

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-1" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER  
&  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.482/DEL/2022  
Assessment Year 2017-18

Ballapur Solar Power Projects Pvt. Ltd., Unit No.236B, 236C First Floor, DLF South Court Saket, New Delhi.	v.	AO, Circle-4(2), Delhi.
TAN/PAN: AAGCB6645P		
(Appellant)		(Respondent)

Appellant by:	Shri Kamal Sawhney, Adv. Shri Prashant Meharchandani, Adv.		
Respondent by:	Shri Surender Pal, CIT-DR		
Date of hearing:	19	05	2022
Date of pronouncement:	31	05	2022

**ORDER**

**PER PRADIP KUMAR KEDIA, A.M.:**

The captioned appeal has been filed at the instance of the assessee against the order of the National Faceless Assessment Centre, Delhi dated 16.02.2022 passed under Section 143(3) r.w. Section 144C(13) r.w. Section 144B of the Income Tax Act, 1961 (the Act) concerning AY 2017-18.

2. The grounds of appeal raised by the assessee reads as under:

*“That on the facts and in circumstances of the case and in law, the Ld. Assessing Officer (“AO”)/ Ld. Transfer Pricing Officer (“Ld. TPO”) based on directions of the Hon’ble Dispute Resolution Panel -DRP”) has:*

1. *Erred by making adjustment/ disallowances of INR 34,45,97,435 to the total income filed the Appellant.*
2. *Erred by alleging that EREN Renewable Energy SA, France (“EREN France”) constitutes an Associate Enterprise (“AE”) of the Appellant only on the basis of disclosure in the related party transactions schedule of the Appellant, without appreciating that the said entity does not fall within the definition of AE as per Section 92A of the Act.*
3. *Without Prejudice to ground 2, even if EREN France constitutes AE of Appellant, erred in not considering the detailed economic analysis submitted as additional evidence before the DRP to benchmark the impugned transaction which substantiates that the purchase of solar modules/panels (i.e., capital assets) were at arm’s length from an Indian transfer pricing perspective*
4. *Without Prejudice to ground 2, even if EREN France constitutes AE of Appellant, erred in redetermining the value of capital assets purchased (which is appearing as a tangible asset in the financial statements of Appellant) from EREN France as “NIL” using “Other Method” as per Rule 10AB of the Income Tax Rules, 1962 (“the Rules”) as the most appropriate method (“MAM”) in an arbitrary manner without performing any comprehensive benchmarking analysis*
  - 4.1. *Without prejudice to ground 4, erred in disregarding the fact that the purchase of capital ( items from EREN France, was a back-to-back purchase from third parties (on*

*which EREN France had charged a minor administrative mark-up, back-to-back invoices for which were submitted before the DRP) and if a disallowance is warranted on the same, it should be restricted to the depreciation on the mark-up charged by EREN France on supplies of such capital items and claimed by the Appellant in its tax-return “*

*4.2. Without prejudice to ground 4 and 4.1 erred in making adjustment for the entire amount of capital items purchased from EREN France, instead of restricting the same to the extent of depreciation claimed by the Appellant on such capital items while calculating the total taxable income during the subject assessment year*

*Initiation of Penalty proceedings under Section 270A and 271AA of the Act*

*4. Erred in proposing initiation of penalty proceedings under Section 270A and 271AA of the Act.*

*The above grounds are without prejudice to each other. The Appellant craves to leave to add, withdraw, alter, modify, amend or vary the above grounds of appeal before or at the time of hearing.”*

3. When the matter was called for hearing, the Id. counsel for the assessee submitted at the outset that ground no.4 in the instant case is dominant and overwhelming and when this ground is adjudicated, other grounds will fade into insignificance. The Id. counsel submitted as follows:

3.1 The assessee is engaged in the business of production and generation of powers using solar, fossils and other alternative source of energy. It is also engaged in distribution of electricity. Return of income was filed declaring a loss of Rs.12,65,25,861/-. During the Financial Year 2016-17 relevant Assessment Year 2017-18 in question, the assessee purchased solar modules/panels from EREN Renewable Energy SA (EREN France) for an amount of Rs.34,45,97,435/-. On reference, the TPO Benchmarked the aforesaid transaction of purchase of solar modules/panels from EREN France by alleging that EREN France is an AE of the assessee. The TPO determined the Arms' Length Price (ALP) of such transaction at 'Nil' by holding that no uncontrolled enterprise would have paid any amount for such asset without making requisite enquiries and negotiations. The Assessing Officer eventually added the entire value of transaction for purchase of its assets of Rs.34,45,97,435/- from alleged AE as the income of the Assessee. In this context, it was submitted that the assessee has entered into contract with EREN France for supply of solar module/panel. The supplier further entered into a module supply agreement with third party vendor namely Zhejiang Jinko Solar Co. Ltd. in order to fulfill its obligation to supply the assets. Against supply, the third party raised invoices on EREN France and EREN France in turn has raised bill on the assessee by adding a markup percentage. In essence, EREN France has purchased the asset from third party [Zhejiang Jinko Solar Co. Ltd.] at the cost of Rs.33,22,67,513/- on which administrative markup of Rs.1,23,29,922/- was added and such assets were, in turn, sold to the assessee for a total consideration of Rs.34,45,97,435/-. In this backdrop, it was contended that notwithstanding and without

prejudice to the fact that the purchase of fixed assets in question is not an international transaction as EREN France is not an AE of the assessee as wrongly alleged; the assumption of whole of cost of purchase as income on account of adjustments to ALP of alleged international transaction is *prima facie* devoid of any logic. The cost incurred by the AE, ostensibly, cannot be regarded as income of the assessee by way of adjustment to ALP.

3.2 It was contended that EREN France the alleged AE had itself purchased such capital goods from third party namely Zhejiang Jinko Solar Co. Ltd. and thereafter transferred the same assets to the assessee. A reference was made to the additional evidences filed before the DRP and TPO to contend that the assessee had provided back to back invoices raised by the third party supplier on EREN France as additional evidence before the DRP and TPO. However, the TPO entirely failed to address the additional evidences on back to back third party invoices in the remand report. The DRP has also wrongly stated in its directions that the assessee has only provided few invoices for purchase of capital assets from EREN France on sample basis and has not divulged complete particulars of back to back invoices raised by third party supplier on EREN France. The ld. counsel thus submitted that the action of the lower authorities are wholly unjustified in making adjustments of the gross amount of its assets purchased and consequently increase the chargeable income for cost of acquisition of asset. It was submitted that the Revenue could have, at best, entered into adjustment to the value of depreciation on markup and not the whole amount of purchase it is in the light of decision of the Co-ordinate Bench of Tribunal in *Ciena India Pvt. Ltd. vs. ITO, 1453/Del/2014 order dated 24.04.2015 & Roki Minda*

*Co. Pvt. Ltd. vs. ACIT, ITA No.6555/Del/2016 order dated 19.11.2020.*

3.3 On being inquired by the Bench, the Id. counsel for the assessee could not clarify its position on the admission of the additional evidences filed before TPO/DRP by way of impugned back to back invoices. The Id. counsel however insisted that Assessing Officer perversely and wrongly added the entire value of fixed assets amounting to Rs.34.45 crore to the retuned loss of Rs.12.65 crore instead of restricting the adjustments to the extent of depreciation only. It was thus submitted that best possible transaction pricing adjustment that may be warranted is to the extent of depreciation claimed on markup by the alleged AE and not more.

4. The Id. CIT-DR for the Revenue, on the other hand, relied upon the order of the lower authorities and contended that in the absence of facts made available before lower authorities, the action of the AO/TPO/DRP cannot be faulted.

5. We have carefully considered the rival submissions. The assessee has raised several grounds but without prejudice to all other grounds, Ground No.4 was pressed. It was asserted that the invoices for purchase of fixed assets from the alleged AE cannot be subjected to Transfer Pricing Adjustment for the whole amount where the purchase cost of the associate enterprise is supported by back to back invoice raised by third party vendor on the alleged AE. The invoices raised by alleged AE (EREN France) on the assessee and back to back invoices raised by third party vendor on EREN France against each purchase lot is tabulated herein.

S.No.	Invoices raised by Zhejiang Jinko on EREN France		Invoices raised by EREN France on Appellant	
	Invoice No.	Amount (in USD)	Invoice No.	Amount (in USD)
1.	Z2016101811	8,30,000	1.1	8,60,800
2.	Z2016101812	8,30,000	2.1	8,60,800
3.	Z2016101813	8,30,000	3.1	8,60,800
4.	Z2016101864	8,30,000	4.1	8,60,800
5.	Z2016101865	8,30,000	5.1	8,60,800
6.	Z2016101866	8,30,000	6.1	8,60,800

6. On perusal of the order of DRP, it is not discernible as to whether the additional evidences towards so called back to back invoices raised were admitted by the DRP or otherwise. DRP is silent on this point. A remand report was sought by the DRP from the TPO in the course of proceedings before it. However, the TPO appears to have not examined the factual matrix. Under the circumstances, we consider it expedient to set aside the impugned order of the Assessing Officer passed under Section 143(3) r.w. Section 144C(13) r.w. Section 144B of the Act and remit the issue back to the file of the AO to conduct enquiry/cause to make enquiry through TPO as per law on the factual matrix regarding back to back purchases pointed out on behalf of Assessee.

7. We find rationale in the plea of the assessee that the disallowances warranted, if any, should be restricted to the depreciation on the markup charged by EREN France on supply of such capital items and claimed by the assessee in its tax return. Hence where the Assessing Officer is satisfied on the *bono fides*

of purchase transaction of capital goods claimed to be back to back invoices, the disallowance shall be restricted to depreciation claimed on markup charges only. It shall be open to Assessing Officer to make necessary enquiries in this regard as per law. It shall also be open to the assessee to furnish such evidences and explanation as considered expedient to support its case on genuineness of purchases of capital goods in question with all documentary evidences including purchase of asset by the supplier EREN France. The Assessing Officer shall pass the order in accordance with law and after taking into account order of TPO on specific points, if considered necessary. Needless to say, proper opportunity of hearing shall be provided to the assessee.

8. Ground No.4 is thus allowed for statistical purposes.
9. All other grounds have not been adjudicated in the absence of any substantiation thereof and thus stands dismissed.
10. In the result, the appeal of the assessee is partly allowed.

**Order pronounced in the open Court on 31/05/2022.**

Sd/-  
**[CHANDRA MOHAN GARG]**  
**JUDICIAL MEMBER**

DATED: **31/05/2022**

*Prabhat*

Sd/-  
**[PRADIP KUMAR KEDIA]**  
**ACCOUNTANT MEMBER**