

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

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 6548/DEL/2016 (A.Y 2012-13)
(THROUGH VIDEO CONFERENCING)**

Ratnagiri Gas and Power Pvt. Ltd. NTPC Bhawan, Core-7, Scope Complex, 7, Institutional Area, Lodhi Road, New Delhi AADCR1375F (APPELLANT)	Vs	DCIT Circle-21(1) New Delhi (RESPONDENT)
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ITA No. 2952/DEL/2019 (A.Y 2013-14)

DCIT Circle-21(1) New Delhi (APPELLANT)	Vs	Ratnagiri Gas and Power Pvt. Ltd. NTPC Bhawan, Core-7, Scope Complex, 7, Institutional Area, Lodhi Road, New Delhi AADCR1375F (RESPONDENT)
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Appellant by	Sh. Ved Jain, CA & Sh. Akshit Goel, CA
Respondent by	Smt. Sushma Singh, CIT, DR

Date of Hearing	14.01.2021
Date of Pronouncement	25.01.2021

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee and the Revenue against the order dated 30/11/2016 & 31/01/2019 passed by CIT(A)-7, New Delhi for Assessment Year 2012-13 & 2013-14 respectively.

2. The grounds of appeal are as under:-

ITA No. 6548/DEL/2016 (A.Y. 2012-13 Assessee's appeal)

1. *“On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.*

2(i)*On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of Rs. 12,99,68,406/- on account of bonus payable to GE International Ltd.*

(ii) *That the learned CIT(A) has erred both on facts and in law in confirming the disallowance rejecting the contention of the assessee that the bonus payable being an ascertained liability, the same is allowable in the year under consideration.*

(iii) *That the learned CIT(A) has confirmed the disallowance misinterpreting the terms of Comprehensive Service Agreement between the GE International Ltd. and the assessee.*

3(i)*On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 12,99,68,406/- on account of bonus payable to GE International Ltd., while computing Minimum Alternate Tax (MAT) under Section 115JB of the Act.*

(ii) *That the learned CIT(A) has erred both on facts and in law in holding the bonus payable to be a provision for unascertained liability despite the same being an ascertained liability and a revenue expenditure incurred during the year.”*

ITA No. 2952/DEL/2019 (A.Y. 2013-14 Revenue's appeal)

“1. On the facts and under the circumstances of the case, the Ld.CIT(A) has erred in law and facts in giving relief to the assessee of Rs. 2,15,05,00,000/- on account of interest attributed to work in progress only relying upon the order of his predecessor for A.Y. 2012-13 without going into the merits of addition made by the AO in the mater for the impugned Assessment Year.”

“2. On the facts and under the circumstances of the case, the Ld. CIT(A) has erred in law and facts in giving relief to the assessee of Rs. 65,25,165/- on account of HQ expenses merely relying upon the order of his predecessor for A.Y. 2012-13 while failing to appreciate the merit of the addition and especially not appreciating the facts brought on record vide the remand report submitted by the AO during the appellate proceedings.

3. Firstly, we are taking up Assessment Year 2012-13. The assessee Company filed its return for the A. Y. 2012-13 on 29.09.2012 declaring income at Rs.10,20,84,87,730/- which was adjusted against the brought forward losses and depreciation. Further, the assessee company declared book profit u/s 115JB at Rs.13,61,73,81,701/-. Order u/s 143(3) was passed on 29.03.2015 assessing the income at Rs.12,15,07,27,240/- after additions/disallowances of Rs.1,11,48,304/- u/s 41(1) on account of cessation of trading liability, Rs.68,22,800/- on account of HQ Expenses, Rs. 12,99,68,406/- on account of bonus paid to GE International Ltd. and Rs. 1,79,43,00,000/- u/s 36(1) (iii) on account of interest attributed to work in progress.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards to addition of Rs. 12,99,68,406/- on account of bonus

payable to General Electric International Ltd., the Ld. AR submitted that the assessee is a public sector undertaking having NTPC and GAIL as its major shareholder and is engaged in the business of generation of power and the accounts of the assessee, being a public sector undertaking, have been audited by CAG. During the year the assessee has debited an expenditure on account of bonus payable to employees of Rs.12,99,68,406/-, payable to General Electric International Ltd under the head Repair and maintenance expenses. During the assessment proceedings the assessee submitted that the assessee has entered into a long term agreement with GE International Ltd. according to which they have to ensure 90% availability of the Power Plant for operation and if they ensure availability above 90%, then they are eligible "or Bonus, else they are liable for penalty. This will accrue on year to year basis and will be finally settled on closure of the contract. However, the Assessing Officer was not satisfied with the submissions of the assessee and held that the assessee failed to produce the agreement with the GE International Ltd. to prove the Business Expediency. Further, the assessee failed to prove the basis of calculation of bonus payable and also that the amount of bonus pertains to the current year. Thereafter, the assessee preferred an appeal before the CIT(A), and filed the copy of long term Comprehensive Service Agreement (CSA) with GE International dated 20.06.2009 vide an application u/r 46A. The Ld. AR pointed out that in the remand report the Assessing Officer has reiterated the contents of the assessment order and observed that the liability is an unascertained liability. On the perusal of the written submissions and the rejoinder to the remand report, the CIT(A) held that the bonus payment to GE International is subject to certain terms and conditions in the contract and therefore, the liability cannot be considered to be an ascertained liability. The Ld. AR submitted that the assessee has entered into a long term Comprehensive Service Agreement (CSA) with GE International, a renowned International organization, on 20.06.2009 for the power plant and the said agreement is valid March 31. 2025. As per the agreement, (GE) have to ensure

90% availability of the Power Plant for operation and if they ensure availability above 90% then they are eligible for Bonus otherwise they are liable for penalty. This will accrue on year to year basis and will be finally settled on closure of the contract. The Ld. AR pointed out that as per the CSA with GE International under which they have to ensure 90% Equivalent Availability Factor (EAF) of the Power Plant for operation throughout all hours in operating year, which are 8,760 hours in a regular year and 8,748 hours in a calendar leap year. The methodology for calculation of availability of plant under different scenario is explained in CSA-Exhibit A & B. The Ld. AR submitted that during the year under consideration, the contractor has ensured the 90% availability of the power plant to the assessee. Accordingly, the assessee booked an expenditure of Rs. 12,99,68,406/- on account of bonus payable to the contractor. The Ld. AR submitted that as regards, the payment of the bonus, there is an option given to the contracting parties in the CSA. The relevant provisions of the contract in this regard are as follows:

"In case owner is not entitled to an availability bonus for the term of an AGP from the purchaser of the facility's power, the contractor agrees that the owner may choose to either pay in cash to the contractor the bonus amount due or credit the bonus amount as an offset against any future amount due from the contractor to the owner under this agreement."

"In case owner is entitled to an availability bonus for the term of an AGP from the purchaser of the facility's power, the owner shall be, through Letter of Credit or prior to the expiry of 30 days from the same AGP, to the contractor the bonus amount due to the owner under this agreement "

In view of the above terms of the agreement, the assessee is liable to pay bonus to the contractor where the availability exceeds 90% of the average equivalent availability factor (EAF). As regards, the payment of the bonus, two conditions have been prescribed in the agreement:

- (i) where the assessee is not entitled to availability bonus from the purchaser of the power.

(ii) Where the assessee is entitled to availability bonus from the purchaser of the power.

In the first condition, where the assessee is not entitled to availability bonus from the purchaser of the owner, the assessee has been given an option for the payment of bonus. The assessee may choose either to pay in cash to the contractor or it may keep the bonus amount as payable to the contractor which may be adjusted of against any amount due from the contractor i.e. GE International under the given agreement. The second condition is where the assessee is entitled to availability bonus from the purchaser of the power, in this condition the assessee shall pay off amount of bonus through Letter of Credit within the stipulated time of 30 days. The Ld. AR submitted that the liability of bonus has to be discharged by the assessee in both conditions stated above. The only option given to the assessee is with respect to the payment / settlement of bonus in the condition where assessee is not entitled to recover any bonus from the purchaser of the power. The Ld. AR submitted that there is no uncertainty about the incurrence of the expenditure The assessee becomes liable to pay the bonus to the contractor as soon as the contractor fulfill the conditions of annual availability of power plant in terms of the factors given under the said contract. The Ld. AR pointed out that if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. The Ld. AR submitted that it is certain that the assessee has assumed the liability and it is capable of being estimated with reasonable certainty. Thus, if these requirements are satisfied the liability cannot be a contingent one. The liability is in present though it will be discharged at a future date. In this regard reliance is placed on the decision of the Hon'ble Supreme Court in case of Bharat Earth Movers Vs. CIT (2000) 245 ITR 428 (SC). The Ld. AR also relied upon the following decisions:-

(a) CIT vs. Oberon Edifices & Estates (P) Ltd. (ITA No. 163/2016 dated 05.09.2019) (Ker. HC).

(b) Housing And Urban Development Corporation Ltd vs. Addl. CIT (ITA 541/2019 dated 06.02.2020) (Del HC)

(c) Pr.CIT vs. NHPC Limited (ITA No. 256 of 2015 dated 21.03.2018) (P & H HC).

The Ld. AR further submitted that there is no uncertainty about the incurrence of the expenditure. The assessee becomes liable to pay the bonus to the contractor as soon as the contractor fulfills the conditions of annual availability of power plant in terms of the factors given under the said contract. Further, the manner of computing and payment is also mentioned in the same contract. Thus, in the case on hand the liability is an ascertained liability and therefore the expenditure is allowable u/s 37(1) as incurred wholly and exclusively for the purpose of business. Further, the same cannot be disallowed while computing the book profits u/s 115J B of the Act. In the light of the above submissions and Judicial pronouncements, the Ld. AR submitted that the addition made by the Assessing Officer and confirmed by the CIT(A) be deleted.

6. The Ld. DR relied upon the assessment order and the order of the CIT(A).

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the assessee has entered into a long term Comprehensive Service Agreement (CSA) with GE International, a renowned International organization, on 20.06.2009 for the power plant and the said agreement is valid till March 31, 2025. As per the agreement with GE, the party has to ensure 90% availability of the Power Plant for operation and if they ensure availability above 90% then they are eligible for Bonus otherwise they are liable for penalty. This will accrue on year to year basis and will be finally settled on closure of the contract. During the year under consideration, the contractor has ensured the 90% availability of the power plant to the assessee. Accordingly, the assessee booked an expenditure of Rs. 12,99,68,406/- on account of bonus payable to the contractor. These facts

were not disputed by the revenue at any point of time. There was no uncertainty regarding the incurrence of the expenditure and assessee becomes liable to pay the bonus to the contractor as soon as the contractor fulfills the conditions of annual availability of power plant in terms of the factors given under the said contract. Thus, the assessee has established that a business liability has definitely arisen in the accounting year which is year to year basis. The assessee is following the mercantile system of accounting which is not disputed by the revenue. Therefore, the liability is ascertained liability and is allowable u/s 37(1) of the Act which was not taken cognizance by the Assessing Officer as well as the CIT(A). Thus, appeal of the assessee for A.Y. 2012-13 being ITA No. 6548/Del/2016 is allowed.

8. As regards to A.Y. 2013-14 relating to Revenue's appeal being ITA No. 2952/Del/2019, the Ld. DR submitted that Ground No. 1 is relating to the relief granted by the CIT(A) to the assessee of Rs. 2,15,05,00,000/- on account of interest attributed to work in progress only relying upon the order of his predecessor for A.Y. 2012-13 without going into the merits of addition made by the AO in the mater for the impugned Assessment Year. The Ld. DR relied upon the Assessment Order. As regards to Ground No. 2, the Ld. DR submitted that the CIT(A) erred in law and facts in giving relief to the assessee of Rs. 65,25,165/- on account of HQ expenses merely relying upon the order of his predecessor for A.Y. 2012-13 while failing to appreciate the merit of the addition and especially not appreciating the facts brought on record vide the remand report submitted by the Assessing Officer during the appellate proceedings.

9. The Ld. AR relied upon the order of the CIT(A).

10. We have heard both the parties and perused all the relevant material available on record. From the perusal of records, we find that the facts as

emerge from the Assessment Order for A.Y 2013-14 are identical to that of earlier assessment year that is of A.Y. 2012-13 and no new finding or facts brought on record by the Assessing Officer. In A.Y 2012-13, the then CIT(A) has allowed both these issues in favour of the assessee. The submissions of the Ld. AR that the revenue has accepted the order of the CIT(A) and the revenue did not prefer any appeal was not controverted by the Ld. DR. Since, the CIT(A) while deleting the addition has followed the order of the preceding year and the relief granted by the CIT(A) on both the issues have been accepted by the Revenue as no appeal filed, following the rule of consistency, we uphold the order of the CIT(A). Thus, Revenue's appeal being ITA No. 2952/Del/2019 for A.Y. 2013-14 is dismissed.

11. In result, appeal of the assessee being ITA No. 6548/Del/2016 for A.Y. 2012-13 is allowed and appeal of the Revenue being 2952/Del/2019 for A.Y. 2013-14 is dismissed.

Order pronounced in the Open Court on this 25th Day of JANUARY, 2021.

Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 25/01/2021
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

