

## Bombay HC's Colorcon Judgment on DDT vs DTAA Tax Rate Controversy: Treaty Supremacy Re-affirmed?

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The landmark [Bombay HC judgment](#) in Colorcon qua DDT vs DTAA tax rate controversy, is certain to reignite the debate on treaty supremacy, Parliament's sovereign powers, the nature of 'dividend' tax and a host of related issues. Given the stakes involved, the issue is almost certain to travel to the Apex Court where Revenue will be hoping for a different outcome.



### Mukesh Butani

Managing Partner, BMR Legal

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*What seems to have been set right is taxability in the hands of non-residents who are governed by the treaty. The introduction of DDT regime merely set out a mechanism/ mode to collect tax and not on who to tax or not. The fact that a provision to exempt the beneficiary of dividend was present in the law does it change anything - it was merely to prevent double taxation, having collected tax, by way of DDT, from the dividend declaring company.*

*More importantly, for non-residents covered under the treaties, how can a domestic law which effectuates a change for mechanism to collect alter its taxability. It's a sound judgment which tends to set right a public international law principle emphasising the overriding importance of double tax convention.*

*Discrimination between domestic shareholders and foreign shareholders eligible for low withholding tax (under treaties) is valid and does not violate the constitution. The central issue here is the rate that should apply to a non-resident tax payer as per the treaty and that unless the treaty is amended, there can't be any domestic law provision which can impose a more onerous obligation than what prevailed at the time investment was made.*

*I think that we are confusing the debate here by trying to over-analyse the issue by bringing in the argument of impact on domestic taxpayers.*



### Himanshu Parekh

Partner and Head of Tax (West) KPMG in India

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*This decision vindicates the proposition canvassed by us that the rate of DDT applicable on dividends paid by an Indian company to an overseas shareholder is circumscribed by the rate prescribed in the Tax Treaty. The High Court has clarified that for applicability of Treaty, what is relevant is the nature of income (i.e. dividend) which is covered by the Treaty provisions and not in whose hands is the dividend*

taxed. Even if the tax liability is on the Indian company, the lower rate of Tax Treaty would be applicable in such case. This is a landmark decision which will provide significant relief to taxpayers.



### **Ajay Rotti**

Founder & CEO, Tax Compaas

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*While I have always been in the other camp and believed that the rate of DDT is not restricted by DTAA. If this ruling is good law, it does open up a lot of questions. The Hon HC at the end of para 57 on page 64 clearly concludes that what is sought to be taxed by the Respondent is not 'income' of the company but "income" of the person earning dividend ie shareholder. Else, it would be unconstitutional since the tax is not on income. Fair enough.*

*If this is case, why should it apply only to non residents and DTAA cases. In case a resident individual gets dividend of Rs 250,000 and no other income, how is that taxable when he or she does not exceed minimum amount not chargeable to tax. Would the resident be entitled to get a refund of the DDT since it is his or her tax?*



### **Ronak Doshi**

Partner, Bansil S. Mehta & Co.

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*The Bombay High Court decision has relied on certain important provisions or principles of Constitution where respecting DTAA is emphasized. By following principles laid down by Apex Court in Tata Tea, HC has allowed DTAA benefits on dividend declared by Indian Company while discharging DDT. Apart from fact it shall be challenged in Supreme Court, question shall remain about fate of Assessee who still contested post Total Oils(SB) and those who did not and now they can raise additional ground before HC. Also relevant question would be maintenance of MA basis subsequent Jurisdictional HC at Mumbai ITAT. Also data mining of old shareholders and DTAA entitlement documents for past years would be challenging.*



### **Dhaval Trivedi**

Partner, Corporate & International Tax, K C Mehta & Co. LLP

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*In upholding Treaty superiority on the aspect of DDT, Bombay High Court has, at Para 50 nicely brought out the four elements for application of Article 11 (and thereby held it to be applicable to DDT) which imply that tax incidence in the hands of shareholder in India is not a pre-condition for the Article to apply. Further, at Para 52 of the Order, categorically dismissed Revenue's reliance on SC ruling in the case of*

*Godrej & Boyce and Mumbai Special Bench (ITAT) ruling in the case of Total Oil and has upheld the Taxpayer's reliance on SC ruling in the case of Tata Tea which directly dealt with the aspect of DDT being a tax on dividend income. In my opinion, this was always the weakest link in the ITAT Special Bench Ruling in the case of Total Oil.*

*While there are high chances that the matter shall travel to Supreme Court, there are surely finer arguments that would find place as we move further on this extremely intriguing issue!*



**Mayank Mohanka**

SM Mohanka & Associates

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*My curious mind is forcing me to ponder upon a hypothetical scenario. What if in this case, Colorcon Asia was not the 100% subsidiary of Colorcon UK, but instead say only 51% subsidiary and its 49% shareholding was with Indian shareholders. So, whether in that case, whether two different DDT rates would have been applicable, higher standard rate for domestic Indian shareholders (as they would not have been entitled for DTAA benefit) and the lower 10% rate for UK based shareholder company. And if that is so, the helpless domestic shareholders unlike NRIs don't have even the benefit of any non discrimination clause, under domestic provisions, if going by the logic that any tax burden on a domestic company is ultimately to be borne by its shareholders.*