IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI C.N. PRASAD, JM

ITA No.8536/Mum/2011
ITA No. 8537/Mum/2011
(**Assessment Year :2007-08 & 2008-09**)

ACIT 23(1), Mumbai	Vs.	M/s. Nathpa Jhakri Joint Venture Hincon House LBS Marg, Vikhroli (W) Mumbai – 400 083
PAN/GIR No.		**AAAAN1127C**
Appellant)	..	**Respondent**)

ITA No.7311/Mum/2013
(**Assessment Year :2009-10**)

ITO 23(1)(1), Mumbai	Vs.	M/s. Nathpa Jhakri Joint Venture Hincon House LBS Marg, Vikhroli (W) Mumbai – 400 083
PAN/GIR No.		**AAAAN1127C**
Appellant)	..	**Respondent**)

ITA No.3249/Mum/2014
(**Assessment Year :2010-11**)

ACIT 23(1), Mumbai	Vs.	M/s. Nathpa Jhakri Joint Venture Hincon House LBS Marg, Vikhroli (W) Mumbai – 400 083
PAN/GIR No.		**AAAAN1127C**
Appellant)	..	**Respondent**)

ITA No.1273/Mum/2015
(**Assessment Year :2011-12**)

ACIT 29(2), Mumbai	Vs.	M/s. Nathpa Jhakri Joint Venture Hincon House LBS Marg, Vikhroli (W) Mumbai – 400 083
PAN/GIR No.		**AAAAN1127C**
Appellant)	..	**Respondent**)

ITA No.8527/Mum/2011 & 8528/Mum/2011
(**Assessment Year :2007-08 &2008-09**)

M/s. Nathpa Jhakri Joint Venture Hincon House LBS Marg, Vikhroli (W) Mumbai – 400 083	Vs.	DCIT – 23(1) Mumbai
PAN:AAAAN1127C		
Appellant)	..	**Respondent**)

Revenue by	Shri. M.V. Rajguru
Assessee by	Shri H.P. Mahajan
Date of Hearing	**12/04/2018**
Date of Pronouncement	**31/05/2018**

आदेश / O R D E R

PER BENCH:

These are the appeals filed by assessee and revenue against the order of CIT(A)-33, Mumbai for the A.Y.2007-08 to 2011-12 in the matter of order passed u/s.143(3) of the Income Tax Act, 1961.

2. At the outset, learned AR placed on record orders of Tribunal in assessee's own case wherein most of the grounds were covered in favour of assessee. We observe that common grounds have been taken by assessee and revenue in all the years under consideration

3. The common grounds have been taken by the revenue in all the years under consideration are as under:-

- *Disallowance u/s 40(a)(i) of reimbursement of Bank Guarantee Commission paid to nonresident*

- *Treatment of Interest Income as Income from Business*
- *Allowing as Revenue expenses amount incurred by assessee without appreciating that assessee has not started business & expenses ought to be capitalised.*
- *Allowance of claim for exclusion of deemed export benefits*
- *Adhoc Disallowance of 20% of travelling expenes*

4. Rival contentions have been heard and record perused. Facts in brief are that assessee, M/s. Nathpa Jhakri Joint Venture was set up under Joint Venture Agreement between M/s. Hindustan Construction Co. Ltd., India and M/s. ImpregiloSpA of Italy for the purpose of executing Civil Works at Nathpajhakri Hydroelectric Power Project, of Satlujal Vidyut Nigam Ltd.,(formerly Nathpajhakri Power Corporation (NJPC) of Government of Himachal Pradesh.

5. As in earlier years, the assessee made certain payments, principally to the nonresident JV partner IGL and another Group concern without deducting tax at source u/s 195. As in the earlier years the AO disallowed the entire amount of such expenditure u/s 40a (i). The CIT(A) allowed relief following orders for earlier years.

6. Ground Nos. 1-5 in the A.Y.2007-08 are same as Ground No. 1-5 for AY 2006-07 concerning disallowance u/s 40a(i)

7. Grievance of Revenue relates to deleting disallowance u/s.40(a)(i) in respect of reimbursement of bank guarantee commission paid to non-residents. At the outset, learned AR placed on record, the order of the Tribunal in assessee's own case for the A.Y.2003-04 which was followed

by the Tribunal in subsequent years, wherein issue has been decided in favour of the assessee.

8. We had carefully gone through the orders of the Tribunal for the A.Y.2003-04 and found that disallowance of reimbursement of bank guarantee commission paid to non-residents was deleted by the Tribunal after having a detailed finding and the same order has been followed by the Tribunal in the subsequent years. Copies of the orders are placed at page 1-34 of the paper book. Precise observation of the Tribunal was as under:-

> *"As the reimbursement of expenses is not taxable in the hands of payee, there is no point in compelling the assessee to still go ahead with the deduction of tax at source. Ex consequenti the impugned order on this issue is set aside. This ground is allowed."*

9. This issue of non-deduction of tax at source from similar payments made to nonresidents has been decided in favor of the assessee right from AY 2003-04.

10. In the order for AY 2006-07 in ITA 6187/M/2011 the Tribunal has dismissed the Revenue's appeal in Para 3, 4 & 5 which are reproduced below:

> *"Before us, Ld Counsel for the assessee submitted that identical issues were the subject matter of adjudication by the Tribunal in the assessee's own case for the AY 2004-05 vide ITA Nos 260 and 459/M/2008, copy of the said order dated 30.04.2014 is placed on record. Bringing our attention to Ground No. 1 of the assessee's appeal for the AY 2004-05, which was discussed by the Tribunal vide paras 11 to 15 of the said Tribunal's Order (supra), Ld Counsel for the assessee mentioned that the identical disallowances/additions were made by the AO in the said AY 2004-*

05 and the Tribunal granted relief and deleted the addition as per the discussion given in Para 15 of the said Tribunal's order (supra) After hearing both the parties, we have perused the said order of the Tribunal dated 30.04.2014 (supra), wherein one of us (AM) is a party to the said order, and find para 15 of the said order is relevant in this regard and the same is extracted as follows 15. On hearing both the parties, we are of the opinion that the decision of the Tribunal for the AY 2003-04 was taken basing on the comparing facts of the present case. It is not appropriate for us to go into the errors in the order of the Tribunal when the same were not removed through Miscellaneous Application u/s 254 of the Act. Now the matter is seized up by the Hon'ble High Court by way of admitting appeal of the Revenue. Therefore, the order of the Tribunal for the AY 2003-2004 will have a binding value . In these circumstances, we are of the opinion that the order of the CIT{A) is required to be reversed on the issue of disallowance of the Rs. 1,98,64,847 and the assessee gets relief accordingly. Thus, ground no. 1 raised by the assessee is allowed."

11. Learned DR fairly conceded that issue is covered in favour of the assessee. Respectfully following the same, we confirm the action of CIT(A) on this issue in all the years under consideration.

12. Next grievance of Revenue relates to treatment of interest income as 'income from business'. We have considered rival contentions and found from record that interest income was earned on FD kept with banks. The assessee is a single project joint venture. The purpose of which is execution of the contract for civil work of Contract Lot 2.2 of the Nathpa Jhakri Hydroelectric Project. Although during the year under consideration, the joint venture was not executing any construction activity, as such, the existence venture is necessary in order for meeting the obligations to the client under the agreement. The joint venture is also involved in arbitration proceedings with the client & certain

contractual matters were also pending before the Honorable Delhi High Court. In this scenario, the idle funds available with the joint venture which are out of erstwhile contract receipts are invested in Fixed Deposits and interest is earned thereon. We found that this interest mainly arose on account of fixed deposits kept with banks. These funds were so invested pending final resolution of contractual disputes and completion of the contract. Since the funds were found to be surplus pending final resolution of disputes the AO had rightly assessed interest income under the head Income from Other sources. This ground of the Department is therefore allowed in all the years under consideration.

