**आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम**

**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री वी. दुर्गाराव, न्यायिक सदस्य एवं**
**श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं.**/I.T.A.No.530/Vizag/2017**
(निर्धारण वर्ष / Assessment Year: 2013-14)

| | |
|---|---|
| GVK Power & Infrastructure Ltd<br>Jegurupadu<br>[PAN No.AAACJ5599A] | ACIT, Circle-2(1),<br>Rajamahendravaram |
| (**अपीलार्थी** / Appellant) | (**प्रत्यार्थी** / Respondent) |

| | | |
|---|---|---|
| अपीलार्थी की ओर से / Appellant by | : | Shri G.V.N. Hari, AR |
| प्रत्यार्थी की ओर से / Respondent by | : | Shri Deba Kumar Sonowal, DR |
| सुनवाई की तारीख / Date of hearing | : | 09.05.2018 |
| घोषणा की तारीख / Date of Pronouncement | : | 18.05.2018 |

**आदेश / O R D E R**

**PER D.S. SUNDER SINGH, Accountant Member:**

This appeal filed by the assessee is directed against order of the Dispute Resolution Panel-1 (DRP), Bengaluru vide F.No.241/DRP-1/BNG/2016-17 dated 18.8.2017 for the assessment year 2013-14.

2. Ground No.1 is related to the transfer pricing adjustment of Rs.11,32,94,387/-. The assessee M/s. GVK Power & Infrastructure Limited in short (GVKPIL) is incorporated on 28.4.2005 is flagship

company of GVK Group. The assessee has diversified its business in the fields of power, airports, roads and also own the equity stake in domestic coal mines for captive purposes and has entered into an oil and gas exploration business jointly with BHP Billiton. The assessee has entered into an international transaction with it's Associated Enterprise(AE) M/s G.V.K. Coal Developers (Singapore) PTE Limited, (in short GVK Singapore) and extended Corporate guarantee of INR 2814,32,00,000/- as on 31st March, 2013 and has charged commission to it's A.E. amounting to Rs.25,25,67,213/-. The A.O. referred the International transaction u/s 92CA(1) of the Income Tax Act, 1961 (hereinafter called as 'the Act') to Transfer Policy Officer (TPO) for determination of Arms Length Price (ALP) of the tax payer company. The commission charged by the tax payer for corporate guarantee has worked out to 0.90%. The assessee has made the transfer pricing (TP) study and adopted the Comparable Uncontrolled Price ("CUP") method as most appropriate method for bench marking the transaction of corporate guarantee. The assessee in it's Transfer pricing documentation has conducted the search using the 'Bloomberg' database to identify the market yield on debt securities with credit ratings. The assessee has used the *US Industrial Bond Yield Curve* to determine the bench mark of guarantee fee range. The assessee has

considered the one year US Industrial Yield Curve as bench mark for the market interest rates, since the duration for the transaction of loans is less than or equal to one year. Based on the analysis of US Industrial Bond Yield curve for the period under consideration, the assessee has held that the transaction of guarantee fee charged to it's A.E. is at Arms Length. The TPO considered the issue of corporate guarantee commission charged by the assessee is less than the comparable fee based on the guarantee commission charged by the banks and issued show cause notice to the assessee as to why fee @ 1.30% should not be charged on the corporate guarantee extended and thereby proposing an adjustment u/s 92CA of the Act. The assessee filed explanations stating that the bank guarantee and corporate guarantees are not similar and the same are not comparable. Bank guarantees and corporate guarantees are given under different motivations. While the corporate guarantees are issued in order to support the A.Es, bank guarantees are issued by banks in the normal course of business, thus, the commercial considerations in the two cases with different approaches. In the case of corporate guarantee, the purpose is to support the A.E. and derive a long term benefit while in the bank guarantees, the service is rendered in the general course of its business and the benefit towards the bank is the profit element associated with

the services rendered. The Ld. A.R. further submitted before the A.O., that for comparability, the necessary adjustments must be made to account for the difference in the functional nature of the guarantees as well as for the terms and conditions and the risks of the tested transaction. Since the bank guarantee and corporate guarantee are two different transactions, the rates cannot be compared. The naked bank quotes on a website are generic in nature, not specific to any other by transaction that has been carried out. Thus, not only they are negotiable, they also vary depending on the terms and conditions of the transactions and the relationship between the banks and customers. The assessee further submitted that there are various differences between the bank guarantee and corporate guarantee and there are multiple factors, which needs to be analysed and appropriate adjustments are warranted as provided under Rule 10B of the Income Tax Rules, 1962 before comparing the rate chart by various banks as guarantee fee with guarantee fee charged by the independent companies. The assessee also argued that the A.O. has not brought on record the terms and conditions of the comparable transaction of guarantee of State Bank of India which has charged the bank guarantee commission @ 1.30% for the assessment year 2013-14. The assessee argued before the A.O. that as per the decision of Hon'ble Bombay High

Court in the case of Everest Kanto Cylinders Limited and other Tribunals the corporate guarantee commission charged from 0.25% to 0.53% is considered to be appropriate for issuance of corporate guarantees. The assessee placed reliance on the following decisions of various Tribunals:

| *Sl. No.* | *Name of the Case Law* | *Assessment Year* | *Guarantee Fees* |
|---|---|---|---|
| *1.* | *Everest Kanto Cylinder Limited<br>High Court –ITA No.1165 No.2013<br>ITAT –ITA No.542/Mum/2012* | *AY 2007-08* | *0.53%* |
| *2.* | *Foursoft Limited<br>ITA No.1903/HYD/2011* | *AY 2007-08* | *0.53%* |
| *3.* | *Prolifice Corporation Limited<br>ITA No.237/HYD/2014<br>ITA No.1646/HYD/2014* | *AY 2009-10<br>AY 2010-11* | *0.53%* |
| *4.* | *Glenmark Pharmaceuticals Limited<br>ITA No.5031/MUM/2012* | *AY 2008-09* | *0.535* |
| *5.* | *Asian Paints Limited<br>ITA No.7801/MUM/2010* | *AY 2005-06* | *0.25% to 0.35%* |
| *6.* | *Reliance Industries Limited<br>ITA No.4475/Mum/2007* | *AY 2003-04* | *0.38%* |
| *7.* | *Nimbus Communication Limited<br>ITA No.3664&2359/Mum/2010<br>ITA No.6816 & 7105/Mum/2010* | *AY 2005-06<br>AY 2006-07<br>AY 2007-08* | *0.50%* |

