

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2", NEW DELHI
BEFORE SHRI J. S. REDDY, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No.399/Del/2012
Assessment Year : 2007-08**

Clough Engineering Ltd., Alluvion, 58, Mounts Bay Road, Perth, Western Australia. PAN : AABCC 6248 C	Vs.	ADIT (International Taxation), Dehradun.
(Appellant)		(Respondent)

Appellant by : Shri Nageswar Rao, Adv.
Respondent by : Shri Anuj Arora, CIT(DR)
Date of hearing : 20-03-2017
Date of pronouncement : 24-03-2017

ORDER

PER J. S. REDDY, A.M :

This is an appeal filed by the assessee directed against the order passed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), on 25th November, 2011 on the following grounds of appeal :-

"Based on the facts and circumstances of the case, Clough Engineering Limited (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal against the order passed by the Assistant Director of Income-tax (International Taxation), Dehradun [hereinafter referred to as the 'Hon'ble AO'] under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act'), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel - New Delhi (hereinafter referred to as 'Hon'ble DRP') on the following grounds:

Ground 1

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO erred in assessing the total income at Rs 474,268,690 as against returned loss of Rs

(1,326,171,207) computed by the Appellant in its return of income.

Taxability of revenues earned from Outside India operations

Ground 2

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO erred in considering revenues received from operations carried out outside India as assessable to tax in India.

Ground 3

Without prejudice to the above contention of the Appellant that the revenues earned from outside India operations are not taxable in India, the learned DRP/ AO have erred in not considering the loss incurred by the Appellant in executing the contract in India while estimating the taxable income at 25% of revenues.

Ground 4

Without prejudice to Ground 2, the learned DRP/ AO have erred in making an arbitrary estimate of taxable income in respect of offshore activities at 25% of the gross revenues which is excessive, without any basis and unreasonable.

Taxability of revenues from Inside India operations

Ground 5

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO erred in ignoring the audited books of accounts submitted by your Appellant and taxing the revenues received from Inside India operations under Section 44BB of the Act on a 10% deemed profit basis and ignoring the fact that the assessee has incurred losses during the year.

Ground 6

In addition to the above, the Hon'ble DRP/ AO has erred in not granting the allowances under Section 32, Section 37, Section 40(a)(i) and Section 40(a)(ia) of the Act while determining the income subject to tax for onshore activities.

Transfer pricing grounds

Ground 7

The learned AO, based on the directions of the learned DRP, has erred on the facts and circumstances of the case and in law in making an addition of Rs 67,128,766 to the total income of the Appellant on account of adjustment in the arm's length price of various the international transactions.

Ground 8

The learned DRP/ AO has erred in facts and circumstances of the case and in law in disallowing a payment of Rs 81,90,489 towards receipt of logistics support services.

Ground 9

The learned DRP/ AO has erred in law in making an adjustment of Rs 18,442,111 to the international transaction of hire of equipment by disregarding the provisions of the Act and the Circulars issued by the Central Board of Direct Taxes.

Ground 10

The learned DRP/ AO has erred in making an adjustment of Rs 4,522,027 to the international transaction of project work installation services.

Ground 11

The learned DRP/ AO has erred in making an adjustment of Rs 13,933,197 to the international transaction of receipt of project support services.

- i) The learned DRP/ AO has erred in rejecting the Associated Enterprise ('AE') as the tested party.*
- ii) The learned DRP/ AO has erred in considering incorrect operating margins of Dolphin Drilling Offshore Enterprise India Limited under the Transactional Net Margin Method.*
- iii) The learned DRP/ AO has erred in not providing the benefit of 5 percent as required under proviso to section 92C(2) of the Act.*

Ground 12

Without prejudice to the above Grounds, where the income is taxed under Section 44BB of the Act on 10% deemed profit basis, no transfer pricing adjustments are warranted.

Ground 13

The learned DRP/AO has erred in law and in facts in making an adjustment of Rs 22,040,942 to the international transaction of allocation of overheads to the Appellant.

Ground 14 - Taxability of interest of income-tax refund

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO has erred in treating the interest income as business income and taxing the aforesaid income at 41.82% as against the lower rate of 15%.

Ground 15 - Levy of interest under Section 234B of the Act

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO has erred in levying interest under Section 234B of the Act amounting to Rs 96,625,256.

Ground 16 - Levy of interest under Section 234D of the Act

On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ AO has erred in levying interest on excess refund under Section 234D of the Act amounting to Rs 6,351,401.

The above grounds of appeal, including the sub grounds, are distinct and separate and without prejudice to each other and the Appellant requests that the above grounds be decided based on the merits of the case.

Your Appellant craves leave to add, to amend, to alter, to delete and/ or to modify any or all the aforesaid ground(s) of appeal."

2. At the time of hearing, ld. counsel for the assessee submitted the following in writing :-

“Clough Engineering Limited (CEL) has closed its operations way back in 2007 and does not have any presence in India. However, its tax litigation in India is still going on. The management of CEL intends to close its protracted litigation in India due to time and costs involved in such prolonged litigation. In its endeavor to avoid protracted litigation, CEL has undertaken various steps as follows:

- *Filed a revised return of income for AY 2009-10 giving up its claim for deduction of expenses.*
- *Non-filing of appeal before Your Honors for AY 2008-09 and AY 2010-11. However, since the Tax Department filed an appeal in those years, CEL then filed Cross Objection(s).*
- *Non-filing of appeal before the Hon'ble Commissioner of Income-tax (Appeals) against the recent order dated 27 February 2017 passed under section 143(3) read with section 144C(13) of the Act for AY 2006-07.*

Reference is invited to Internal page 22 of draft assessment order dtd. 31.12.2010, (it may kindly be noted that this order is wrongly titled as assessment order instead of draft assessment order) wherein a letter said to be received from ONGC is extracted. It will kindly be noticed that the project was terminated prematurely. Copy of the relevant portion of contract with ONGC can be found at pages 1 to 41 of the paper book. As can be seen the contract involved offshore supplies and onshore supplies. Reference made to TPO resulted in recommendation of adjustment on different grounds as can be seen from order of transfer pricing Officer dated 29 October 2010.

Detailed objections filed before dispute resolution panel (DRP) are placed as part of the appeal memo. Kind attention is invited to summary of arguments running into 15 pages which is part of the appeal memo. This may kindly be considered for the purposes of present appeal. Particular attention is invited to the submissions in the context of offshore supplies which can be found from page 6 of 15 to 14 of 15.

In continuation steps taken by CEL to avoid protracted litigation, under instruction we do not wish to press Ground 5 and Grounds 7 to 14 in respect of the captioned appeal, although CEL is not agreeable to the additions made in the order dated 25 November 2011 passed under section 143(3) read with section 144C(13) of the Act. Thus, CEL wishes to submit that based on commercial and administrative reasons and considering the time and costs involved in protracted litigation, it does not wish to press the aforementioned grounds of appeal.

Several of these disputes were involved in the earlier years also. The dispute relating to attribution of profits on offshore revenues was also subject matter of appeal in AY 06-07. A copy of the said order was placed on record during the hearing. Subsequently the AO while giving effect to the directions of Hon'ble Tribunal adopted 10% as the , profit attribution on offshore revenues. Copy of Order dated 27.2.2017 was placed on record and kind attention was invited to page 4 of the same. In this context it is also submitted that the Department has not appealed against this issue. It

was therefore, submitted that a similar approach may kindly be adopted in the context of Ground of Appeal 3 and 4.

Additionally, in respect of Ground 6, CEL's claim of the deduction for expenses disallowed under section 40(a)(i)/ 40(a)(ia) in earlier years and claimed as deduction in AY 2007-08 ought to be granted as deduction in A Y 2007-08, subject to verification.

CEL further wishes to clarify and emphasis that non-pressing of other grounds should not be construed as acceptance of the order of claims of department in any way and may kindly be viewed solely in the background of the facts stated hereinabove, and should also, not be regarded as a precedent for other assessments/ appeals with regard to the similar issue. CEL reserves the right to appeal similar issue in assessments for other years."

3. The Id. counsel for the assessee has made detailed submissions of Ground No.3, 4 and Ground No.6. He prayed for relief.

4. Ld. Departmental Representative (DR), on the other hand, opposed the contentions of the assessee and relied on the orders of the DRP as well as the TPO on ground nos.3, 4 and 6, which were pressed by the assessee.

5. After hearing rival contentions of both the parties, we hold as follows :

6. Ground nos.1, 2 are dismissed as general in nature.

7. Ground nos.5, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 are dismissed as not pressed. The assessee had not pressed these grounds for the reason that the assessee wanted to avoid protracted litigation as they have closed its operations way back in 2007. This dismissal of grounds shall not be taken as a precedent for the reason given above.

8. This appeal leaves us with ground nos.3, 4 and 6.

9. Ground nos.3 and 4 are on the issue of attribution of profits on offshore revenues. The Assessing Officer estimated taxable income in respect of

offshore activities at 25% of the gross revenues. Admittedly, similar issue on the very same facts, has come before this Bench of the Tribunal in assessee's own case in ITA No.4849/Del/2010 for the assessment year 2006-07, order dated 31.07.2014. The Tribunal had restored the issue to the file of the Assessing Officer with a direction that an afresh exercise be undertaken and attribution of profits on offshore revenues be determined. Consequent to such direction, the Assessing Officer, for the assessment year 2006-07, adopted 10% as the profit attribution on offshore revenues. As the Department has itself come to this decision on these very facts, we have no hesitation in applying the same percentage to the year under consideration. The Assessing Officer is directed to adopt 10% as the profit attribution on offshore revenues for the impugned assessment year 2007-08. In the result, ground nos.3 and 4 of assessee's appeal are partly allowed.

10. Ground no.6 of the assessee's appeal is against the non-granting of allowances u/s 32 and section 37 and disallowances u/s 40(a)(i) and section 40(a)(ia) of the Act. Ld. counsel for the assessee has not pressed its claim for granting of deduction u/s 32 and section 37 of the Act. Hence, we dismiss the same.

11. Coming to issue of disallowances u/s 40(a)(i) and section 40(a)(ia), we set-aside the issue to the file of the Assessing Officer for fresh adjudication *de-novo* in accordance with law. The assessee states that its claim for deduction

of expenses were disallowed u/s 40(a)(i) and section 40(a)(ia) in the earlier year and are being claimed in the current assessment year 2007-08. This claim has to be verified. Hence, we set aside the same to the file of the Assessing Officer.

In the result, ground no.6 is allowed for statistical purposes.

12. Resultantly, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on this 24th day of March, 2017.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(J. S. REDDY)
ACCOUNTANT MEMBER

Dated: 24-03-2017.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The DRP-II, Delhi.
- 4) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi