IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' NEW DLEHI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.6369/Del/2016
Assessment Year: 2012-13

ACIT, Central Circle-28, New Delhi.	vs.	M/s. Glencore India Pvt. Ltd., 806, Meghdoot, 94, Nehru Place, New Delhi.

PAN : AAACG3787B

C.O. No. 106/Del/2019
(in ITA No.6369/Del/2016
Assessment Year: 2012-13

M/s. Glencore India Pvt. Ltd., 806, Meghdoot, 94, Nehru Place, New Delhi.	vs.	ACIT, Central Circle-28, New Delhi.
(Appellant)		(Respondent)

Revenue by : Ms. Rakhi Vimal, Sr. DR
Assessee by : Sh.Tarandeep Singh, Adv.

Date of hearing: 09.02.2021
Date of order : 09.02.2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by order dated 30/9/2016 passed in appeal No. 23/2016-17/CIT (A)-29 passed by the learned Commissioner of Income Tax (Appeals)-29, New Delhi ("Ld. CIT(A)") in the case of Glencore India

Private Limited ("the assessee"), for the assessment year 2012-13, both the Revenue and the assessee preferred the appeal and cross objections.

2. Briefly stated admitted facts of the case are that assessee is engaged in providing consultancy services with respect to metal, minerals, energy and agri-commodities to Glencore International AG i.e the Associated Enterprise (AE). It provides services regarding market conditions in India, liasoning with the customers, monitoring delivery schedules to the customers as well as organizes for speedy recovery of payments. M/s Glencore International AG is parent company of assessee. For the assessment year 2012-13, assessee filed the return of income on 21/11/2012 declaring an income of Rs. 6, 63, 75, 875/-. For a determination of the Arms Length Price ("ALP"), a reference was made to the Ld. Transfer Pricing Officer (Ld. TPO) and the Ld. TPO by order dated 20/1/2016 passed under section 92 CA(3) of the Income Tax Act, 1961 (for short "the Act") did not drawn any adverse inference in respect of the international transaction. Assessment under section 143(3) of the Act was complete by order dated 16/3/2016 at Rs. 10, 19, 75, 050/-after making two additions, namely, Rs. 3, 05, 73, 000/-on account of advance income received by the assessee and Rs. 50, 26, 177/-on account of the disallowance of business promotion expenses.

3. Assessee preferred appeal before the Ld. CIT(A). Ld. CIT(A) by way of impugned order deleted the addition of Rs. 3, 05, 73, 000/-by accepting the contention of the assessee that the Revenue has been book or to the extent of services rendered by the assessee to its AE during the relevant financier, which is also as per the agreement between the assessee and its parent company and the same is higher than the Mark up percentage of the expenditure, which was not adversely commented by the Ld. TPO. Ld. CIT(A) however, gave relief to the assessee in respect of the business promotion expenses to the extent of Rs. 33, 50, 785/-by restricting the disallowance to 20% as against 60%

disallowed by the learned Assessing Officer, but sustained the addition to the tune of Rs. 16, 75, 392/-. Challenging the deletion of the addition made on account of the advance amount paid and the granting relief to the assessee by restricting the disallowance of the business promotion expenses to 20% only, Revenue is in this appeal; whereas the assessee preferred the cross appeal in respect of the addition on account of business promotion expenses to the extent they are sustained by the Ld. CIT(A).

4. Coming to the grounds No. 1 to 3 of Revenue's appeal relating to the addition of Rs. 3, 05, 73, 000/-made by the learned Assessing Officer by treating the advance, received from the parent company as the income for the relevant assessment year is concerned, it is the argument of theld. DR that the assessee failed to communicate about how such amount was treated by the parent company of the assessee; that no correspondence has been produced by the assessee regarding what was the final amount to be decided as the final adjustment as mentioned in clause 5.2 (c) of the contract between the assessee and the parent company; that the assessee on the basis for payment for the period between 1/10/2011 and 31/3/2012 which was to be agreed and determined by the parties as the same was not a picks repayment as in the case of the period between 1/4/2011 and 30/9/2011; that each Assessment Year is different and the principle of res judicata is not applicable to the Income Tax proceedings; that the Ld. CIT(A) failed to notice all these things while granting relief to the assessee, and therefore, the findings of the assessing officer on this aspect have to be upheld.

5. Per contra, while driving our attention to the financials of the assessee, Ld. AR argued that as on 1/4/2011 there was an opening balance of "income received in advance" of Rs. 2.67 crores and as on 31/3/2012 there was a closing balance of "income received in advance"

of Rs. 3.05 crores; that the assessee submitted all the details of consultancy fees received by it from the AE with copies of FIRC; that during the year under consideration the assessee had received 12 monthly instalments of foreign remittances of US the 6 ended, 000/-from its AE; that the opening balance of income received in advance to the tune of Rs. 2.67 crores was offered to tax this year whereas the closing balance of income received in advance to the tune of Rs. 3.05 crores as on 31/3/2012 was offered to tax in the subsequent years therefore, the question of bringing to tax the advance amount does not arise. He further submitted that the remittances of Rs. 3.05 crore pan offered to tax in the assessment year 2013-14, it was accepted by the learned Assessing Officer in the order dated 20/12/2016 without making any objection. He further submitted that the Ld. TPO in his order dated 20/1/2016 for the assessment year 2012-13 has accepted the Arms Length Price ("ALP") of the remuneration received by the assessee and on consideration of all these facts the Ld. CIT(A) granted relief to the assessee. He therefore, submitted that there are no merits in the argument of the Ld. DR and prayed to dismiss the appeal of the Revenue.

6. We have gone through the record in the light of the submissions made on either side. As could be seen from the agreement entered into with its parent entity, the assessee is receiving service income from its AE pursuant to the terms of consulting and service agreement dated 24/3/2011.According to the terms of agreement, for the period between 1/4/2011 and 30/9/2011 a fee of USD 600, 000/-per month will be invoice and paid on quarterly basis to the assessee by the AE, for the period between 1/10/2011 and 31/3/2012 fees will be determined and agreed to between the assessee and the AE in the 1st week of October, 2011 and shall be invoice and paid on quarterly basis, and a final adjustment based upon the actual cost for the period between 1/4/2011 and 31/3/2012 for the services rendered by the assessee company will

be invoice and paid in the 2nd quarter of 2012.

7. Is not in dispute that the opening balance mentioned as "income received in advance" to the tune of rupees to the tune of Rs. 2.67 crores as on 1/4/2011 was offered to tax in the assessment year 2012-13, whereas the closing balance as on 31/3/2012 mentioned as "income received in advance" to the tune of Rs. 3.05 crores was offered to tax in the Assessment Year 2013-14 which was accepted by the learned Assessing Officer in that year without rising any eyebrow. Further the agreement reads that the assessee has to be remunerated by the AE at cost plus basis, with a minimum markup of 15%, which is again subject to the adjustment by mutual agreement to comply with the arm's length principle. Agreement also provides for the mechanism for charging this free under para 5.2 of the agreement.Further while determining the arm's length price of this receipt, Ld. TPO did not draw any adverse inference and accepted ALP of the remuneration received by the assessee.

8. Impugned order clearly shows that the Ld. CIT(A) considered the charts furnished by the assessee showing the opening balance and closing balance along with the working of the receipts being treated as Revenue and the balance was shown as advance and such a practice was established by the fact that in the assessment year 2011-12 the advance was not taxable as income while completing the assessment under section 143(3) of the Act.

9. It is not the case of the learned Assessing Officer that the agreement between the parties is a sham document are that the parties acted in violation of the terms thereof. In such an event when the assessee says that the services corresponding to the amount of Rs. 3, 05, 73, 000/-received in advance were not rendered during that year, there is no reason for the learned Assessing Officer to suspect the same and to

bring into tax. When the tax rates per the assessment year 2011-12, 2012-13 and 2013-14 are same, it cannot be said that is not a Revenue neutral transaction. In these circumstances, we are of the considered opinion that, it does not fit in the order of the things that having accepted the offering of Rs. 2.67 crores received by the assessee in the financial year 2010-11 to tax in the assessment year 2012-13 and also having accepted the offering of Rs. 3.05 crores received by the assessee in the financial year 2011-12 to tax in the Assessment Year 2013-14, the learned Assessing Officer would have held that all the amounts that were received during the financial year 2011-12, irrespective of the fact that corresponding services were rendered during that year are not, should be brought to tax in the assessment year 2012-13 itself.

10. In the light of our discussion in the foregoing paragraphs, we hold that the reasoning adopted by the Ld. CIT(A) and the conclusions reached by him in deleting this amount of Rs. 3.05 crores which is in fact the advance amount but retreated by the learned Assessing Officer as income for the assessment year 2012-13, are perfectly legal and not warrant any interference. We, accordingly, declined to interfere with the same and dismiss grounds 1 to 3 Revenue's appeal.

11. Now coming to the 2nd addition on account of the disallowance of business promotion expenses, learned Assessing Officer observed that the assessee could not provide any proper justification and the need for business promotion expenses especially when the assessee company is not required to attract any customers through business promotion and its only client is its hundred percent holding company to which it provides market information; and also that the assessee failed to furnish the details recording the persons to whom the gifts categorised as business promotion were given along with the details of the business relations with such persons. Learned Assessing Officer however took a view that, considering the fact of offering the gifts on the festive

occasions of Diwalietc, it is customary under Indian tradition, 40% of such business promotion expenses could be allowed and the rest of the same were to be disallowed.

12. Ld. CIT(A), in appeal, found that the assessee had to incur certain expenses towards customary gifts on various occasions to procure and maintain its business relationship and also in order to obtain the market information, certain expenses were required to be incurred towards listening and entertainment; that the assessee provided some of the bills to show that these expenses were incurred to by the gifts like dry fruits, sweets etc and also provided the list of companies and organisations with the category of gifts and name of the persons to whom the gifts were given, the perusal of which reveals that it was not clear that what is the meaning and range of such category for gifts and when the same was given. Ld. CIT(A) further held that looking at the business expediency, providing customary gifts on different festive occasions to procure and maintain good relations for a better business environment, nature of services being provided by the assessee to its parent company etc 60% was a highly estimate of disallowance and, therefore, restricted the same to 20% thereof.

13. Ld. DR submitted that the learned Assessing Officer elaborately discussed the veracity of the claim made by the assessee filed disallowing 60% of the expenses and is also a fact that the assessee failed to give proper justification for these expenses when entire sales or made only to the parent company of the assessee. She further submitted that they gifts by the assessee perhaps were given to procure insider information of the market and could be barred by law.

14. Per contra, it is the submission of the Ld. AR that the disallowance by both the authorities is on ad hoc basis and not in consonance with any applicable legal provisions. He further submitted that the orders of the

authorities below clearly establish that the details and documents like sample invoices, copy of Ledger account, summary mentioning category of gifts and the list of people to whom the gifts were given etc were furnished and without bringing on record any objective material to show that there are any defects in the details furnished by the assessee, any disallowance at whatsoever percentage is unsustainable. He further submitted that offering gift is not banned by law.

15. He further submitted that during this assessment year the assessee derived a markup of cost plus 22.81% from its AE, even business promotion expenses of Rs. 83, 76, 961/-, assessee was compensated by its AE with a markup of 22.81% and, therefore, the entire expense has been incurred for the purpose of business carried on by the assessee.

16. At this stage there is no dispute that the assessee produced the details and documents like sample invoices, copy of Ledger, summary mentioning the category of gifts and the list of people to whom gifts were given etc were furnished before the authorities and no discrepancies are specifically pointed out with any of these documents. Further AO himself admitted that it is customary under Indian tradition to offer gifts on the festive occasions like Diwali Festival. Ld. CIT(A) held that maintenance of cordial relations with customers are required for obtaining the market information which is for the furtherance of the assessee's business. By no stretch of imagination could be said that offering of gifts by a businessman to is customers is barred by any law for the time being in force.

17. Now coming to the quantum of disallowance learned Assessing Officer made it at 60% whereasthe Ld. CIT(A) restricted the same to 20%. As observed by is about, no discrepancies found with the books of accounts of the assessee as to the incurring of these expenses or to show that there is any illegality of purpose of this expense. In the absence of

any concrete basis to determine the disallowance of the expense and in the absence of a specific finding that the expenses were not exclusively and fully for the purpose of business, we find it difficult to sustain the disallowance year at 60% or 20%. With this view of the matter we delete the addition made by disallowing the business promotion expenses. Ground No. 4 of Revenue's appeal is dismissed and grounds of C.O. No are allowed.

18. In the result, appeal of the Revenue is dismissed and cross objections filed by the assessee are allowed.

Order pronounced in open court on this 9th day of February 2021 immediately after conclusion of the hearing by way of virtual mode.

Sd/-	Sd/-
(G.S. PANNU)	**(K. NARASIMHA CHARY)**
VICE-PRESIDENT	JUDICIAL MEMBER

Dated: 09/02/2021
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