3. The Transfer Pricing Officer not being convinced with the explanation of the assessee held that the international transaction entered into by the assessee with it's A.E. is not at Arms Length Price and held that corporate guarantee commission @ 1.30% charged by the State Bank of India for its guarantee held to be comparable and at Arms Length Price. Therefore, suggested for upward adjustment of Rs. 11,32,94,387/- difference being the corporate guarantee charges worked out @ 1.30% and charged by the assessee u/s 92CA of the Act.

The A.O. issued the draft assessment order on 16.11.2016 proposing to make the adjustments as suggested by the TPO and the assessee approached the Dispute Resolution Panel (DRP) u/s 144C(2) of the Act and raised the grounds objecting for charging the service charges @ 1.30% on the basis of the guarantee commission charged by the State Bank of India and argued that commission charged @ 0.25% to 0.53% held to be reasonable as per the orders of the various Tribunals relied upon by the assessee. The assessee also explained the difference between the bank guarantee commission charged by the banks and the corporate guarantee. The assessee reiterated the submissions made before the Transfer Pricing Officer and also relied on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Everest Kento Cylinders Ltd. (ITA No.1165/Mum/2013), wherein it was held that corporate guarantee cannot be compared with the bank guarantee for transfer pricing purposes. The assessee also relied on the decision of Glenmark Pharmaceuticals Ltd. (2014) 43 Taxmann.com 191 wherein ITAT held that the bank guarantee commission prices cannot be comparable for external CUP to bench mark the corporate guarantee. The Ld. DRP considered the submissions made by the assessee and observed that the assessee failed to show as to how the US Bond rate is more applicable than the bank rates adopted by the TPO. Further, it

was also observed that if 0.53% would be the ALP rate in 2007-08, then the rate at 1.30% for the subject year would not be unreasonable and accordingly rejected the objections raised by the assessee. The A.O. passed the assessment order u/s 143(3) r.w.s. 92CA(3) of the Act and u/s 144C(13) of the Act on 29.9.2017 making the upward adjustment of Rs.11,32,94,387/- on account of adjustment of corporate guarantee.

4. Aggrieved by the order of the A.O/DRP, the assessee carried the matter to the Tribunal. During the appeal hearing, the Ld. A.R. argued that the assessee has conducted transfer pricing study and adopted the US Bond Yielding Curve method to bench mark the transaction for guarantee commission for corporate guarantee. The assessee's A.E. M/s. GVK Coal to borrow USG Denominated loan of US D$ 1.25 Billion for which the assessee has provided the corporate guarantee to third party lender i.e. Consortium of ICICI Bank, Bank of India, Bank of Baroda, Canara Bank and Kotak Mahindra Bank. With this borrowing, GVK Coal acquired holdings in certain coal companies in Australia towards the said loan and GVK Coal has given its assets, securities and mining tenements and other fixed assets of the target company and additional security in the form of all shares owned by GVK coal, and the assessee has extended its corporate guarantee to the third party lenders. The Ld. A.R. further argued that the primary securities are the

stocks, the assets and the mining tenements of the associated enterprises and the corporate guarantee is an additional security. Hence, argued that the risk factor involved in the bank guarantee and the corporate guarantee is completely different. In the bank guarantee, the direct monetary transactions are involved, in case of default, the bank has to honour the guarantee immediately. In the case corporate guarantee, the assessee has to make the payment in case the AE failed to repay the loan and it involves legal process to liquidate the primary securities, collateral securities and then the corporate guarantees are invoked. Therefore, risk factor involved in corporate guarantee is different and minimal against the maximum risk involved in case of bank guarantees. Further, the Ld. A.R. argued that in the case of Corporate guarantee it is extended to it's AEs in the commercial interest of the company for deriving the long term benefit. Whereas in the case of bank guarantee, the services are rendered for profit and the commission is charged depending on terms and conditions of the guarantee and the securities offered and margin money etc. The Ld. A.R. further submitted that the assessee has relied on number of decisions and the A.O. did not bring any other comparable case or decision of the tribunal/ or High court to fortify the argument that bank guarantee commission charged by the bank is comparable and at Arms Length Price. Since the decision

of Hon'ble Bombay High court and the decisions of Tribunals supports the assessee's case and held that the corporate guarantee commission charged @ 0.25% to 0.53% is considered to be reasonable and the assessee has charged commission at 0.90% which is higher than the comparable cases, the Ld AR argued that corporate guarantee commission is at ALP and no adjustment is warranted.

5. On the other hand, the Ld. D.R. supported the orders of the lower authorities and argued that the bank guarantee commission is comparable and hence no interference is called for in the order of the AO/DRP.

6. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee has conducted Transfer Pricing study and arrived at ALP rate of 0.89% based on US Industrial bond yield curve. The assessee has extended the corporate guarantee to the third party lender banks for providing credit facilities. The primary security given by the Associated Enterprises is mortgage of land, securities, mining tenements and other fixed assets of the target company and all shares owned by the GVK Coal. We agree with the argument of the Ld.AR that the bank guarantee and the corporate guarantees are issued on different

approaches and with different motivations. In corporate guarantee, the risk factor is lesser since the credit facilities granted by the bank was firstly covered by the assets of the borrowing company, whereas in the bank guarantee, the risk factor is more since immediate monetary transaction is involved. Therefore, the commission charged in bank guarantee would be more than the corporate guarantee to cover the risks and the profits. Further in case of bank guarantee, the bank guarantees are undertaken with a profit element, whereas, in the case of corporate guarantee mutual commercial interest and long term benefits are prime factors. Further, though the Ld. A.O. adopted the bank guarantee commission as a comparable and at ALP, the terms and conditions of the bank guarantee and the terms and conditions of the corporate guarantee were not brought on record and did not allow the necessary adjustments to various risks. If the A.O. is taking any of the comparable cases for transfer pricing study, the risk factors involved, the terms and conditions of the guarantee, the profits, etc. require suitable adjustments. In this case, the A.O. has not made any such adjustments and brushed aside the entire argument advanced by the assessee before the A.O. as well as the DRP. The DRP also brushed aside the argument of the assessee simply stating that the assessee did not demonstrate how the US bond rate is more applicable than the bank

rates adopted by the TPO. Neither the A.O. nor the DRP studied the issue how the US bond rate is more applicable than the bank rate and there was no analysis of data with risk factors, financial factors, commercial interest, profits, etc., while making the transfer pricing study. The assessee has brought on record the number of case laws relied up on, but the revenue did not make out a case for rejection of the commission @ 0.25% to 0.53%, which is held to be reasonable. Neither the A.O. nor DRP brought on record any decision, which is held to be more favourable to the revenue and no other judgement was brought on record controverting the decisions relied upon by the Ld. A.R. In the case of Videocon Industries Ltd. Vs. DCIT Range -3(3)(2), Mumbai reported in 79 Taxmann.com 216 by ITAT 'K' Bench, Mumbai held that where the loan for which assessee had given corporate guarantee, primarily covered by pledge of securities hypothecation of debtors balances and other assets of AE, corporate guarantee commission around 0.5% would be acceptable as ALP. Further, the ITAT Mumbai 'K' Bench in the case of Nimbus Communications Ltd. Vs. ACIT (11)(1) Mumbai (2017) 85 Taxmann.com 237, against the guarantee commission adjustment made by the assessee @ 3% held that 0.5% is reasonable and at ALP. In the case of Glenmark Pharmaceuticals Ltd. (supra) relied upon by the assessee, Hon'ble

Bombay High Court held that bank guarantee commission is not a comparable transaction for transaction to determine the ALP. However, Hon'ble Supreme Court has granted SLP in this case. Therefore, in the assessee's case, the primary securities offered by the assessee was the assets of the GVK Coal and corporate guarantee was extended to third party lender. As per the decisions referred in this order of various Tribunals and High Courts, the corporate guarantee commission charged @ 0.25% to 0.53% is considered to be reasonable in the facts and circumstances of the assessee's case. The Ld. D.R. did not place any other judgement or order of the High Court or any other court to controvert the decision cited (supra). In the assessee's case the corporate guarantee commission charged by the assessee was 0.90% which is more than the corporate guarantee commission of 0.25% to 0.53% approved by various judicial forums. Therefore, respectfully following the view taken by the coordinate benches, we hold that the corporate guarantee commission charged by the assessee company is at ALP and no adjustment is required. Accordingly, we delete the addition made by the A.O. and allow the appeal of the assessee.

7. Ground No.2 is related to the Transfer pricing adjustment made by the A.O. amounting to Rs.22,44,330/- by imputing notional interest on outstanding amounts from A.E.. The transfer pricing officer found

that the assessee has receivables of Rs.7,32,97,465/- as at the end of the year. The TPO requested the assessee to submit the details of raising the invoice and subsequent receipt of the amount and also called for an explanation as to why notional interest should not be charged @ 14.45% on receivables which was not repaid by the AEs after the due date of payment. The A.O. found the amounts were outstanding for more than 60 days allowable credit period, hence, charged the interest @ 14.5% which worked out to Rs.49,89,329/- and proposed for upward adjustment on account of notional interest u/s 92CA(3) of the Act. On receipt of the draft assessment order from the A.O., the assessee approached the DRP and filed their objections before the Hon'ble DRP and argued that the receivables should not be considered as a separate international transaction and there by proposing to levy notional interest. Further, argued that while determining the ALP, the interest for delay is considered, hence the differed receivables or delay in receivables would not constitute a separate international transaction. The differed receivables are not in the nature of capital financing even as per the amended provisions. Further, argued that receivables are closely linked to the principal transaction of provision of service and not an international transaction, hence, recharacterising the transaction as international transaction is

not permissible. The Ld. DRP after considering the objections raised by the assessee held that after insertion of explanation to section 92B with retrospective effect from 1.4.2002 differed receivables or the receivables or any other debt arising during the course of business would amount to international transaction and relied on the decision of ITAT, Delhi in the case of Bechtel India Pvt. Ltd. in ITA No.6530/Del/2016 dated 16.5.2017. Further, with regard to the argument of the assessee that receivable is an independent transaction and that the allowance of working capital adjustment would take care of the impact of profitability, the DRP negated the claim of the assessee and relied on the decision of Hon'ble ITAT in the case of Bechtel (supra). Further, on the argument of Ld. A.R. that no interest could be imputed when the assessee has no finance cost the Tribunal negated the claim of the assessee placing reliance on ITAT Delhi in the case of Bechtel (supra). With regard to the hypothetical or notional interest, the DRP relied on the decision of ITAT Delhi in the case of Techbrook International Pvt. Ltd. in ITA No.240/Del/2015/Asst.year 2010-11 dated 6.7.2015 and rejected the assessee's objection. Placing reliance on the above decisions and the explanation to section 92B by Finance Act, 2012, the DRP held that the differed receivables would constitute international transaction and interest has to be bench

marked for delay beyond the allowable credit period and accordingly directed the A.O. to determine the ALP. However, the DRP was of the view that the adjustment proposed by the TPO @14.45% is unreasonable and directed the TPO to adopt the adjustment taking the domestic term deposit rates of SBI. Accordingly, the assessing officer made the adjustment of Rs.22,44,330/- towards the notional interest on outstanding amounts receivable from AE.