13. Next grievance of Revenue relates to allowing certain expenditure as revenue expenses incurred by the assessee during the course of business. We have considered rival contentions and found that in A.Y.2005-06 on substantially identical facts AO decided the matter being sent back by ITAT following the order for A.Y.2004-05 held that business was being carried on, accordingly allowed the same as 'revenue expenses'. We also observe that the main expenses incurred during the year was on account of bank guarantee charges, travelling and conveyance of professionals and professional fees paid for the arbitration proceedings. Various performance guarantees and retention guarantees which would have expired in July 2003 were further extended only at the behest of the client. This plea of the assessee is supported with the documents attached with the written submission at page 34-36 which is a

copy of undertaking executed on 09/07/2003 given by the assessee to SJVNL regarding performance of contract by which the performance under the contract is extended till the resolution of all the pending disputes between the parties. The assessee an Association of Persons, is a project specific joint venture between Hindustan Construction Company Limited and Impregilo (IPGL, for short) SPA, Italy formed to execute the contract for construction of Headrace Tunnel and Pressure Shaft at Rampur, Busher for SJVNL. During the course of the execution of the project certain disputes arose between the SJVN and assessee joint venture (NJJV) regarding the Extension of Time and on account of cost overrun. It is general practice in the construction industry that unresolved differences arising during the execution period, is never pressed for keeping in mind the overall interest/progress of the project. On completion of the projects, such unresolved issues are taken by either parties. The assessee has outstanding performance bank guarantees and retention bank guarantees of Rs. 125.17 crores issued to SJVN. The expenses incurred were on account of keeping the bonds and guarantees alive pending resolution of the disputes. The claims raised by the assessee joint venture and counter claim raised by project authority against NJJV, were pending before the Arbitrators. By keeping alive the Performance Guarantee and Retention Guarantee the assessee has continued to expose itself to financial and other obligations under contract, a significant feature of the project business carried on by the

assessee. Expenditure on traveling and conveyance, professional charges was incurred in a context of matters pertaining to arbitration. These expenditures are all incurred in maintaining an establishment to meet its subsisting obligations under the contract arising in the above context. Various issues relating to the contract, its execution, claims and counter claims were at the time lying before the Board of Arbitrators for adjudication and were being actively pursued by the assessee. The issues and disputes in question are of substantiate nature and have a direct co-relation with the execution of the project. Thus taking into account the totality of the facts of the case, the assessee was very much carrying on business during the years under consideration. During these years expenditure was incurred mainly in respect of the bank guarantee charges & professional charges, traveling and conveyance for professionals. From the record we find that in AY 2004-05, AY 2005-06 and AY 2006-07 the Tribunal has restored this issue to the file of the Assessing Officer for fresh adjudication, in AY 2005-06 the AO by his order dated 16.12.2016 passed u/s 143(3) r/w 254 has held that the assessee was in fact carrying on business and has allowed the entire business expenditure incurred by the assessee. The AO has thus relied on the maintenance certificate issued by SJVN on 18.3.2011 and the assessment orders passed by the AO for AY 2010-11 & 2011-12 wherein it has been held that the assessee continued to carry on business and claim for expenditure was allowed. From the said certificate it is clear that the assessee continued to be liable

for completion of contractual obligations which obligations came to an end only during the assessment year 2011-12. From this certificate it is seen that the contractual obligations of the assessee came to an end only on 18/3/2011. The assessee is a single project joint venture and since as per the final maintenance certificate it's obligations under the contract continued till issuance of said final maintenance it should be deemed to carrying on business till the issuance of said certificate as held by the AO while giving effect to the order of the Tribunal for AY 2005-06. We found that AO has passed the assessment orders u/s 143(3), giving effect to order of Tribunal and the AO himself has accepted the factual position that the business of the assessee was continuing and has assessed the income of the assessee under the head Business income. The assessee being a single project joint venture it cannot be said that the assessee was not carrying on business in some intervening years but in business in earlier and later years. Earning of income during the year is not a prerequisite for coming to the conclusion that business is in fact carried on during the year. Accordingly the assessee is very much carrying on business in the years under appeal and the Ground raised by the Department is dismissed in all the years under consideration.

14. In the A.Y.2011-12, department is aggrieved by the action of CIT(A) allowing claim of exclusion of deemed export business benefits. We have considered rival contentions The facts in this regard are that the

Assessee was engaged in the execution of a civil construction project for the Sutlej Jal Vidyut Nigam (earlier known as Nathpa Jhakri Power Corporation Limited). his was a World Bank aided project enjoying the category of a deemed export. The project started in 1993 and was substantially completed on 08.07.2002. The assessee was following the completed contract method of accounting which was accepted by the Department in the past and accordingly on substantial completion of the project in the year ended March 31 2003 the assessee accounted for the entire income from this project which till then was being carried forward as Work in Progress. The AO brought the said sum to tax in AY 2003-04. This addition was confirmed both by the CIT (A) and by the Tribunal (ITA No. 35/Mum/2007). The CIT(A) has elaborately dealt with the issue and decided the issue in favor of the assessee the operating part of his order being as under:

> *"It is undisputed that the entire amount of Rs. 12.83 Crores has already been brought to tax in the assessment for AY 2003-04 which has also been confirmed by the IT AT, although the assessee has preferred appeal in the High Court which is still pending. This issues has therefore to be decided on the basis of decision prevailing as on date, which is that the entire amount of claim of Rs. 12.83 Crores has been subjected to tax in A Y 2003-04 and has also been paid up by the assessee. Taxing the same again in AY 2011-12 would certainty not be lawful. Out of the total claim of Rs. 12,83,51,428/-, a sum of Rs. 54,97,774/- has already been claimed as a deduction and allowed in AY 2010-11. The remaining amount of Rs. 12,28,53,654/- is claimed in AY 2011-12, comprising of three components, as per table above. The facts and the allowability*

of each of the three components have been sufficiently demonstrated by the assessee*. In respect of the claim of Rs. 7,36,60,300/- for which the claim was received by the assessee during the year and credited to the P&L A/c, exclusion of this amount is claimed in return to avoid double taxation as it is already taxed in AY 2003-04. The rejection of the claim for Rs. 2,66,33,297/- is claimed as deduction as Form C were received by the assessee during this year Since income to this extent is already taxed in A Y 2003-04, the rejection of the claim amounts to a loss, which is claimed as a deduction. Further, since claim to the extent of Rs.* 2,25,60,057/- *has not been made yet and the JV has reached its finality and conclusion, the same is claimed as a loss as this amount has already been brought to tax in A Y 2003-04.*

5.16 In view of the all the above, in my considered opinion, the assessee is eligible to deduction to the extent of Rs. 72,28,53,654/- *during the AY 2011-12, as claimed. Hence Grounds No. 2 & 3 are allowed, subject however to the decision of the Hon'ble Bombay High Court in appeal filed by the assessee against order of the ITAT in AY 2003-04. To the extent of relief allowed in that decision, necessary reversal should be made from the deduction allowed herewith."*

15. As the deemed export benefits were taxed in the A.Y.2003-04 on accrual basis. There is no infirmity in the order of CIT(A) for excluding the deemed export benefits which have already been taxed in the A.Y.2003-04 and Tribunal have also confirmed the action of the AO. Accordingly, there is no infirmity in the order of CIT(A) for excluding deemed export business benefits.

16. In the A.Y.2011-12, department is also aggrieved for deleting the disallowance of 20% on travelling expenses. We found that all the expenses are primarily incurred in connection with the arbitration

proceedings and other pending litigations. Keeping in view the totality of facts and circumstances of the case, vis-à-vis nature of expenses and the findings given by CIT(A), we do not find any infirmity in the order for restricting disallowance to 20% of expenses.

17. In the A.Y.2007-08 and 2008-09, assessee is aggrieved for disallowance made by AO u/s.40(a)(i) in respect of fee for included services within the meaning of double tax avoidance agreement between India and USA.

18. We have heard the rival contentions. From the record we found that in the A.Y.2007-08, assessee has made payment to following two parties.

- J.R. Knowles, USA
- S.A. Healy & Co., USA

19. These entities had rendered services in connection with the arbitration proceedings with the client. M/s JR Knowles had been employed for the purpose of providing independent testimony. These services rendered do not 'make available' any technical knowledge, experience, skill, know-how or process nor does it consist of the development of and transfer of a technical design or plan in favour of the assessee joint venture. The assessee joint venture had also obtained CA Certificates at the time making the remittance without deduction of tax Similar facts apply to the remittance made to SA Healy, USA.

20. We observe that services of both the parties were availed by the assessee in the context of the arbitration proceedings between the

assessee and SJVN. Both the payees are residents of USA. Accordingly payments to them are governed by the India USA DTAA. Article 12 of the said DTAA defines 'fees for included services' as those which 'make available technical knowledge, experience, skill, know-how or processes or development and transfer of technical plan or technical design". The definition of fees for included services is narrower than the definition of fees for technical services in section 9(1)(vii) of the Act. The concept of 'make available' has been explained in the case of Mckinsey & Co. (99 ITD 549)(Bom) a copy of which has been filed at pages 130-142 of the paper book. Similarly in the case of Wockhardt Life Sciences Ltd (copy at pages 143-153) the concept of make available has been applied following the decision of the Mumbai tribunal in the case of Raymond Ltd. (86 ITD 791). Applying this concept to the present case it is seen that the payees have merely given testimony during the course of arbitration proceedings and cannot be said to have made available any technical knowledge, skill etc. to the assessee. Accordingly the amounts paid by the assessee are not chargeable to tax in India in the hands of the payee. Once the receipts are not chargeable to tax in India there is no obligation to deduct tax at source u/s 195 as held by the Supreme Court in the case of GE Technology Centre P Ltd (327 ITR 456). The assessee has also followed the alternative procedure laid down by CBDT by obtaining CA certificate for the remittances made by it and hence there was no need to approach the Assessing Officer u/s 195(2) of the Act. Thus, in the circumstances

the assessee was not required to deduct tax at source u/s 195 from the aforesaid payments. The disallowance is deleted and the ground of the assessee is allowed.

21. In view of the above, we do not find any justification for the disallowance so made by the AO.

22. Similarly in the A.Y.2008-09 a sum of Rs.10,06,442/- was paid to J.R. Knowles, USA on account of litigation support and expert testimony and Rs.10,958/- to J.R. Knowles, USA on account of travel expenses. Following the reasoning given hereinabove in the A.Y.2007-08, we do not find any justification for the disallowance so made by the AO.

23. In the A.Y.2007-08, Revenue is aggrieved by the action of CIT(A) for treating the interest income of Rs.64,51,646/- as business income in place of treatment given by the AO as 'income from other sources.' We have considered rival contentions and found that interest income has mainly arose on account of fixed deposit with the bank, which were invested in the bank pending final resolution of contractual dispute. Since the funds were found to be surplus pending final resolution of disputes the AO had correctly assessed interest income under the head Income from Other sources. Accordingly, we do not find any justification in the order of CIT(A) for treating the same as business income. The order of the CIT(A) on this ground is reversed and allowed in favour of the Revenue.

24. In the result, appeals of the Revenue and assessee are allowed in terms indicated hereinabove.

Order pronounced in the open court on this 31/05/2018

Sd/-	**Sd/-**
(C.N. PRASAD)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 31/05/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai