

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6708/Del./2017
Assessment Year: 2011-12

M/s. GE Power Services India Pvt. Ltd., A-18, First Floor, Okhla Industrial Area, Phase-II, South Delhi, New Delhi	Vs.	DCIT, Circle-10(1), New Delhi
PAN :AAACG2129F		
(Appellant)		(Respondent)

Appellant by	Shri Sachit Jolly, Adv.
Respondent by	Shri F.R. Meena, Sr.DR

Date of hearing	16.12.2020
Date of pronouncement	23.12.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 17/04/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-18, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2011-12 raising following grounds:

1. *That the Commissioner of Income Tax(Appeals) ['CIT'A]] erred on facts and in law in confirming disallowance of Rs.22,76,088 on account of liquidated damages incurred by the Appellant in the ordinary course of business.*

- 1.1 *That the CIT(A) erred on facts and in law in not appreciating that liability on account of aforesaid liquidated damages is allowable as business expenditure under Section 37(1) of the Income-tax Act, 1961.*
- 1.2 *That the CIT(A) erred on facts and in law in alleging that the aforesaid liability of liquidated damages is not allowable since the Appellant did not furnish confirmation from the other party, without appreciating that the Appellant had furnished voluminous documentary evidences which, inter-alia, included copies of party ledger account, copy of the relevant contract, copies of the invoices etc.*

The Appellant craves leave to alter, amend and/or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary wither before or during the time of hearing.

2. Briefly stated facts of the case are that the assessee was engaged in the business of repair and servicing of steam turbines and generators and trading of related dispute parts. For the year under consideration, the assessee filed return of income on 20/11/2011 declaring total income of ₹11,19,56,303/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the scrutiny assessment completed under section 143(3) of the Act on 27/02/2015, the Assessing Officer disallowed claim of expenses of ₹ 22,97,988/- as liquidated damages paid to two parties namely 'Chandrapura Thermal Power Station', 'DVC, Jharkhand' and 'Indian Farmers Fertilisers Cooperative Society Ltd. (IFFCSL), Bareilly. According to the Assessing Officer, the liquidated damages were suffered by the assessee on account of non-compliance of business obligations, which resulted in levy of the penalty in the shape of underpayments or compensatory

payments, which are not allowable in terms of section 37 of the Act. On further appeal, the Ld. CIT(A) called for certain documents/evidence from the assessee in support of the claim, however, according to him, the evidence produced by the assessee in respect of 'Chandrapura Thermal Power Station' were of the unilateral nature and, therefore, he sustained the disallowance in respect of this party and deleted the amount of ₹ 21,900/- in respect of 'IFFCL'. The relevant finding of the Ld. CIT(A) is reproduced as under:

"4. FINDINGS:

Grounds 1,3 & 4 were carefully analysed by me. Upon a careful consideration I am of the confirmed view that the same are of highly subjective nature. Hence, I do not feel persuaded to deal with them.

Ground no. 2 was carefully examined by me. By reason of the said ground the assessee sought to raise objections to the disallowance of Rs.22,97,988/- of business expenses booked under the head 'liquidated damages' rejected by the AO holding the same to be not allowable under section 37 of the Act.

In order to appreciate the facts of the matter, the contentions of the AO were gone into. The case of the AO was that liquidated damages were suffered by the assessee on account of non-compliance of business obligations towards certain parties. According to the AO the assessee sustained the damages due to its negligence or non compliance with its business promises which resulted in levy of penalty in the shape of under payments or compensatory payments which deprived the assessee of the right to claim expenditure u/s 37 of the Act.

Per contra it was contended by the authorized representative for the assessee that the damages suffered by it were wholly and fully connected with the business of the assessee and had no personal or extraneous element. Reliance was placed by it on a catena of decisions of Mon'ble Courts to substantiate its claim. The sum and substance of the assessee's contentions was that as a normal business practice and in line with the general contractual arrangements entered by the Appellant with its customers/suppliers, it was required to pay/receive compensation from parties in case the order was not completed within the stipulated time schedule. In the ultimate analysis the assessee's

contentions were as under in regard to the eligibility conditions for claiming expenditure u/s 37:

- The expenditure must not be governed by any other provisions of the Act.
- The expenditure must have been laid out wholly and exclusively for the purposes of the business of the assessee.
- The expenditure must not be capital in nature
- The expenditure must not be personal in nature
- The expenditure must not be incurred for a purpose which is an offence or which is prohibited by any law
- The expenditure must not be incurred on advertisement in any souvenir, brochure, etc. published by a political party

As a token of proof the assessee also furnished a list of the parties who had made short payments to the assessee by way of liquidated damages. The sum of Rs. 22,97,988/- represented the liquidated damages from two parties i.e. Chandrapura Thermal Power Station. DVC Jharkhand and Indian Farmers Fertilizers Co-operative Ltd. Bareilly.

During the appellate proceedings, the assessee was called upon to elaborate on the validity of claim of expenditure as liquidated damages by producing documentary evidence like bills, communications/confirmations by the parties who charged liquidated damages from the assessee. The AR for the assessee produced the copies of the agreements and the texts of various case laws to defend its position. The correspondences entered into between the assessee and the aforesaid two parties were produced before me on 17 August 2017. The details comprised the copies of account of M/s Indian Farmers Fertilizers Co-operative Ltd., Bareilly, invoice and challan dated 16.07.2010 issued in favour of IFFCL, confirmation of IFFCL Bareilly UP, regarding withholding of Rs.21,900 against advocates legal charges, letter dated 09.09.2010 issued by the assessee to Chandrapura Thermal Power Station, DVC Jharkhand requesting the latter to release withheld liquidated charges amounting to Rs. 10,00,692, Rs.3,40,442/-, Rs. 1,66,266/- and Rs. 1,17,500/- against jobs done vide CTPS, Wo NO. dated 20.04.2009 and 30.07.2009 only.

After going through the above evidence I am compelled to hold that the above documents were not sufficient to prove the fact that what the assessee claimed was correct. The above documents represented unilateral correspondences and book entries only. In order to check the veracity of the assessee's claim the AR for the assessee was therefore, requested on 27.07.2017 by the undersigned to submit concrete proof of the fact that the liquidated damages claimed by the assessee were confirmed /certified by the

above said two parties also. In other words, confirmations for the substantiation of the above claim were specifically demanded by me. On 17.08.2017 the afore stated documents only were produced before me.

In my considered view, the materials produced do not satisfy the requirement of the law of burden of proof. Whatever the assessee produced in the form of correspondences were self serving evidence and of unilateral nature. In a nut shell the assessee badly failed to produce the confirmation of Chandrapura Thermal Power Station, DVC Jharkhand and its copy of account in its ledger to the effect that any sum of money was withheld by it in the form of liquidated charges in the case of the assessee. In such a scenario the claim of liquidated damages by the assessee cannot be regarded as in congruence with law and facts. Therefore, the so called liquidated charges allegedly recovered by Chandrapura Thermal Power Station, DVC Jharkhand were rightly disallowed by the AO. The disallowance is upheld in full in the case of this party.

As regards IFFCL confirmation of retention of only Rs.21,900/- by this party was produced by the assessee before me. Regarding the balance amount the assessee could not produce any evidence of bilateral nature. In the said circumstances, Rs.21,900/- only is deleted and the remaining amount is sustained.”

2.1 Aggrieved, the assessee is before the Tribunal by way of raising the grounds as reproduced above.

3. Before us, the parties appeared through Videoconferencing facility. The learned counsel of the assessee referred to the order of the lower authorities and submitted that liquidated damages are as a result of contractual obligation between two parties and not in the nature of statutory penalties liable for disallowance in terms of section 37 of the Act. He submitted that the assessee has filed all the documents including bills, copy of agreements and correspondence as asked by the lower authorities and, therefore, the Ld. CIT(A) is not justified in sustaining the disallowance.

4. On the contrary, the Ld. DR relied on the order of the lower authorities and submitted that disallowance has been sustained

mainly on the ground of failure on the part of the assessee to produce confirmation from the party stating the sum of money with held in the form of the liquidated damages.

5. We have heard rival submission of the parties and perused relevant material on record, including the order of the lower authorities. We find that the Assessing Officer has originally made disallowance in respect of expenditure of liquidated damages in relation to two parties, holding the same as penal in nature. But the Ld. CIT(A) has in principle agreed that expenses towards liquidated damages are not penal in nature and on production of confirmation from one party i.e. M/s IFFCL deleted the disallowance made by the Assessing Officer. The Ld. CIT(A) has held that the assessee was asked to produced confirmation from another party i.e. 'M/s Chandrapura Thermal Power Station', DVC Jharkhand but the assessee only produced letter issued by it to the said company requesting to release the liquidated charges amounting to ₹ 10,00,692; ₹ 3,40,442; ₹ 1,66,266/- and ₹ 1,17,500/-. Though, the Ld. CIT(A) in absence of reconciliation of amount of the liquidated damages claimed, has rejected the claim of the assessee, however, in our opinion, it is matter of verification from the third-party only and the interest of the justice, one more opportunity can be allowed to the assessee to produce confirmation of the liquidated damages charged by said company to the assessee. If the accounts of both the assessee and the said party can be reconciled, then matter ends and no disallowance would be required in the case of the assessee. Accordingly, we feel it appropriate to restore this issue back to the file of the Ld. CIT(A) with the direction to the assessee to produce

document in support of its claim of liquidated damages including confirmation of 'Chandrapura Thermal Power Station' and copy of ledger account of the assessee in their books of accounts specifying money withheld in the form of liquidated charges. It is needless to mention that both the assessee and the Assessing Officer shall be provided adequate opportunity of being heard.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 23rd December, 2020.

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

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

Dated: 23rd December, 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