8. Aggrieved by the order of the A.O., the assessee is in appeal before us. During the appeal hearing, the Ld. A.R. argued that the transactions were entered into by the assessee at the end of the year and there was marginal delay in realizing the receivables from the A.E. The assessee has not engaged in the organized activity of realizing the receivables beyond the due date provided in the invoice. On couple of occasions, there was a delay, hence, argued that there is no case for charging notional interest. The assessee relied on the decision of Motherson Sumi Infotech & Designs Limited Vs. DCIT reported in (2018) 52 CCH 0122 Delhi. The Ld. A.R. argued that in the instant case, there is no reason to charge the notional interest since the same was not a regular practice of the assessee to make the delay of receivables.

9. On the other hand, the Ld. D.R. argued that the issue with regard to charging of notional interest on differed payment or differed receivables would constitute separate international transaction or not? was considered in detail by the DRP and after considering the decisions of the coordinate benches of the Tribunal in the case of Techbrook International Pvt. Ltd. and Bechtel Ltd., held that the delay in payment of differed receivables would constitute an international transaction, which require to be bench marked for ALP. The Ld.DR further argued that as per the insertion of explanation to 92B by Finance Act 2012 with retrospective effect the notional interest on differed receivables is an international transaction. The Ld. DRP also considered the issue of rate of interest on differed receivables and scaled down the rate interest adjustment proposed by the TPO. Therefore, argued that no further adjustment is required and addition made by the A.O. has to be upheld.

10. In the rejoinder, the Ld. A.R. submitted that the date of invoice in this case was 31.3.2013 and the assessment year involved is 2013-14, which shows that the transaction was entered at the end of the year. For the impugned assessment year the time limit allowed by the assessee would not fall due in the impugned Assessment Year and maturity date falls beyond the financial year ending the relevant AY,

hence even if it is presumed that notional interest required to be charged, the same should not be charged for the assessment year under consideration since notional interest does not accrue or arise in the year ending 31.3.2013.

11. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case on 3 occasions, there was a delay in receivables received by the assessee beyond the due date. The details of date of invoice, date of receipt of receivables are as under:

| Date of Invoice | Amount billed in INR | Dt. on which Amount received | Amount billed in INR | Credit Period | Credit Period allowed | Period of delay in days | Interest adjustment |
|---|---|---|---|---|---|---|---|
| 31 Mar 2013 | 645,113,554 | 02 Dec 2013 | 64,373,109 | 60 | 246 | 186 | 4,740,154 |
| 31 Mar 2013 | 8,924,356 | 02 May 2013 | 1,341,500 | 60 | 32 | - | - |
| 31 Mar 2013 | | 21 Aug 2013 | 7,582,856 | 60 | 143 | 83 | 249,164 |
| | | | | | | Total | 4,989,318 |

Since the invoices were raised on 31.3.2013 and credit period allowed was 60 days, we agree with the Ld. A.R's argument that the notional interest does not accrue or arise in the year under consideration, therefore, the addition made by the A.O. on account of notional interest is unsustainable as per the system of accounting

followed by the assessee. The assessee is following the mercantile system of accounting and the interest accrues only when the debt falls due and the same is remained unpaid. Since the debt do not fall due in the impugned Assessment year, we hold that the interest is neither accrued nor crystalised in the year under consideration. Accordingly, the same is deleted.

12. Even otherwise as observed from the order of the TPO on three occasions, there was a delay of receivables and pointed out by the Ld. A.R. the assessee is not indulged in any systematic or organized activity of allowing the undue credit to the AEs. The assessee relied on the decision of Motherson Sumi Infotech & Designs Limited Vs. DCIT reported in (2018) 52 CCH 0122 Delhi, and Hon'ble ITAT Delhi held as under:

> *"We have considered the rival submission and perused the material available on record. The assessee has given several reasons to explain that it being a business transaction, commercial consideration should have been considered by the authorities below. It was explained that the long term business relation with the customer and A.E. predicate waiver of this right. The interst is only associated with the loans and not services. It was explained that payments are received only after satisfaction of the customer and therefore, there was delay in receiving the payments. The assessee also explained before T.P. authorities below that average outstanding days for recovering sales dues was 57 days in the case of A.Es, whereas, in the case of non A.E., it was 66 days. It was also explained that non charging of interest from A.E.s as well as non A.E. on interest receivables was that it being predominantly involved in the provision of services to it's A.Es as well as third parties. The contention of the assessee have not been disputed by the authorities below. It may also be noted here that all international transactions were accepted by the TPO to be at arm's length, except, payment of interest*

*on loan. The authorities below have treated the delayed payment beyond 30 days as loans. In fact, no loan have been extended by the assessee. It was the amount 'due' against the A.Es as well as non A.E on which interest have been charged by considering the deemed loans. Therefore, the decision of ITAT, Delhi Bench in the case of M/s. Kusum Healthcare Pvt. Ltd., (supra) squarely apply in the case of the assessee, since the assessee earned significantly higher margin than the comparable companies, which have been accepted by the TPO, therefore, there was no justification to charge interest on outstanding. The decision of Hon'ble jurisdictional Delhi High Court in the case of Pr. CIT Vs. Kusum Healthcare Pvt. Ltd. (supra) squarely apply to the facts and circumstances of the case. The assessee also explained that there are similar delays in collection of outstanding receivables from both A.Es and non AEs which is due to business and commercial reasons. Therefore, there is uniformity in act of assessee in not charging interest from AEs and non AEs. Therefore, the decision of the Hon'ble Bombay High court in the case of CIT Vs. Indo American Jewellery Ltd. (supra) squarely apply to the facts of the case.*

*5.1 Considering the nature of business of assessee and the facts explained above, we are of the view that there was non justification for the authorities below to make adjustment to the income declared by assessee. Recently, the ITAT, I-2 Bench in the case of Terradata India Pvt. Ltd. Vs. ACIT in ITA No.7855/Del/2017 vide order dated 21st February, 2018, following the order in the case of same assessee, in which the decision of Hon'ble jurisdictional Delhi High Court in the case of Pr. CIT Vs. M/s. Kusum Healthcare Pvt. Ltd. (supra) have been relied upon, allowed the appeal of assessee on the similar ground. In view of the above discussion and in the light of various decisions above and facts of the case, we are of the view that the adjustment to the income of the assessee is wholly unjustified on account of interest on receivables. We, accordingly, set aside the orders of the authorities below and delete the entire addition."*

The department has not made out case of systematic planning of allowing the undue credit to the AE. Further Ld.AR relied on the decision of Pr.CIT vs B.C.Management Services (P) Ltd, (2018) 164 DTR (Del)299 where in Ho'ble Delhi High court held that delayed payment made by AE cannot be treated as part of income. For ready

reference we extract the relevant part of the order of the Hon'ble Delhi High court which reads as under:

> *"9. With respect to the treatment of notional interest by the TPO/AO, the Court is of the opinion that no question of law arises. In an identical situation, in Bechtel India (P.) Ltd. (supra), the Court had held that such notional income on account of delayed payment made by the AO cannot be treated as part of the income and made the subject matter of the adjustments. The question no. 2 and 3 therefore does not arise for consideration."*

While rendering the judgement the Hon'ble High court has considered the decision in the case of Bechtel India (P) ltd. Therefore, placing reliance on the decision of Motherson Sumi Infotech & Designs Limited Vs. DCIT (supra) and the decision in the case of B.C.Management services (P) Ltd we hold that the revenue has not made out case of disallowance of notional interest on delayed payments and accordingly, we set aside the orders of the authorities below and delete the addition. The appeal of the assessee on this ground is allowed.

13. Ground No.3 is related to the sponsorship expenses of Rs. 10,68,138/-. During the course of assessment proceedings, the A.O. found that the assessee has claimed Rs.10,68,138/- as a sponsorship expenses. Since there was no nexus between the nature of expenses incurred and the business of the assessee company, the A.O. proposed to disallow the expenditure under the head sponsorship fee amounting to Rs.10,68,138/-. Against the draft assessment order,

the assessee filed objections before the DRP and the Ld. DRP held that these expenses cannot be said to be incurred wholly and exclusively for the purpose of business, accordingly, upheld the action of the A.O. The A.O. passed the assessment order making the addition of Rs. 10,68,138/- relating to sponsorship expenses.

14. Aggrieved by the order of the A.O., the assessee is in appeal before us. During the appeal hearing, the Ld. A.R. taken our attention to the document of objections filed before the DRP in form No.35A. In annexure 5, the assessee has furnished the details of sponsorship expenses and submitted its explanation as under:

*"During the financial year relevant to assessment year under consideration, the Assessee has incurred an amount of INR 10,68,138/- incurred towards sponsorship. The break-up of such expenses is summarized in the table below:*

| *Sl.No.* | *Name of Party* | *Nature of Event* | *Amount* |
|---|---|---|---|
| *1* | *The Financial Times Limited* | *Sponsorship fee paid for conducting the 2nd Financial Times – Yes Bank International Banking Summit held in Mumbai* | *9,06,338* |
| *2* | *Young Indian National Summit* | *Acting as co-sponsor for conducting 9th Young Indian National Summit held in Delhi* | *1,61,800* |
| | *Total* | | *10,68,138* |

- *The Ld. AO disallowed the said expenses on ground that there is no nexus between such expenditure and the business of the assessee.*
- *In this regard, the Assessee would like to submit that said expenses were incurred to sponsor various events that have taken place wherein hoarding of*

*the assessee are displayed, the senior management people of the assessee are invited to address the forum. It may be noted that the advertisements through sponsorship of events are incidental to the business of assessee to promote create public awareness of the company and, therefore, such expenditures are incidental to the business and have been incurred to promote the Company. Further, now-a-days it is common to sponsor some events to advertise the products of the company or the company's corporate image itself. Therefore, such expenditure should be allowed as revenue expenditure. The Courts and Tribunals have held the same on various occasions. In this regard, reliance can be placed on following* ***decisions:***

***JCIT—vs.- ITC Limited (2008) 112 lTD 57(KOL.)(SB)***

*The Hon'ble Kolkata Tribunal (Special Bench) held that the expenditure incurred by assessee on sponsorship of events/sports for purpose of advertising its product/corporate image is allowable as revenue expenditure. Relevant extract is reproduced below:*

*30. We have given our careful consideration to the rival submissions made before us and have perused the orders of tax authorities. We have also considered the paper book filed by the Id. counsel for the assessee and the case laws relied upon. In this case, the Assessing Officer has disallowed the expenditure observing that these are not incidental to the business of the assessee. However, there is no discussion about the nature of expenditure by the Assessing Officer, whereas the assessee has submitted details in respect of expenditure incurred by it for sponsorship of events. Now-a-days it is common to sponsor some sports or events to advertise the products of the company or the company's corporate image itself it is not in dispute that the assessee had also incurred the expenditure by sponsorship of events/sports for the purpose of advertising its product/corporate image. Such expenditure is the revenue expenditure incurred jot the purpose of business. The Assessing Officer has not given any cogent reason for disallowing such expenditure. Hon'ble Delhi High Court in the case of Delhi Cloth & General Mills Co. (supra) has upheld the order of the Tribunal allowing the expenditure on Football tournament incurred by the assessee. No contrary decision is referred to by the revenue. in view of the above, considering the facts of the case and the arguments of both the sides, in our opinion, the CIT(A) has rightly deleted the disallowance of expenditure on sponsorship of the events made by the Assessing Officer. We uphold the order of the CIT(A) in this regard and reject ground No. 5 of the revenue appeal.*

*Torrent Power Limited —vs.- DCIT 120131 33 taxmann.com 287 (Ahmedabad Trib.)*

*The Hon'ble Tribunal held that the amount paid by assessee as contribution for construction of collector's office was allowable as business expenditure.*

*CIT -vs.- Delhi Cloth & General Mills Co. 119991 240 ITR 9 (Delhi)*

*The Hon'ble Delhi High Court in this case held that expenditure incurred by assessee company for running a football tournament is allowable as revenue expenditure.*

*CIT -vs.- Lake Place Hotels & Motels (P) Ltd. 120071 293 ITR 281 (Raj)*

*The Hon'ble High Court affirmed the view of Tribunal wherein it was held that expenses incurred by the assessee for sponsoring the trophy had the ingredient of advertisement of its business and, consequently, the assessees claim to deduction as expenses wholly and exclusively incurred for the purpose of its business is justified.*

*In view of the above, the Assessee would like to submit that the disallowance made by Ld. A.O. is without considering the facts and is purely based on assumption/presumptions/conjectures and surmises and hence should be deleted."*

15. During the appeal hearing the Ld.AR argued that expenses were incurred for the purpose of business and reiterated the submissions made before the DRP. On the other hand, the Ld. D.R. relied on the orders of the authorities below and supported the addition made by the A.O.

16. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee has incurred the amount of Rs.10,68,138/- towards sponsorship expenses and genuineness of expenses was not disputed by the A.O. As per the details furnished by the assessee the sponsorship fee was paid to Financial Times and for conducting the Second Financial Times -Yes Bank International Banking Summit held in Mumbai and Young Indian National Summit held in Delhi and submitted in the events that are taken place, the hoardings of the assessee are

displayed, the senior management people of the assessee were invited to address the forum. Therefore, argued that the expenditure was incurred to promote the public awareness of the company, hence the expenditure is in the nature of business expenditure and requested to allow the same.

17. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee has incurred the expenses for conducting various events that have taken place as mentioned above, to promote the public awareness of the company and the expenditure was incidental to the assessee's business. Merely because the assessee company is engaged in Power and Infrastructure, the argument of the assessee that such an event would promote the public awareness would not be brushed aside. It is common to sponsor some events to advertise the products of the company or to build the corporate image. The Young Indian National Summit held in Delhi would create awareness and promote the assessee's company among the public. There is no need to have direct nexus of the assessee's business with the sponsorship linked events. Even indirect benefit is sufficient to sponsor the sports or social or economic events. We are of the considered view that the social events, sports events and the business events which involves the participation

of various institutions would have direct or indirect impact on the assessee's business and the expenditure incurred on such events is business expenditure. The case laws relied upon by the assessee in the case of JCIT Vs. ITC Limited 112 ITD 57 (Kolkata) (Special Bench) and CIT Vs.Lake Place Hotels and Motors Pvt. Ltd. 293 ITR 281 (Raj) have also taken the similar view. Therefore, we hold that the sponsorship amount is a business expenditure, which required to be allowed as deduction and accordingly, we delete the addition made by the A.O. and allow the appeal of the assessee.

18. Ground No.4 is related to the legal and professional charges of Rs.2,41,47,303/-. During the assessment proceedings, the A.O. found that the assessee had incurred legal and professional charges as under:

| *Name of the party* | *Nature of expenditure* | *Amount in Rs.* |
|---|---|---|
| *AECOM India (P) Ltd.* | *Fee for conducting feasibility studies for Oka Port* | *98,47,869* |
| *Beckett Rankine India P Ltd.* | *For due diligence of Okha port* | *32,67,800* |
| *Coastal Marine Construction & Engineering Ltd.* | *Geotechnical studies for development of Okha port* | *81,16,901* |
| *Deloitte touché Tohmatsu India P Ltd.* | *Traffic study for development of Okha port* | *19,30,250* |
| *M.K. Soil Testing Laboratory* | *Field work of soil testing for development of Okha port* | *9,84,483* |
| | *Total* | *2,41,47,303* |

19. A.O. was of the view that the expenditure is capital in nature, hence, proposed to disallow the same. Against the proposal for disallowance of expenditure the assessee filed objections before the DRP u/s 144C(2) of the Act. The Ld. DRP held that the expenses cannot be said to be incurred in relation to or for deriving the income admitted in its P&L account and do not partake the character of revenue expenditure. Therefore, justified the proposed disallowance of the A.O., accordingly, the A.O. passed the assessment order making the addition of Rs. 2,41,47,303/-.

20. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The case of the assessee is the expenditure incurred in this case is revenue expenditure, which required to be allowed, since the expenses were incurred for conducting feasibility studies, due diligence, geo technical studies for development of Okha Port and the Study for Development report and field work of soil testing. The assessee argued that the assessee is expanding its business activities and for the purpose of expansion the assessee had incur the expenses, which are revenue nature. The Ld. A.R. further submitted that on the similar facts and circumstances the Hon'ble Tribunal of this bench allowed the appeal of the assessee and accordingly, the issue squarely covered by the ITAT's

order in the case of assessee in ITA No.292/Vizag/2014 dated 5.5.2017 for the assessment year 2010-11.The ld DR supported the orders of the lower authorities.

21. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. On the similar facts, in the assessee's own case, for the AY 2010-11, the Tribunal has allowed the legal and professional charges, feasibility expenses after holding that the expenditure is wholly incurred for the purpose of business. For ready reference, we extract relevant part of the order of this Tribunal (supra) which reads as under:

> *"14. The assessee is a company engaged in the business of operation and maintenance of power plants. From the objects of the Memorandum of Association, we find that the assessee is carrying on various activities such as promoter, sponsor, developer, advisor, operator or otherwise, alone or in consortium with others, within or outside the group companies and to do all such acts as are required to participate float, or acquire through bidding or negotiate process for promoting, developing implementing and operations all kinds of projects such as infrastructure and also undertake development execute and implement various projects for itself or for others including subsidiaries.*
>
> *15. The assessee to carry out the above activities has to indentify the project, thereafter, conduct feasibility study of the project. Further for that purpose assessee has to consult various technical experts such as HOK International Ltd., Zen Energy Consultants Pvt. Ltd. and Consulting Engineers Group Ltd. etc and after obtaining the reports, it has to participate in the bid. Further for this purpose, assessee has incurred legal and professional fees. The Assessing Officer and ld. CIT(A) were of the opinion that it is capital in nature. The ld. CIT(A) has observed that the expenditure incurred by the assessee prior to participation in the bid and allotment of project to enable its subsidiaries/associate companies to bid in the projects. The assessee do not bid for the project, therefore, the ld. CIT(A) was of the opinion that it had not incurred for the purpose of business, but genuineness of the expenditure incurred by the assessee has not been doubted by the authorities below. It is*

*also a fact that assessee has incurred these expenditure. From the paper book at page No. 26, it is clear that the assessee has received various fees for services rendered, particularly, fee for rendering services, reimbursement of expenses, payment for services rendered. The assessee has incurred the above expenditure on behalf of its subsidiaries, which has been received from its subsidiaries for all kinds of services rendered. Therefore, the ld.CIT(A) is not correct in saying that the expenditure incurred by the assessee is not for the business of the assessee and it is for the subsidiaries. The ld.CIT(A) raised one more objection to disallow these expenditure that the subsidiaries or its associate companies may or may not get the project, but the assessee undertakes technical studies for the business purpose, therefore, it cannot be allowed. We find that the ld. CIT(A) not correct in holding that the expenditure incurred by the assessee cannot be allowed for following reasons. The business of the assessee is that to identify the project and to study the feasibility of the project by obtaining various reports from the technical experts and to participate in the bid. If assessee is successful in the bid, it may keep project or may allocate it to subsidiaries or others. But it is not sure that all the time bid is successful, whether bid is successful or not, the assessee has to incur the expenditure in respect of legal and professional fee. The assessee undertakes project studies through various technical experts and has to decide whether project is feasible or not? The assessee has come to a conclusion that the project is feasible, it participates in bid/tender. Therefore, the expenditure incurred by the assessee is very much necessary for the purpose of carrying out the business, therefore, it has to be allowed. The ld.CIT(A) also observed that the expenses incurred by the assessee is not relating to deriving income admitted in the profit & loss account. As it already mentioned above, the assessee is rendering services to the subsidiaries and incurring various expenses and also receiving income, towards rendering services, reimbursement of expenses, payments for services rendered, therefore, ld. CIT(A) is not correct in saying that there is no relation between the expenditure incurred and the income of the assessee. After careful consideration of the business activities carried out by the assessee and the expenses incurred by the assessee, we are of the opinion that the expenditure incurred by the assessee is wholly and exclusively for the purpose of business and it has to be allowed under section 37 of the Act.*

*16. So far as case-laws relied upon by the learned counsel for the assessee is concerned, in the case of* ***Tamilnadu Industrial Development Corporation Ltd.,*** *(supra), the Hon'ble Madras High Court has observed that the assessee corporation having been formed with the main object to finance and promote industrial development through partnership with private enterprises, pre-project expenses written off by the assessee in respect of projects being promoted by it are allowable as deduction.*

*17. In the case of* ***Kerala State Industrial Development Corporation Ltd****. (supra) the Hon'ble Kerala High Court has held that the expenditure incurred in investigation, research and feasibility studies are only revenue expenditure and not capital expenditure. In the case of Tata Robins Fraser Ltd. (supra), the Hon'ble Jharkhand High Court has held that if the*

*expenditure has been incurred for setting up a new unit which was subsequently abandoned, then the aforesaid expenditure will be treated as revenue in nature as no new industrial asset came in existence and the matching principles referred by the ld.CIT(A) have no application.*

*18. Keeping in view of the above and by considering the facts and circumstances of the case and also by following the judicial precedents, we are of the opinion that the expenditure incurred by the assessee is wholly and exclusively for the purpose of business and, therefore, it has to be allowed under section 37 of the Act."*

22. Since the expenses incurred are similar nature respectfully following the view taken by this Tribunal, we hold that the expenditure incurred for the purpose of Okha Project in connection with the field study as discussed above is a business expenditure and allowable u/s 37(1) of I.T.Act. Accordingly, we set aside the orders of the authorities below and allow the appeal of the assessee.

23. Ground No.5 is related to the disallowance u/s 14A of the Act. The assessee in this case filed a return of income disallowing the expenditure u/s 14A of the Act as under:

*Add: Disallowance u/s 14A (Refer {17(1)} of Form 3CD):*

| | |
|---|---|
| *- Payment made to Pinakini for* | |
| *Investment Maintenance charges* | *- 953,512* |
| *- Interest expenditure* | *- 493,133,474* |
| *- Processing fees paid for obtaining loans* | *- 27,633,193* |

24. Subsequently, the assessee filed a letter during the pendency of assessment proceedings stating that the assessee has no exempt

income earned during the year, hence, no disallowance is called for u/s 14A of the Act. The assessee also relied on various judicial pronouncements as under:

> *Rainy Investment Pvt. Ltd. Vs. ACIT (ITA No.549/Mum/2011)(Mumbai ITAT)*
>
> *T&T Motors Limited Vs. ACIT (ITA No.5096/Del/2011)(Delhi ITAT)*
>
> *ITO vs. M/s. LGW Limited (ITA No.267/Kol/2013) (Kolkata ITAT)*
>
> *Cheminvest Limited Vs. CIT (ITA 749/Del/2014)(Delhi HC)*
>
> *CIT Vs. Oriental Structural Engineers (P) Ltd. ITA No.605/Del/2012) (Delhi HC)*
>
> *Anriya Project Management Services Pvt. Ltd. Vs. DCIT (ITA No.1799/Bang/2013)*

25. The assessing Officer passed the assessment order without considering the request of the assessee. Aggrieved by the draft assessment of the A.O., the assessee filed objection before the DRP. The DRP rejected the objection of the assessee stating that the assessee on its own made the disallowance u/s 14A of the Act and offered to tax, but during the assessment proceedings, the assessee sought to withdraw the income offered otherwise than by revised return which is impermissible. The A.O. would not be in a position to entertain a revised claim to reduce the income offered to tax without revised return. Accordingly, rejected the objection of the assessee, and consequent to the DRP's order, the A.O. passed the assessment order without allowing the request of the assessee.

26. Aggrieved by the order of the A.O., the assessee is in appeal before this Tribunal.

27. During the appeal hearing, the Ld. A.R. argued that the assessee did not get any exempt income during the year under consideration. Hence, no expenditure required to be disallowed as per the judicial precedents. During the pendency of assessment proceedings, the assessee has made the claim before the A.O. but the A.O. neither considered the request nor did he give any reason for rejecting the assessee's claim. The Ld. A.R. argued that though the assessing officer is not permitted to entertain the claim of the assessee other than by revised return, Appellate authorities are not barred from taking up the fresh claim made by the assessee during the appellate proceedings. The assessee relied on the decision of DCIT Vs. India Glycols Ltd. (2017) (Kolkata Tribunal) 51 CCH 0089 where in ITAT held with regard to the claim of the assessee u/s 80IC of the Act, that the appellate authorities are not barred from entertaining the fresh claim during the appellate proceedings. For the sake of clarity, we extract relevant part of the order of the Hon'ble Kolkata Tribunal in para No.5 and 8 to 8.1 which reads as under:

> *"8. Having heard Ld. D.R. and also gone through the orders of the Authorities Below and the case laws relied upon before us by the assessee. The issue in the instant case before us is that assessee has*

*claimed deduction u/s 80IC of the Act by way of filing a letter to A.O. at the time of assessment proceedings but A.O. rejected the same on the ground that he cannot entertain the claim of deduction as the assessee failed to claim the same in its return of income. However, Ld. CIT(A) observed that the appellant authority are entitled to admit the claim of assessee which was not made in the income tax return.*

*Now the limited issue before us for our adjudication arises so as to whether the assessee can make a fresh claim during the assessment proceedings which was not claimed in the return of income. On this issue the law is fairly settled by the judgement of Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) wherein it was held as under:-*

*:4. The decision in question is that the power of the Tribunal under section 254 of the income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income tax Appellate Tribunal under section 254 of the Income tax Act, 1961. There shall be no order as to costs.*

*From the above precedent, we find that Hon'ble Supreme court has prohibited the Assessing Officer to entertain any claim/deduction of the assessee otherwise than claiming in the return/revised return. However, this restriction was not imposed by Hon'ble Supreme Court in the case of appellant authority. Thus, it can be concluded that the appellant authority are very much entitled to admit the fresh claim of the assessee which was not made in the income tax return.*

*8.1 We also find that assessee is entitled to raise additional claim which was not made in its return of income in terms of judgement of Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. (supra) where in it was held that the additional claim of assessee can be admitted by the appellant authority though the same was not made in the income tax return. In the instant case, the deduction was omitted to be claimed by the assessee in its income tax return filed electronically inadvertently. The A.O. has not brought anything on record showing any infirmity in the amount of deduction claim by the assessee by way of filing a separate letter during the course of assessment proceedings. In the background of the above discussions and precedent we do not find any infirmity in the order of Ld. CIT(A0 and accordingly we uphold the same. This ground of Revenue's appeal is dismissed."*

28. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below as well

as the case laws relied upon by the assessee. In this case, the assessee disallowed the expenditure relatable to u/s 14A of the Act on it's own, but there was no exempt income earned by the assessee during the year. The assessee is of the view that if there is no exempt income no disallowance is called for u/s 14A of the Act. The assessee relied on various case laws in the submissions made before the A.O. The assessing officer has neither examined the issue nor given any findings on the facts and the legal position of the assessee's claim. It is settled issue that the assessee required to pay the tax on true and correct income. Though A.O. is not permitted to entertain the additional claim of the assessee without the revised return of income, the appellate authorities are not barred to entertain the additional claim of the assessee during the appellate proceedings. This view is supported by the case laws relied upon by the assessee as well as the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. Vs. CIT 284 ITR 323. In the assessee's case the assessee has made disallowance of expenditure u/s 14A of the Act, but there was no exempt income as claimed by the assessee. Therefore, in the interest of justice, we are of the view that the issue required to be remitted back to the file of the A.O. to consider the disallowance u/s 14A of the Act on the facts and merits of the case. Accordingly, we remit the

matter back to the file of the A.O. to consider the issue afresh on merits. The appeal filed by the assessee on this ground is allowed for statistical purposes.

29. Ground No.6 is related to charging of interest u/s 234 B &C, which is consequential in nature and mandatory. Hence, this ground of appeal filed by the assessee is dismissed.

30. In the result, the appeal filed by the assessee is partly allowed.

The above order was pronounced in the open court on 18th May'18.

| Sd/- | Sd/- |
|---|---|
| **(वी. दुर्गाराव)** | **(डि.एस. सुन्दर सिंह)** |
| **(V. DURGA RAO)** | **(D.S. SUNDER SINGH)** |
| **न्यायिक सदस्य/JUDICIAL MEMBER** | **लेखा सदस्य/ACCOUNTANT MEMBER** |

विशाखापटणम /Visakhapatnam:
दिनांक /Dated : 18.05.2018
VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – GVK Power & Infrastructure Limited, 5-48, GVK Power Plant, Jegurupadu, Kadiyam Mandal, East Godavari, Andhra Pradesh-533 126
2. प्रत्यार्थी / The Respondent – The ACIT, Circle-2(1),Rajamahendravaram
3. The Office of the Dispute Resolution Panel-1, Bengaloru-560034.
4. आयकर आयुक्त (अपील) / The CIT (A), Visakhapatnam
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम **/**
   DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM