative competence to tax agricultural income, and therefore, Section 14 transgresses the legislative power which is assigned to State legislature under Schedule 7 List 2 entry 46. It was also urged that at the best the amount of dividend distributed by the Company to the extent of 40% on which income tax can be charged can only be subject to additional tax as Parliament cannot touch agricultural income. 50/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc 48 Per contra, the argument advanced on behalf of Union of India was specific that dividend which is decided to be distributed by the company to its shareholders is no longer agricultural income, as the company is being asked to pay additional tax on the amount of dividend distributed by and not on its agricultural income and Parliament had full legislative competence to enact Section 115-O. Referring to Entry 82 of List 1 as "Taxes on income other than agriculture income" reference is also made to State list entry 46 in list 2 "Taxes on agriculture income", the definition of 'Agriculture Income' under Article 366 was invoked as it defined the same for the purpose of enactments relating to Indian Income Tax. The definition of term 'Income' in 2(24) of the Act of 1961 was held to be an inclusive definition and, therefore, the pivotal question to be answered in the Appeal was determined as, "Whether the provisions of Section 115-O which contain a provision imposing additional

tax on the dividends which are declared, distributed or paid by a Company, are within the fold of legislative field covered by List 1 or it relates to legislative field assigned under List 2. 49 We may not get into discussion about legislative competence which the Judgment focusses upon, but with reference to the definition of the term dividend, it is suffice to note that the definition of term 'income' was noted to be exclusive definition including specifically 'dividend', which was found to be statutorily regulated and under the Articles of Association of 51/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc Companies, is required to be paid as per Rules of the Companies to the shareholders, and Section 115-O pertains to declaration, distribution or payment of dividend by domestic company and imposition of additional tax on dividend and was found to be covered by Entry 82 and the provision of Section 115-O was held not to be directly included in the field of tax on agricultural income. It was, therefore, held that even assuming for the sake of argument, it was held that even if the provision trenches on the field covered by List II Entry 46, it is only incidental and in "pith and substance" the legislation in form of Section 115-O is clearly covered by List 1 Entry 82. The concluding observation in the said decision reads thus : "34. This Court, however, while considering the nature of dividend in the above case held that although when the initial source which has produced the revenue is land used for agricultural purposes but to give to the words "revenue derived from land", apart from its direct association or relation with the land, an unrestricted meaning shall be unwarranted. Again as noted above, in Nalin Behari Lal Singha observation was made that shares of its profits declared as distributable among the shareholders is not impressed with the character of the profit from which it reaches the hands of the shareholder. We, thus, find substance in the submission of the learned counsel for the Union of India that when the dividend is declared to be distributed and paid to the company's shareholder it is not impressed with character of source of its income.

35. The provisions of Section 115-O are well within the competence of Parliament. To put any limitation in the said provision as held by the Calcutta High Court that additional tax can be levied only on 40% of the dividend income shall be altering the provision of Section 115-O for which there is no warrant. The Calcutta High Court having upheld the vires of Section 115-O, no further order was necessary in that writ petition."

Thus, the Treaty shall prevail over domestic law. (C) (4) : ANALYSIS OF THE INDIA-UK TREATY (DTAA) 52/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc 50 The scope of the treaty as defined under Article 1 in paragraph 1 states that, "This convention shall apply to persons who are resident of one or both of the contracting states." Hence, the Appellant being a resident of one of the contracting states under Article 4 is entitled to seek relief under the treaty whereby the payment is being made to the resident of another contracting state. Article 2 of DTAA, further lists down the taxes covered and in paragraph 1(b), it covers income-tax including any surcharge thereon under the definition of the 'tax' for the purpose of 'Taxes Covered' in India. Paragraph 2 of Article 2 makes it wider by including any identical or substantially similar taxes imposed by the either contracting State within such definition. DDT by revenue's assertion is an additional income-tax, charged on distribution of dividend and hence, covered under Article 2 of India-UK DTAA. Credit is allowed in accordance with Article 24 which provides as under :-

(a) Indian tax payable under the laws of India and in accordance with the provisions of this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within India (excluding, in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Indian tax is computed.

(b) In the case of a dividend paid by a company which is a resident of India to a company which is a resident of the United Kingdom and which controls directly or indirectly at least 10% of the voting power in the company paying the dividend, the credit shall take into account in [addition to any Indian tax for which credit may be allowed under the provisions of sub-paragraph (a) of this paragraph] the Indian tax payable by the company in respect of the profits out of 53/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc which such dividend is paid.

The relevant provision is Article 11 which pertains to 'Dividend' and cover dividend paid by a company which is resident of a Contracting State to a resident of the other Contracting State may be taxed in other State. The Article contains four elements to trigger its application, (a) the payment must be the dividend as defined in Article 11(3), (b) such dividend shall be paid by a resident of one state (India), (c) such dividend shall be paid to a resident of other state (UK), (d) such dividend, if beneficially owned by the resident of the other state (UK), the rate of tax in accordance with Article 11(2)(b) cannot exceed 10 per cent. Admittedly, on a plain reading of the terms of treaty, all four criteria are fully satisfied. Dividends in this case have been paid by a resident of India (the Appellant) to a resident of the other contracting state (Colorcon UK), which satisfies the definition of 'dividend' both under the DTAA and under the Act, and Colorcon UK, admittedly being beneficial owner of the dividend. India in good faith, is obliged not to tax this category of income at a rate greater than 10 per cent. Thus, it is undisputed in the fact placed before us that the payments made by the Appellant to the Colorcon UK are covered by the aforesaid definition of dividend provided under the treaty. It is logical therefore, to say that if the payment is dividend under the provision of the treaty, the taxability thereof has to be under article 11(2)(b) of this treaty at the rate of 10%. The payment made by the Appellant to Colorcon UK is in the nature of dividend, both covered under the definition of 54/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc 'Dividend' as provided under Section 2(22) of the Income Tax Act and Article 11(3) of the treaty. The concept of 'Dividend' on a careful scrutiny has not undergone change either under the domestic law or under the treaty, but from the legislative history of Section 115-O, we have noted that there is change in the incidence of tax under the domestic law from time to time, but that is for administrative convenience. When the term 'Income tax' is specifically covered within the treaty it definitely include 'dividend' and in any case Article 2(1)(b) read with Article 2 (2) of the treaty include 'Income Tax' and any identical or substantially similar taxes imposed by India as 'taxes' covered for the purpose of India-UK DTAA. DTAA being an additional 'income tax' on such dividend, it is covered under Article 11(3) of the treaty and necessarily has to be charged in accordance with the rate prescribed. If the meaning of the words in the treaty clearly read alongwith Section 90 which gives supremacy to the treaty (provisions of the treaty), when some inconsistency arises on the domestic front, then it must be given effect to, particularly when the change and on the domestic front is only on the incidence of tax from shareholders to the company, with the nature of payment having not changed and still falling within the definition of 'Dividend' both under Section 2(22) of the Act and also under Article 11(3) of the India UK DTAA. The unilateral change made in the domestic law over the years changing the incidence of tax, therefore, cannot, alter or override the beneficial provisions of the treaty. The courts are under an obligation within the legitimate limits to so interpret the 55/69 :: Uploaded on - 08/12/2025 :: Downloaded on - 12/12/2025 21:34:47 :: income tax.doc municipal law as so to avoid confrontation with the treaties as well. In the judgment of Engineering Analysis (supra) dealing dealing with the similar situation wherein substantial unilateral changes made to the definition of 'royalty' under the Income Tax Act was sought to be applied to negate the treaty benefit to the tax fair under various treaties whereby royalty was already defined in the manner favourable to the tax payer, the Supreme Court accepted the plea of resident tax payers, who were obliged to deduct taxes at an appropriate rate on payment of such royalty to their counterparts outside India and the absurdity in denying the tax rate capped under the 'treaty', it was held thus :-

"68. The absurd consequence that the residents in India after making the deduction/payment, would not then get any excess payment made by way of refund, when the regular assessment tax place, as the non-resident assessee alone will be entitled for such refund. It is after keeping all this in view,

this court set aside the judgment of High Court of Karnataka and remanded the matter to High Court for its decision on merits i.e. on so question as to whether ITAT was justified in holding that the amount paid by the appellants to the foreign suppliers did not amount to royalty, as a result of which no liability to deduct TDS arose.

69. Even otherwise, a look at Article 12(2) of India-Singapore DTAA would demonstrate fallacy of aforesaid submission. Under Article 12(2) of the DTAA, royalties may be taxed contracting State in which they arise (India) and according to the laws of that contracting State (Indian laws) if the reciprocals is the beneficial owner of the royalties and tax so charged is capped @ 10% of 15%. If the learned Additional Solicitor General is correct in his submission, that DTAA would then not apply, royalty would be liable to be taxed in India at the rate mentioned in Income Tax Act which can be much higher than DTAA rate, as a result of which, the deduction made under Section 195 of the Income Tax Act by the 'person responsible' would have to be a proportion of much higher sum than the tax i.e. ultimately payable by the non-resident assessee. This equally absurd result cannot be countenanced given the fact that the person liable to deduct tax is only liable to be deduct the tax first and foremost if the non-resident person is liable to pay tax and second that if so liable, is then liable to deduct tax depending upon the rate mentioned in DTAA." 56/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc The Apex Court affirmed the principle laid down in Azadi Bachao (supra) to interpret the treaty liberally, with a view to implement the true intention of the parties and held that a important principle which needs to be kept in mind in interpretation of provision of international treaty, including one for double taxation relief is that the treaties are negotiated and several considerations are at their basis and ultimately it held that unilateral amendments at the domestic law cannot alter the treaty provisions by approving the decision of the Delhi High Court in DIT Vs. New Skies Satellites BV [(2016) 382 ITR 114(Del.)] 51 Apart from this, the Apex Court in Engineering Analysis also accepted the eligibility of resident person to claim treaty benefit while determining the tax to be deducted from the payments to be done to the non-residents outside India, who are residents of treaty countries and in the case before us, in the wake of a plain reading of Article 1 of India-UK DTAA, which clearly state that the treaty is applicable to the residents one or both of contracting states, we do not find any reason to read it otherwise. 52 Heavy reliance is placed by the Revenue on Godrej & Boyce Manufacturing Co. Ltd. Vs.DCIT (supra) which is also followed by the Special Bench of Tribunal in DCIT Vs. Total Oil India (P) Ltd. (supra). The issue revolve around the admissibility or otherwise of 57/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc deduction of expenditure incurred in earning dividend income, which is not included in the total income of the assessee by virtue of Section 10(33) of the Income Tax Act 1961, which was in force at the relevant Assessment Year 2002-03. It is in this context, in para 30 of the decision, with reference to Section 10(33) exempting dividend income under Section 115-O of the Act with being conscious of the fact that there are other species of dividend income on which tax is levied, the Court held thus :-

"We do not see how the said position in law would assist the assessee in understanding the provision of Section 14-A in the manner indicated. What is required to be construed in the provision of Section 10(33) read in 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 is concerned, the earning of the said dividend is tax free in hands of the assessee and not includable in the total income of the assessee. If that is so, we do not see now the operation of Section 14A of the Act can be foreclosed. The fact that Section 10(33) and Section 115-O of the Act were brought together, deleted and reintroduced later in a composite manner also do not assist the assessee. At such point of time, when the position was reversed by Finance Act, 2002 reintroduced by Finance Act, 2003, it was the assessee who was liable to pay tax on such dividend income and the assessee was entitled under Section 57 to claim benefit of exemption of expenditure incurred to earn income. Once Section 10(33) and 115-O were reintroduced, position was reversed. The above actually fortified the situation that Section 14-A of the Act would operate to disallow deduction of all expenditure incurred in earning of the dividend income under Section 115-O, which is not includable in the total income of the assessee.

The reliance on Godrej & Boyce (supra) therefore, do not govern the question that arises for consideration before us or what was referred for advance ruling. In light of the undisputed position that DDT being tax on dividend income having been declared, distributed and paid to Colour Corn UK not being in dispute, since it is covered under the definition of dividend in 58/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc Article 11(2) India-UK-DTAA, the decision in Godrej & Boyce (supra) is of no succour to the Revenue. Similarly, the decision in DCIT Vs. Total Oil India Pvt. Ltd. (supra), which followed the dictum laid down by the Apex Court while deciding the nature of DDT under Section 115-O of the Act, particularly when the Apex Court in Godrej & Boyce (supra) was dealing with a different situation on different issue of disallowance of expenses under Section 14-A, if the tax payer earns any in exempt income. In contrast, the decision in Tata Tea (supra) has provided an answer that DDT is tax on dividend income and that is completely ignored by the authority.

53 The ITAT Kolkata Bench 'A' in Deputy Commissioner of Income Tax vs. Indian Oil Petronas (P) Ltd. with reference to the dividend, it was held thus :

"8.13 Thus, in conclusion, it may be stated that the rate of tax payable on dividend distributed to non-resident shareholders would depend upon the relevant Article of the DTAA entered into between India and the country to which the non-resident belongs, subject to the fulfillment of the conditions stated hereinbelow:

- (I) Dividend should be paid to the non-resident shareholder.
- (ii) Dividend constitutes income in the hands of the non-resident shareholder.
- (iii) The non-resident shareholder is the beneficial owner of the dividend.
- (iv) The non-resident shareholder should not have a 'Permanent Establishment' in India.

8.14 The Hon'ble Delhi High Court in the case of Pr. CIT v. Maruti Suzuki Ltd [W.P.(C) No. 13241 of 2019 dated 16-12-2019] held that the Hon'ble Tribunal is within its power to admit the additional ground in respect of claim of refund of tax paid in excess, by following provision of section 115-O of the Act instead of the relevant Article of the applicable DTAA. 8.15 The Delhi ITAT in the case of Giesecke & Devrient (India) (P.) Ltd. v. Addl. CIT [2020] 120 taxmann.com 338 has held that the rate 59/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc specified in DTAA would be applicable to dividend distributed by company to non-resident shareholders and not the rate specified in section 115-O of the Act. However, the Hon'ble Tribunal after deciding the issue has set aside the ground to the effect of the Ld. AO to verify, only to admitted purpose, as to whether the non-resident shareholder was having any 'Permanent Establishment' in India. 8.16 The Hon'ble ITAT Kolkata Bench in the case of Reckitt Benckiser (I) (P.) Ltd. v. Dy.CIT [2020] 117 taxmann.com 519 set aside the above issue to the effect of the AO without adjudication after admitting the additional ground taken up by the company." The Kolkata ITAT followed the decision of the Supreme Court in Tata Tea & Anr., ruling that "the dividend is still taxable as income though the incidents of tax has shifted from the shareholder, to the company paying a dividend." Once the Hon'ble Apex Court has held that dividend connotes income, the logical conclusion is that as per Section 4 of the Act, the said income should be chargeable to tax in the hands of the person earning such income. 54 The ITAT has also considered the judgment in Godrej & Boyce, and it held that

though the dividend income was taxable in the hands of payer company, the term 'income' can only have a logical relevance qua the recipients of certain sums of money or its equivalent and not the payer thereof and conclusively it held that dividend constitutes income in the hands of non-resident shareholder and non-resident shareholder is the beneficiary owner of the dividend. The submission of the Revenue that where a unilateral amendment shift only the incidents of tax for administrative convenience of one of the contracting States could render 60/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc inoperable treaty obligations, without any amendment in the treaty, substantive or otherwise would be wholly contribute the good faith obligations contrary to the ordinary term of treaty and also to the law laid down in Azadi Bachao Andolan (supra) as well as Engineering Analysis (supra). D : CONCLUSION 55 We find ourselves fortified by the observation of Delhi Tribunal in Giesecke & Devrient Ltd. (supra), where with reference to the legislative history of Section 115-O, it emerges with clarity, that DDT, is a levy on the dividend distributed by payer company, being an additional tax is covered within 'Tax' as defined in Section 2(43) of Act and, hence, is chargeable as per Section 4, which is subject to other provisions, which include Section 90 and sub-clause (2) thereof, then specially in case of Avoidance of Double Tax, the provisions more beneficial to assessee must be preferred. Considering that the international treaties involve extensive negotiations between two nations, and definitely being conscious of the respective Nation's power to tax, the benefits and detriments of a treaty and particularly a double tax treaty and its avoidance, can only be reciprocal when the flow of trade and investment between treaty partners rests on balance and it is not allowed for one treaty partner to secure benefit to detriment of other. When a treaty is entered into, it is expected to have considered its impact on trade and investment and since it is mutual arrangement, it must be given full effect to and merely because there are unilateral amendments made on domestic front, the treaty cannot be made ineffective by construing the 61/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc same in light of domestic law. The Parliament, is not within its power to change the terms of a bilateral treaty, which is a result of negotiated economic bargain between India and UK. A party may not follow the treaty, it may choose to renege from its obligations thereunder, but it cannot amend the treaty on the guise of its domestic law, having undergone change. Amendments to domestic law, cannot be read into treaty provisions, without amending Treaty itself. Since it is necessary for the contracting party to fulfill their obligations under a Treaty in good faith and this includes its accountability under it and act in a manner, not to defeat its purpose and object, we find that the benefit accruing under the DTAA, and Article 11 thereof, cannot be denied as Revenue is of the opinion that the Treaty do not cover 'Dividend' or it is not applicable to a domestic company. 56 In Tata Tea Company (supra), while pronouncing upon the constitutional validity of Section 115-O of the Act of 1961, which is a provision for declaration, distribution or payment of dividend by domestic company and imposition of additional tax on dividend, it is held by the Apex Court that the source of the income may be agriculture, but when dividend is declared to be distributed and paid to shareholder of a company, its source is not relevant, as it remains dividend income. Nor does the fact that it is share of the company's profit, is held to be interfere with character of profit, from which it reaches hands of shareholder. 57 BFAR has based its decision on the definitional and conceptual framework of DDT holding that if it paid by the 62/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc petitioner to its shareholder, it falls outside scope of DTAA as, (a) Dividend is an amount declared, distributed or paid by the Domestic Company out of the current or accumulated profits; (b) Dividend is additional income tax payable over and above the income tax chargeable in respect of total income of such company. BFAR has concluded that incidence of tax under Section 115-O is only upon domestic company and not shareholder i.e. Colorcon U.K. and DTAA is not triggered and, therefore, there is no question of its being taxed @ 10% as per DTAA. It also renders an finding that Article 11(2) is not triggered at all, as there is no mutual agreement settling the mode of application of tax rates. On perusal of the impugned Ruling by BFAR and on its detail analysis, according to us BFAR has failed to appreciate that section 4 of the Act of 1961 levies income-tax, including additional income tax, in respect of the 'total income' of the previous year of every person. Thus, it is the earning of the 'income' that attracts the charge. 'Income' has been defined under Section 2(24) of the Act to include 'dividend'. Therefore, the Authority has erred in not appreciating that Section 115-O levies additional tax on the company on the "amounts declared, distributed or paid by way of dividends". According to us, the declaration, distribution or payment of dividend by company cannot in any manner be regarded as 'income' of the company distributing the dividend. Even Section 2(24) has not been amended by the Legislature inasmuch as regarding the "amounts declared, distributed or paid by way of dividends" as "income" of the company distributing dividends. Moreover, the Hon'ble Supreme Court in UOI v. Tata Tea Co. Ltd. (supra), has, in no 63/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc uncertain words, held that "income as defined in Section 2(24) of the 1961, Act is the inclusive definition including specifically 'dividend' and that "section 115-O pertain to declaration, distribution or payment of dividend by company and imposition of additional tax on dividend is thus clearly covered by subject as embraced by Entry 82". Once the Hon'ble Supreme Court has held that dividend connotes 'income', the natural corollary is that as per section 4, the said income should be chargeable to tax in the hands of the person earning such income. However, from a combined reading of Section 115-O and 10(34), alongwith the legislative history narrated earlier, it is evident that DDT is a tax on the dividend income of the shareholder, though the incidence of tax has shifted from the shareholder to the company paying the dividend. Any other interpretation of the provisions will render the section 115-O of the Act unconstitutional as it will fall foul of Entry 82, since what is sought to be taxed by the Respondent is not 'income' of the company. 58 The Board of Advanced Ruling has further failed to appreciate that in view of the statutory provisions and legislative background of Section 115-O of the Act, DDT paid by a company distributing dividend is not an income tax on profits or income of the company, but, is a tax on the dividend, which is income of the shareholder of the company. Hence, DDT is tax on the dividend income of the shareholder, which is merely, for administrative convenience, charged in the hands of, and recovered from the company distributing dividend. There is no denying that dividend income is not chargeable to tax and is 64/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:47 ::: income tax.doc exempt in the hands of the shareholders in light of the provisions of Section 10(34) of the Act, since the burden of taxation has been shifted to the company distributing the dividend, from the shareholder. While the DDT is a tax payable by the company, and not the shareholders, in pith and substance, it is a tax on dividends that is income of the shareholders. 59 We must also note that BFAR has grossly erred in rejecting the distinction and has failed to consider the binding dictum of the Apex Court in Tata Tea (supra) and on the other hand its reliance upon Godrej and Boyce (supra) is misplaced. The decision in Godrej & Boyce was rendered on an issue as to whether expenses incurred in relation to earning an exempt income by way of dividend was to be disallowed under Section 14A of the Act. The Assessee argued that dividend income could not be treated as 'exempt' as the income suffered tax under Section 115-O in hands of the company distributing dividend. It was argued that DDT under Section 115-O was nothing but tax paid on behalf of the shareholder and such income which had attracted tax could not be said to be 'exempt'. The conclusion was therefore arrived that Section 14-A of the Act would apply to dividend income on which tax is payable under Section 115-O of the Act. The decision in Godrej & Boyce is, therefore, in a completely different context as the issue before the Court was whether the dividend income not forming part of shareholders income attract Section 14-A qua the shareholder, but the issue before the BFAR was as to what could be taxed under Section 115-O and the answer is to be found in Tata Tea Company Ltd. 65/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:48 ::: income tax.doc (supra), where it is held that DDT is a tax on dividend income of shareholder and it would fall in Entry 82 of the Union List. Further reliance on decision by special bench in Tata Oil is also not well founded as the Apex Court in Godrej & Boyce observed that even if it 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, it would not have made any material difference to the applicability of Section 14-A. The BFAR also erred in not appreciating that as per Section 90(2) of the Income Tax, the provision of DTAA would prevail over the domestic law to the extent they are more beneficial to the assessee who is subjected to tax in India and as per Article 1 of the DTAA, it shall apply to the persons who are residents of one or both of the

Contracting States. Further, Article 2 of the Treaty apply in respect of income tax and also to any identical or substantially similar taxes which are imposed after DTAA is brought into force. Since DDT is an 'Income Tax' as per the provisions of the Act, it definitely fall within ambit of Article 2 of DTAA as income tax includes surcharge and dividend and Article 2 (2) clearly apply to any identical or substantially similar tax in addition to or in place of tax. DDT is squarely covered under Article 11 of the DTAA. On its plain reading the payment being covered under definition of dividend under Article 11(3) which is paid by the Company, resident of India to a resident of UK and therefore, in our view, Article 11(1) is automatically triggered, consequently triggering the restriction in rate of tax under Article 11(2). 66/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:48 ::: income tax.doc 60 Thus, the BFAR erred in not appreciating that the tax under Section 115-O is an additional tax under its sub section (4) which in turn is a part of the Income tax statute and legislation subject to section 90 read with the relevant DTAA. Therefore, levy of tax on dividend paid/distributed by the Appellant in excess of 10% would squarely be contrary to the provision of India- UK DTAA. The BFAR therefore erred in overlooking the settled legal principle that with respect to taxability of dividend income tax under India-UK DTAA, Article 11 allocates the taxing rights between the two contracting states. Para 1 thereof gives the primary right to tax dividend income to the state of residence. However, para 2 entitles the source state to tax the dividend paid in accordance with its domestic laws, but imposes a fetter viz. the tax so charged cannot exceed the rate of 10% under Article 11(2) (b) if the resident of UK is the beneficial owner of the dividend in all cases other than the case falling under Article 11(2)(a) where dividend is being paid out of income derived directly or indirectly from immovable properties, subject to such income from immovable property being exempt from tax. Article 11 therefore, restricts the right of India, as a source State, to levy tax in accordance with its domestic laws, that is, Section 115-O, but instead of the rate prescribed for therein, the tax has to be levied at the minimum rate of 10% to the extent the dividend is paid to a resident of UK. The BFAR erred in holding the respondent's submission by merely following the special bench's ruling stating that in order to invoke Article 11, the shareholder has to be taxed in India on the dividend earned from India. On a plain reading of 67/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:48 ::: income tax.doc the said Article, it is evident that the person on whom the tax on dividend is levied is an irrelevant and extraneous consideration for its application. There is nothing in the Article which suggests that the income has to be taxed in India in the hands of the shareholders. It merely deals with the nature of income, viz. dividend, which cannot be taxed in India at a rate exceeding 10%, if other stipulated conditions are met. The nature of income is a apropos element to invoke the said Article, and not the person who is subjected to tax, in whose hands the tax is levied, is not relevant for application of Article 11, as DDT is a 'tax on dividend income of the shareholder'. The entire legislative history of Section 115-O corroborates this. More importantly, the Apex Court in the case of Tata Tea (supra) too has confirmed the nature of income being dividend income, which is subject to DDT and under Section 115-O the dividend income is sought to be taxed at a rate of 20.36%. Section 90(2) of the Act of 1961 allow the appellant to apply the lower rate under the DTAA and Article 11(2) restrict tax rate of such dividend income to 10% and there is no embargo in Article 11 of the DTAA on the Appellant to apply the lower tax rate stipulated in Article 11(2). 61 In the wake of the above, the Authority has erred in not appreciating that DDT erroneously collected in excess of 10% as provided by India-UK DTAA is erroneous and contrary to law and retention of excess tax would be contrary to Article 265 of the Constitution of India. As a result of the above, the Appeal is allowed by setting 68/69 ::: Uploaded on - 08/12/2025 ::: Downloaded on - 12/12/2025 21:34:48 ::: income tax.doc aside the Ruling dated 27/06/2024 passed by the Board For Advanced Rulings, New Delhi, by declaring that, on the facts and circumstances of the case and in law, Colorcon Asia Pvt. Ltd ("Colorcon India" or "the Applicant" or "Company") is entitled to restrict the tax rate on dividends distributed by it to Colorcon Ltd, United Kingdom (UK), at 10% under Article 11 of the India - UK Tax Treaty. Upon the said question being answered the Department is at liberty to gross up the tax rate in an appropriate manner. (NIVEDITA P. MEHTA, J) (BHARATI DANGRE, J.)

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