

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2', NEW DELHI**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.5618/Del/2017
Assessment Year: 2013-14

M/s. VOSSLOH BEEKAY CASTINGS LTD., Unit 5, 12 th Floor, Eros Corporate Tower, Nehru Place, New Delhi	Vs.	ACIT, Circle-26(2), New Delhi
PAN :AAACB4091K		
(Appellant)		(Respondent)

Appellant by	Shri Nikhil Surana, CA
Respondent by	Shri Mritunjoy Baranawal, Sr.DR

Date of hearing	06.02.2020
Date of pronouncement	18.02.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 30/06/2017 passed by the learned Assistant Commissioner of Income-tax, Circle-26(2), New Delhi [hereinafter referred to as 'the Assessing Officer'] pursuant to the direction of the learned Dispute Resolution Panel (DRP). The grounds raised by the assessee in the appeal are reproduced as under:

1. *The Ld. AO has grossly erred both on facts and in law in confirming the action of the Ld. Transfer Pricing Officer ('Ld TPO') in not considering outstanding receivables from the Associated Enterprises (AEs) as closely linked to the international transaction of sale of goods and consequently re-characterizing the said receivables as short term loans & advances, thereby making a TP adjustment of INR 803,801/- on account of imputed interest.*
2. *Without prejudice to the Ground No 1, the Ld. AO has grossly erred both on facts and in law in confirming the action of the Ld. TPO in benchmarking the outstanding receivables by application of CUP method on the basis of extraneous external comparables and completely ignoring the available internal comparables.*
3. *With prejudice to Grounds 1 and 2 above, the Ld. AO has grossly erred on facts in not giving effect to the direction of the Hon'ble DRP with regard to correction in computation of notional interest and confirming addition of such interest based on erroneous calculation, which is in complete contradiction of methodology stated in the order of the Ld. TPO.*
4. *The Ld. AO has grossly erred both on facts and in law in not appreciating and understanding the substance of commission expense amounting to INR 4,954,459/- paid to third party vendor for administrative and professional support in relation to railway contracts and arbitrarily assuming that such commission has been paid for procuring government contracts and is inadmissible under Section 37(1) of the Act.*
5. *The Ld. AO has grossly erred both on facts and in law in disallowing commission expense without giving due consideration to the fact that the said expense was allowed in the preceding years after duly recording 'statement on oath' from the third party vendor to whom such commission has been paid.*
6. *The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal*

2. Briefly stated facts of the case are that the assessee was engaged in manufacturing of cast manganese steel crossing for rail tracks and other engineering products to cater the requirements of the steel industries, power-plant, mining cement and other plants engineering industries. The assessee filed return

of income for the year under consideration on 30/11/2013, declaring total income of ₹ 11,94,37,330/-. The case was selected for scrutiny assessment and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. During assessment proceeding, the Assessing Officer observed international transactions carried out by the assessee with its Associated Enterprises(AEs) and referred the matter for benchmarking of those international transactions to the learned Transfer Pricing Officer (TPO). The international transactions reported by the assessee was found by the Ld. TPO at arm's length, however, he observed that payments for invoices raised by the assessee on its AEs were not received within the stipulated period as provided in the service agreement with the AE. According to the Ld. TPO, the assessee was required to charge interest on receivables due from the AE. After considering the submission of the assessee in various judicial pronouncements on the issue, he benchmarked the transaction of interest receivable from the AE applying CUP method as most appropriate method and adopted interest rate as 6 months LIBOR rate + 400 basis point. The Ld. TPO computed the benchmarking rate of the interest at 4.4569% and worked out the interest on receivables in respect of the three associated enterprises at ₹ 8,03,801/-. He, accordingly, proposed adjustment of ₹ 8,03,801/- to the income of the assessee. The Assessing Officer accordingly, included the transfer pricing adjustment in the draft assessment order dated 25/12/2016. The Assessing Officer also proposed disallowance of commission expenses of ₹ 49,54,459/- in the draft assessment order. Against the draft assessment order, the assessee filed

objection before the Ld. Dispute Resolution Panel (DRP). The Ld. DRP, dismissed the objection of the assessee against the disallowance of commission expenses, however, as regard to the transfer pricing adjustment, after taken into consideration errors pointed out by the assessee in the calculation of the interest, directed the Ld. TPO to re-compute the interest liability. In compliance to the direction of the learned DRP, the Assessing Officer passed the impugned final assessment order on 30/06/2017 and aggrieved with the additions/disallowance made in the impugned order, the assessee is in appeal before the Tribunal. Subsequent to the filing of this appeal, Ld. TPO gave effect to the direction of the Ld. DRP and in his order dated 31/01/2018, he recomputed the transfer pricing adjustment of the interest to ₹ 3,70,867/-.

3. Before us, the learned counsel of the assessee filed a paper book containing pages 1 to 164 and submitted that the assessee was a debt free company during the year under consideration therefore, in view of the decision of the Hon'ble Delhi High Court in the case of PCIT Vs Bechtel India Private Limited (IT Appeal No. 379 of 2016 dated 21/07/2016), there was no requirement of making any adjustment on account of the receivables. The learned counsel referred to balance-sheet of the company available on page 6 of the paper-book to support that the assessee company was debt free company. The learned counsel also referred to page no. 19 of the paper-book and submitted that no interest expenses have been paid during the year under consideration.

3.1 He further submitted that no interest has been charged by the Associated Enterprises with regard to the receivables from the assessee. He submitted that in case they would have charged interest on the receivable, assessee would have paid more interest and therefore charging of the interest would have been detrimental to the interest of the assessee. The learned counsel referred to page 104 of the paper-book which contained that notional interest of ₹ 8,93,453/- would have been payable by the assessee to the Associated Enterprises, had the Associated Enterprises charged the interest on receivable. He further submitted that outstanding payment in the form of the receivables were also due from the non-associated enterprises and no interest has been charged by the assessee on such receivables and therefore, in view of the decision of the Tribunal in the case of Indo-American Jewellery Ltd. in ITA No. 5872/Mum/2009 for assessment year 2005-06, no adjustment was required to be made.

3.2 On the contrary, learned DR submitted that transaction in dispute is covered by the definition of the international transactions and, therefore, learned TPO justified in benchmarking the transaction. He relied on the various judicial pronouncement referred by the learned TPO in his order. The learned DR also relied on the decision of the Tribunal in the case of Cheil India Private Limited in ITA No. 1230/Del/2014 for assessment year 2009-10.

3.3 We have heard the rival submission of the parties on the issue in dispute and perused the relevant material on record including the decisions cited by both the parties. We find that

Hon'ble Delhi High Court in the case of Bechtel India Private Limited (supra) held that when the assessee is a debt free company the question of receiving any interest on receivable did not arise. The assessee is a debt free company has not been disputed by the learned Departmental Representative after verification of the financial statements of the assessee. In the circumstances, in view of the binding precedents, the transfer pricing adjustment on account of the interest receivables in the case of the assessee cannot be sustained. The other arguments of the learned counsel of the assessee challenging the transfer pricing adjustment are rendered merely academic and accordingly, we are not giving our finding in respect of those arguments. The transfer pricing adjustment on account of the receivables is accordingly deleted. The ground Nos. 1 to 3 of the appeal are accordingly allowed.

4. The Ground Nos. 4 to 5 of the appeal are related to disallowance of commission expenses of ₹ 49,54,459/-.

4.1 The brief facts qua the issue in dispute that the assessee claimed commission expenses of ₹ 49,54,459/-, which were paid to Mr. D.N. Pandey and his proprietary firm M/s. New Global Impex. The assessee filed details of project-wise commission paid along with the copy of the agreement. The Assessing Officer observed that commission was paid to Mr. D.N. Pandey for procuring government contracts of Indian Railways. The Assessing Officer observed that agreement submitted did not provide any specific scope of services to be rendered by Mr. Pandey. The Assessing Officer asked supporting documents like

project reports, email, correspondence etc., however, the assessee submitted few email interaction between the assessee and Sh. Pandey, which according to the Assessing Officer was not sufficient to explain the nature of the services rendered by him. The learned Assessing Officer pointed out that as per the authorities issuing the tender, there was no requirement of any commission agent and if so required the government prescribed persons were only eligible to act as agent for rendering the services, which was not the situation in the instant case.

4.2 The learned AO relied on the decision of the Hon'ble Calcutta High Court in the case of Standipack (P) Ltd Vs CIT (2012) 211 Taxmann 144 (Calcutta), wherein it is held that expenditure towards commission paid for providing expertise to apply for tender and follow up action for acceptance of tender, being from officer impermissibly law, is not allowable as business expenditure.

4.3 Before the learned DRP, the assessee claimed that actually service charges were paid for services rendered by Mr. D.N. Pandey. The learned DRP, however, observed that as per title of the agreement Mr. Pandey was liasion agent for the assessee. The learned DRP further observed that a lump-sum payment was made, which was not dependent on actual efforts or expenditure of the agent. The learned DRP also concurred with the Assessing Officer that commission was not payable on government contract and scope the work mentioned in the agreement clearly indicated that work was not of the legal nature. As no further documentary

evidence were filed by the assessee to support its claim, the learned DRP upheld the finding of the Assessing Officer.

4.4 Before us, the learned counsel of the assessee referred to agreement dated 06/09/2004, a copy of which is available on page 136 of the paper-book, which was claimed by him as a master agreement. He further referred to agreement dated 15/07/2012 in respect of the year under consideration, a copy of which is available on page 141 of the paper-book. The learned counsel of the assessee relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs Conimeters Electricals (P) Ltd in ITA 1401 of 2008 to support that service charges incurred in relation to tender work of the government authorities is allowable as business expenditure. The learner Consul submitted that no addition has been made on this account on earlier years.

4.5 The learned Departmental Representative, on the other hand, relied on the order of the lower authorities and submitted that Mr. D.N. Pandey was an employee of the railway and no other qualification or technical expertise of Mr. Pandey in the field of the work of the assessee, had been brought to the notice of the lower authorities. He further submitted that such commission expenses claimed in subsequent years have also been disallowed. The learned DR submitted that no documentary evidence of any services rendered by Mr. D.N. Pandey has been produced, which could establish that Mr. Pandey interacted with railway official on behalf of the assessee in relation to contract for which he has been allowed commission expenses. He submitted that the agreement has been printed on the plane paper and only signed

at the last Page. According to him, the agreement has not been registered or signed before the notary, which raises doubts on the authenticity of the agreement.

4.6 We have heard rival submission of the parties and perused the relevant material on record. We find that the assessee has failed to produce documentary evidence to support that Mr. Pandey provided any kind of services to the assessee. Merely providing some email exchange between him and the assessee is not sufficient to support that Mr. Pandey provided any kind of services in relation to the contracts for which he has been paid commission expenses. Further during the course of the hearing, the learned counsel of the assessee was asked whether similar commissions have been given in case of the contracts received from private parties, he clearly admitted that no such commission expenses have been paid for executing the contract of the private parties. This fact also support the finding of the Assessing Officer that the commission was given only for procuring contracts from the railway and such kind of commission for procuring contracts from government is not permissible as per the government rules. In view of no documentary evidences to support the service rendered by Mr. Pandey, the reliance placed on the decision in the case of CIT Vs. Conimeters Electricals (P) Ltd. is of no help to the assessee.

4.7 In view of the above facts and circumstances, we uphold the finding of the lower authorities on the issue in dispute. The ground Nos. 4 and 5 of the appeal of the assessee are accordingly dismissed.

5. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 18th February, 2020.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 18th February, 2020.

RK/-(D.T.D.S.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi