

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "B" : DELHIBEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBERITA.No.2391/Del./2018  
Assessment Year 2014-2015

M/s. Cobra Instalaciones Y Servicios SA, 2 <sup>nd</sup> Floor, Malhan One Sunlight Colony, Part-2 Near Jeevan Hospital, Ashram, Delhi PIN-110014.PAN AAACC3459Q	VS	The DCIT, Circle-1(1)(1), International Taxation, New Delhi – 110 002.
(Appellant)		(Respondent)

For Assessee :	Shri Hiren Mehta, C.A. and Shri Nirbhay Mehta, Advocate
For Revenue :	Shri Satpal Gulati, CIT-D.R.

Date of Hearing :	05.06.2018
Date of Pronouncement :	28.06.2018

**ORDER****PER BHAVNESH SAINI, J.M.**

This appeal by assessee has been directed against the order of the Ld. CIT(A)-42, New Delhi, dated 16.02.2018, for the A.Y. 2014-2015, challenging the upholding of the addition of Rs.16,10,71,640/- on account of exchange fluctuation loss.

2. The facts of the case are that the assessee-company filed its return of income for the assessment year under appeal declaring NIL income. The assessee is a Non Resident Company. The assessee is a Company Incorporated in Spain and is engaged in providing services of Consultancy in Projects, Engineering and Electrical Contractors and Suppliers. The assessee-company was carrying out business operations from its Project Office at Delhi (India). The assessee-company has earned income from sale of goods and provisions of services from various projects executed during the year under assessment. The assessee-company has a PE in India and doing business in India through its Project Office. A perusal of profit and loss account of the PE reveals that assessee-company has debited an amount of Rs.16,10,71,640/- in its profit and loss account under the head 'Exchange Fluctuation Loss'. The assessee-company was asked to explain as to how the same is allowable as a revenue expenditure. The assessee-company filed the written submissions which are reproduced in the assessment order in which the assessee-company briefly

explained that it is a foreign company carrying on its business activities in India through various projects offices at different sites on the basis of work awarded to the assessee-company. The activities executed by the assessee-company is financed by either the client, which awarded at work, on which, it charges interest on the advance availed at the rate as stipulated in the contract or the contract is financed by the Head Office at Spain in foreign currency. Head Office of the assessee-company advances the money to the Project Office in India in foreign currency as per Reserve Bank of India guidelines to carry out its operations and the money so received stand outstanding towards the Head Office until the whole Contract is accomplished. It was further submitted that the money so received is revenue in nature because the amount is utilized in day-to-day operations i.e. working capital required for execution of the project and to obtain material as per the terms of the contract with the client. Moreover, utilization of the advance money does not bring any capital asset into existence and the amounts so utilized has been used to incur the operating costs and the same is billed to the Indian client for the work so undertaken during the year under assessment.

Owing to the depreciation in the rupee prices in the international market in the year under consideration, the assessee-company has claimed the foreign exchange fluctuation loss on the amount outstanding in foreign currency towards Head Office which consists of the advance payment made by the Head Office towards the execution of the Projects and the amount of engineering charges billed in their home currency by the Head Office towards the services provided. Therefore, the amount, in essence, reflects the character of sundry payables to the Head Office and hence, is a revenue account and the loss represents the revenue loss. The assessee-company further submitted that PE is separately assessable to tax in India as a different and distinct entity different from its foreign company in Spain. The P.E. has not availed any borrowing facilities from any bank in India for the execution of projects awarded by various Indian clients, which requires working capital funds for execution of such turnkey project. It was explained that only upon reaching the certain milestone as per terms of Contract, the permanent establishment is entitled to raise invoice and receive its payment. While reaching such

milestone, expenses has to be incurred for supply and erection, for which, funds have been borrowed from Head Office in Spain. It was pointed out that no interest is paid on such funds borrowed from Spain. All these borrowings have been made in Euro and the funds received in Euro have been converted into INR on the date of its receipt. However, at the time of payment, the PE is liable to repay the amount in Euros. At the beginning of the assessment year i.e. 01.04.2013, the exchange rate between INR to Euro was 69.54. At the end of the assessment year i.e. on 31.03.2014. the exchange rate was 82.58. Thus, there was a devaluation of Indian currency by an amount of approximately 18.75% for the period under consideration. All the opening balances received from Head Office for execution of various projects were reset on 31.03.2014 as per the prevailing exchange rate on that date, which resulted in fluctuation loss aggregating to Rs.16.10 Crore. The details of loan accounts were filed to prove fluctuation loss. The entire amount of loan availed from Head Office in foreign currency have been utilized only for the purpose of executing contracts. It was, therefore, a working

capital requirement. Therefore, fluctuation loss is of revenue in nature. The accounts of the PE are maintained on accrual system of accounting and hence, year end entry for fluctuation loss and resettlement of asset liability have to be necessarily made and the same is allowable on accrual basis as held by the Hon'ble Supreme Court in the case of CTT Vs. Woodward Governor India (P) Limited [2009] 312 ITR 254 (SC).

3. The A.O. however noted that the amounts received by Project Office is not a loan but a capital contribution and though it is a liability in the balance sheet of the Project Office, it cannot be called a debt incurred during the course of business. The amount of remittance to the project office is a capital contribution by someone in its own business. Loan is taken from a third party. During assessment proceedings, the assessment is made in respect of the total income of foreign company which accrued or arisen to it from a business connection in India or through an asset or source situated in India. A Permanent Establishment is never assessed as an

independent entity. Only income of it is computed as if it is separate and distinct entity. The A.O. by examining the financial report of the assessee-company noted that the amount has been treated as remittance in the Project Office accounts. It has not been shown as loan from Head Office and any claim that this amount is loan from Head Office to Project Office is only an afterthought. The A.O. relied upon the decision of Hon'ble Calcutta High Court in the case of Betts Hartley Huett and Co. Ltd. vs. CIT, 116 ITR 425 in which it was held that “*no question of profit or loss can arise as no person can enter into a contract with oneself*”. If a Company has opened a Project Office in India with the purpose of doing business, it will have to remit/invest some amount of money for the functioning of the business. Such money cannot be called as loan given to the Project Office. The A.O. also referred to provisions of Article 7(3) of India-Spain DTAA which reads as under :

“3. *In the determination of the profits of a permanent establishment, there shall be allowed as deductions*

*expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses, research and development expenses, interest and other similar expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. **However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, knowhow or other rights, or by way of commission or other charges, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits***

*of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.”*

3. The A.O. accordingly noted that above Article specifically prohibits any deduction of expenses relating to Head Office, except reimbursement towards actual expenditure. According to the above Article, it is evident that only actual and real expenditure has to be allowed while computing business income of the P.E. No notional expenditure/loss towards Head Office is allowable as deduction. The assessee-company also claimed that it has not charged any interest on the loan

received from the Head Office, is also becomes infructuous in the light of the clear provision that such interest is not allowable to P.E. The A.O. accordingly disallowed the claim of exchange fluctuation loss to the assessee-company and made the addition of Rs.16,10,71,640/-.

4. The assessee-company challenged the addition before the Ld. CIT(A). The written submissions of the assessee-company is reproduced in the appellate order, in which, the assessee-company more or less reiterated the same facts. It was also submitted that for execution of various projects, the assessee-company being P.E. is dependent upon its foreign company for providing funds, which are primarily utilized by the P.E. as working capital. The total outstanding payable to the Head Office as on 31.03.2014 increased to Rs.154,38,08,645/- as compared to Rs.142,13,94,340/- as on 31.03.2013. The amount received from the Head Office have been shown as a liability of the P.E. out of which, almost half of the amount received has been remitted back to the Head

Office. The assessee P.E. is not an incorporated entity but a Project Office, for which, permission granted by the Reserve Bank of India. Therefore, by no stretch of imagination, the remittances from Head Office to P.E. can be treated as capital contribution. It may be appreciated that assessee-company being an unincorporated entity, cannot receive any share capital. It is also fallacious on the part of the A.O. to say that no one can give or take loan to/from oneself. It may be appreciated that the transaction has taken place whereby, funds required for the purpose of business by the P.E. have been remitted by the Head Office. The P.E. has prepared its accounts on the basis of mercantile system of accounting and therefore, debited foreign exchange fluctuation gain/loss on the outstanding balances at the end of the year. The ledger account shows the complete details of fluctuation. The remittances received from the Head Office are received in EURO and have been repaid in EURO. Therefore, at the end of the year, if there is Rupee devaluation, the difference between amount repayable in Rupees as compared to the amount received in Rupee, have

been correctly treated as foreign exchange fluctuation loss by the assessee-company. The A.O. has misinterpreted the provisions of Law, DTAA and the Judgment of the Hon'ble Calcutta High Court in the case of Betts Hartley Huett and Co. Ltd., vs. CIT (supra). As per Article 7(3) of DTAA as referred to by the A.O, the bar on expenditure where the transaction involves Head Office, is only with respect to royalty, FTS or by way of commission or other charges for specific services performed by the Head Office. In fact. Article-7(3) allows as deduction expenses which are incurred for the purpose of the Permanent Establishment, including executive and general administrative expenses, research and development expenses, interest and other similar expenses. It was further submitted that in preceding A.Ys. 2012-2013 and 2013-2014, the A.O. passed the assessment order under section 143(3) of the I.T. Act and the similar claim of the assessee-company for fluctuation loss have been allowed in favour of the assessee-company. Therefore, rule of consistency should be followed by the Income Tax Authorities. In support of the above

proposition, assessee-company relied upon decision of the Hon'ble Supreme Court in the case of Radhaswamy Satsang vs. CIT 193 ITR 321, Gendamal Hazarilal 263 ITR 679 (M.P.) and Hon'ble jurisdictional Delhi High Court's Judgment in the case of CIT vs. ARJ Security Printers 264 ITR 276 (Del.).

5. The Ld. CIT(A), however, did not accept the contention of the assessee-company and noted that as per provisions of FEMA, the Project Office located in India does not come under the list of eligible borrowers, therefore, the Project Office is not eligible for external commercial borrowings. Therefore, assessee-company cannot take any liability which has to be repaid. The amount remitted to a Project Office in India by a foreign company to do business cannot be taken as "loan"/external commercial borrowing in the hands of Project Office. The Ld. CIT(A) also noted that A.O. has rightly invoked Article 7(3) of India-Spain DTAA since the same does not allow any notional expenditure/loss as deduction. Appeal of assessee was accordingly dismissed.

6. The Learned Counsel for the Assessee reiterated the same submissions made before the authorities below. He has submitted that assessee-company received loan from the Head Office for completion of the Project in EURO, which is repaid in EURO, and amount have been mentioned as loan/liability in the balance sheet. The fluctuation loss was claimed as deduction. The capital of assessee-company is NIL. No expenses have been claimed, as whatever amounts were received in EURO was repaid in EURO. Article 7(3) of DTAA between India-Spain do not apply in the case of the assessee-company. The decision of the Hon'ble Calcutta High Court in the case of Betts Hartley Huett and Co. Ltd., vs. CIT (supra), relied upon by the A.O. is not applicable to the facts of the case. PB-123 is the details of foreign exchange gain/loss claimed by assessee-company. He has submitted that in A.Ys. 2012-2013 and 2013-2014, assessee-company has made claim of exchange fluctuation loss on identical facts, which have been allowed by the A.O. in scrutiny assessment under section 143(3). Copies of the assessment orders are filed at pages 113 to 118 of the paper

book. He has further submitted that in subsequent A.Y. 2015-2016 assessee-company has exchange fluctuation gain due to difference in the rate of the EURO in a sum of Rs.13,37,29,120/-, which have been declared as income in A.Y. 2015-2016. Copy of the P & L A/c for A.Y. 2015-2016 is filed at Pages 127 and 128 of the paper book to show that income was declared on account of foreign exchange fluctuation in aforesaid amount. Learned Counsel for the Assessee submitted that when in preceding assessment year, similar claim have been allowed and assessee-company has paid tax on foreign exchange fluctuation gain in subsequent year on the same facts, the claim of assessee-company should not have been disallowed by the authorities below. PB-48 is balance-sheet for assessment year under appeal to show that share capital is NIL and Head Office amount on liabilities side have been shown at Rs.154,38,08,645/-. He has submitted that the facts have not been disputed with regard to the amount received in EURO and repaid the amount in EURO to Head Office. Therefore, foreign exchange fluctuation loss should have been allowed as

deduction in favour of the assessee-company. No capital was employed by assessee-company. PB-6 and 7 are the frequently asked questions by the parties from Reserve Bank of India, in which, it is replied that *“the credits to the account should represent the funds received from Head Office through normal Banking Channel for meeting the expenses of the Office and/or to Rupee the amount receivable, if any, under the Contract and no other amounts should be credited without prior permission of Reserve Bank of India”*. He has referred to Accounting Standard-11, which also permits exchange difference either should be recognized as income or expenses. He has relied upon the decision of the Hon’ble Supreme Court in the case of CIT vs. Woodward Governor India P. Ltd., (2009) 312 ITR 254 (SC) in which it was held that *“Loss” suffered by assessee on account of fluctuation in the rate of foreign exchange as on the date of the balance-sheet is an item of expenditure under section 37(1) of the Income Tax Act, 1961.*” He has submitted that loan raised by P.E. from its Head Office are very older and prior to 2013. First, such loan

from Head Office was received at the time of starting of the Project Office in India in the year 1995. He has submitted that no action under FEMA have been taken against the assessee-company.

7. On the other hand, Ld. D.R. relied upon the order of the A.O.

8. We have considered the rival submissions and perused the material available on record. In this case, assessee-company is a P.E. of Foreign-Company. Whatever income has accrued or arisen, have been assessed in India against the P.E. The assessee-company explained that for completing the Project in India, either the advance received from the client, or the advance/loan have been received from the Head Office situated in Spain. The loans are admittedly received from Head Office in EURO and have been repaid in EURO as per RBI guidelines to carry out operations in India and was outstanding in balance-sheet. It is also not in dispute that the money so received from the Head Office is revenue in nature because the amount of the

loan is utilized in day-to-day operations i.e., working-capital required for Project execution and to obtain material as per the terms of the Contract. The utilization of the amounts received from Head Office did not bring any capital asset into existence. Therefore, the amounts so received from the Head Office have been utilized to incur the operating cost. The assessee-company has filed copy of the balance-sheet to show that the amount in question have been shown as liability in assessment year under appeal. The outstanding payable to the Head Office as on 31.03.2014 increased to Rs.154,38,08,645/- as compared to Rs.142,13,94,340/- as on 31.03.2013. Therefore, the contention of assessee-company is correct that for the purpose of completing the turn-key Project, the funds are required, which have been provided by the Head Office. It is also explained that for receiving such funds from the Head Office, Reserve Bank of India permission have also been obtained. Though the Ld. CIT(A) referred to FEMA Act, but, no provisions have been highlighted which assessee-company has violated. The Ld. CIT(A) noted that Project Office located in India does not

come under the list of eligible borrowers, therefore, Project Office is not eligible for external commercial borrowings. Assessee-Company, however, explained that it has received loans from Head Office and Assessee-Company being P.E. of foreign Company, is not entitled to raise loans through ECB as ECB can only be raised by Indian borrowers. Findings of Ld. CIT(A) are, therefore, not relevant to point in issue. The Assessee-Company has been receiving the funds in EURO for the last so many years from the Head Office and have been admittedly repaying the amounts to the Head Office in EURO and such claim of assessee-company of foreign exchange fluctuation loss in A.Ys. 2012-2013 and 2013-2014 preceding to assessment year under appeal, have been accepted by the A.O. under section 143(3) of the I.T. Act, 1961. No material have been brought on record, if assessee-company has violated any provisions of FEMA Law or any other Act, for receiving such funds from the Head Office. Therefore, merely referring to FEMA is not enough to disallow the claim of assessee-company. It is also not in dispute that due to depreciation in the Rupee prices

in the International Market in the year under consideration, assessee-company has claimed foreign exchange fluctuation loss on the amount outstanding in foreign currency towards Head Office which consists of advance payment made by the Head Office towards execution of the Project and the amount of Engineering charge billed in their home currency by the Head Office towards the services provided. Therefore, the character of the sundry payable to the Head Office is in the nature of payables/liability. Therefore, it is, on account of revenue account and the loss represents the revenue loss. The assessee-company further explained that it has not paid any interest on the funds borrowed from Head Office. Since, there is no dispute that amount received from the Head Office was in EURO and repaid in EURO, therefore, difference in INR and EURO was correctly claimed as foreign exchange fluctuation loss. The decision of the Hon'ble Calcutta High Court relied upon by the A.O. in the case of Betts Hartley Huett and Co. Ltd., vs. CIT 116 ITR 425 (supra), is distinguishable from the facts of the case because in the present case, no profit have been earned by the

same person. The Article 7(3) of India-Spain DTAA is not applicable in this case because nothing is paid by the assessee-company to the Head Office on account of loss and no deduction claimed. The items of expenses specified in DTAA are not applicable in case of assessee. It was a differential amount on account of foreign exchange fluctuation loss that assessee-company suffered which was claimed as deduction in the P & L A/c. The assessee-company has not violated any terms of Article 7(3) India-Spain DTAA as reproduced above because whatever bar have been provided in this Article are not applicable to the case of the assessee-company. The assessee-company being P.E. of foreign company in India could not obtain any borrowings from any Bank in India, therefore, working capital was required to complete the turnkey projects. The facts and circumstances of the case as mentioned above and considering the assessment orders passed by the A.O. in preceding A.Ys. 2012-2013 and 2013-2014 clearly show that the amount received by the assessee-company from the Head Office is a "loan". Therefore, authorities below were not justified

in holding it to be capital remittance. The assessee-company did not claim any notional expenses. Therefore, findings of the authorities below are wholly unjustified. It may also be noted here that in subsequent A.Y. 2015-2016, the assessee-company has earned foreign exchange fluctuation gain on the same set of facts in a sum of Rs.13,37,29,120/- which have been declared as income. If the A.O. is of the opinion that assessee-company is not entitled for deduction on account of foreign exchange fluctuation loss, he should not have accept the similar claim of assessee-company in preceding assessment years and should have refunded the amount of tax paid on the foreign exchange capital gain shown in subsequent assessment year. It is well settled Law that rule of consistency do apply to the Income Tax proceedings. Therefore, on the same set of facts, the A.O. cannot take a different view in the assessment year under appeal. We may note here that the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India P. Ltd., (supra) held that the "loss" suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date of the

balance-sheet is an item of expenditure under section 37(1) of the I.T. Act, which, clearly support our findings that assessee-company is entitled for deduction on account of foreign exchange fluctuation loss. It is an undisputed fact that assessee-company received the amount from Head Office in EURO and repaid to Head Office in EURO, therefore, even if the amount may be called by any name i.e., loan, borrowing or otherwise, but the assessee-company has suffered foreign exchange fluctuation loss on account of amount received from Head Office in EURO and repaid in EURO on account of differential value in INR, therefore, such fluctuation loss is allowable as deduction in favour of the assessee-company. Considering the totality of the facts and circumstances of the case, we are of the view that assessee-company is entitled for deduction on account of foreign exchange fluctuation loss. We, accordingly, set aside the orders of the authorities below and delete the entire addition.

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court.

Sd/-  
(L.P. SAHU)  
ACCOUNTANT MEMBER

Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

Delhi, Dated 28<sup>th</sup> June, 2018

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "B" Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :  
Delhi.