

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.574/Del/2021
Assessment Year: 2012-13

Oxbow Energy Solutions LLC, USA, 1601, Forum PL Suite P2, West Palm Beach, Florida, USA	Vs.	DCIT, International Taxation- 2(2)(2), New Delhi
PAN :AABCO1049D		
(Appellant)		(Respondent)

Appellant by	Sh. S.K. Agarwal, CA
Respondent by	Ms. Rashmita Jha, CIT (DR)

Date of hearing	03.01.2023
Date of pronouncement	31.01.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee assailing the final assessment order dated 26.03.2021 passed under section 144C of Income-tax Act, 1961 (for short 'the Act') pertaining to assessment year 2012-13, in pursuance to direction of learned Dispute Resolution Panel (DRP).

2. The dispute in the present appeal is confined to addition of amount of Rs.26,56,35,337/- purportedly under section 69A of the Act.

3. Briefly the facts relating to the issue in dispute are, the assessee is a non-resident corporate entity incorporated in United States of America (USA). From the information generated through Annual Information Report (AIR) of the department, it was noticed that certain income earned by the assessee during the year was not offered to tax. Further, from the internal system developed by the department, viz., I-Taxnet; it was found that the assessee's name appears in the list of Non-Filers Monitoring System (NMS). Meaning thereby, the assessee had not filed any return of income for the impugned assessment year. From the system generated information, it was noticed by the Assessing Officer that in the year under consideration, the assessee had entered into transaction of sale and purchase in National/Multi-commodity exchange, amounting to Rs.27,05,30,735/- and has made foreign remittances amounting to Rs.79,70,54,971/-. As observed by the Assessing Officer, in absence of any details due to non-filing of return of income, NMS notice was sent to the assessee to furnish necessary information on financial transaction/activities made

during the year. However, the notice remained un-complied. Thus, ultimately, the Assessing Officer, forming a belief that income chargeable to tax in the year under dispute has escaped assessment, reopened the assessment under section 147 of the Act by issuing a notice under section 148 of the Act. As alleged by the Assessing Officer, neither the assessee complied with the notice issued under section 148 of the Act, nor to the notice issued under section 142(1) of the Act. Due to this reason, the Assessing Officer issued notices under section 133(6) of the Act to M/s DSP Merrill Lynch Ltd., M/s. City Bank Ltd. and M/s. Bombay Stock Exchange Ltd. From the information received from M/s DSP Merrill Lynch Ltd., which acted as a broker in respect of share transaction entered by the assessee, the Assessing Officer found that in the year under consideration the assessee had remitted aggregate amount of Rs.79,70,54,971/- in three trenches. He further found that the assessee has sold shares of Rain Commodities and Rain Industries Ltd. held by it in demat account with M/s DSP Merrill Lynch Ltd. for a consideration of Rs.26,57,84,295/- on 14.11.2011, which was reflected in the client statement of account provided by M/s DSP Merrill Lynch Ltd. Thus, stating that out of total remittances of

Rs.79,70,54,971/- source of Rs.26,56,35,337/- could be identified, whereas, the source of the balance amount of Rs.53,14,19,634/- could not be identified, nor explained by the assessee due to non-furnishing of details, the Assessing Officer added back the amount of Rs.53,14,19,634/- at the hands of the assessee by invoking the provisions of section 69A of the Act, while framing a draft completing the assessment order to the best of his judgment under section 144 read with section 147 and 144C(1) of the Act.

4. Against the draft assessment order so proposed, the assessee raised objections before learned DRP. In course of proceeding before learned DRP, the assessee explained the reason for non-compliance in assessment proceeding by stating that since it did not have any login id on the Income Tax e-filing portal, wherein notices under section 148 and 142(1) of the Act were issued, it could not respond to such notices.

5. Insofar as the merits of the addition is concerned, the assessee contended that during the year under consideration it had sold 92,50,000 equity shares of certain Indian companies through M/s. Bombay Stock Exchange for a net consideration of Rs.26,57,84,297/- and the amount was remitted outside India.

The assessee submitted that the share transaction was Security Transaction Tax (STT)- paid, hence, resultant long-term capital gain was exempt under section 10(38) of the Act. It was submitted by the assessee that except this transaction, the assessee had neither made any other share transactions, nor made any other remittances over and above Rs.26,56,35,337/-. The assessee further submitted that the other two transactions alleged by the Assessing Officer and subject matter of addition in the assessment order are duplication of this transaction. To substantiate its claim, the assessee furnished certain additional evidences before learned DRP. After admitting the additional evidences, learned DRP forwarded them to the Assessing Officer for verification and furnishing the report thereon. As observed by learned DRP, without offering any comment/observation on the additional evidences furnished by the assessee, the Assessing Officer simply stated that the additional evidences should not be admitted and reiterated the stand taken in the assessment order. After considering the submissions of the assessee in the context of evidences brought on record, learned DRP, being convinced that the assessee had actually made a single remittance of Rs.26,56,35,337/-, whereas, other two amounts forming part of

aggregate amount of Rs.79,7054,971/- considered by the Assessing Officer as three separate transactions, are in reality duplication of only one transaction, deleted the addition of Rs.53,14,19,634/- made by the Assessing Officer. While passing the final assessment order in pursuance to the directions of learned DRP, the Assessing Officer, though, deleted the addition of Rs.53,14,19,634/- proposed in the draft assessment order, however, he added the amount of Rs.26,56,35,337/- accepted in the draft assessment order.

6. We have considered rival submissions and perused the materials on record. Facts on record clearly reveal that based on certain information received from M/s DSP Merrill Lynch Ltd., the Assessing Officer found that in the year under consideration, the assessee had made the following remittances outside India:

S. No.	Acknowledge Number	TAN	Amount (Rs.)	TDS (Rs.)	TDS Rates	Nature of Remittances
1.	R2011013YH9B	-	265784297	0	0	Sale of equity shares of BSE held for more than 1 year.
2.	R2011013Y6NE	-	265635337	0	0	Sale of equity shares of BSE held for more than 1 year.
3.	R2011013X7JA	-	265635337	0	0	Sale of equity shares of BSE held for more than 1 year.

7. Since, the assessee, as alleged, did not comply with statutory notices, the Assessing Officer accepted the source of Rs.26,56,35,337/-, being the consideration received from sale of equity shares of certain companies made in M/s. Bombay Stock Exchange, to be explained. Whereas, he treated the balance amount aggregating to Rs.53,14,19,634/- as unexplained money of the assessee under section 69A of the Act, while framing the draft assessment order.

8. Before learned DRP, the assessee specifically contended that in the year under consideration, the assessee had sold 92,50,000/- shares of certain companies and received net consideration of Rs.26,56,35,337/- after deduction of Service Tax, STT, brokerage etc. The assessee very clearly and categorically submitted that except the aforesaid amount, it had neither received any other amount as alleged by the Assessing Officer, nor has made any requirements. To substantiate such claim, the assessee furnished the following addition evidences before learned DRP:

- i. *Copy of the contract note dated 14.11.2011 issued by M/s. DSP Merrill Lynch Limited.*
- ii. *Copy of Transaction Statement issued by National Securities Depository Limited (NSDL).*

- ii. Copy of client statement of account for the period 01.04.2011 to 31.03.2012 issued by M/s. DSP Merrill Lynch Limited.*
- iv. Copy of Form 15CB dated 15.11.2011*
- v. Copy of Form 15CA dated 16.11.2011*

9. It is evident, though, learned DRP forwarded the additional evidences to the Assessing Officer seeking his report, however, the Assessing Officer did not offer any meaningful comment on the merits of the evidences furnished, except stating that the additional evidences should not be admitted. Further, in the report, the Assessing Officer reiterated the stand taken in the draft assessment order by stating that the transaction relating to sale in National Commodities Exchange (NSE) of Rs.27,05,30,735/- and foreign remittance amounting to Rs.79,70,54,971/- still remains unexplained. After factually verifying the materials and evidences brought on record, learned DRP, was convinced that the only transaction made by the assessee in the year under consideration is in relation to sale of 92,50,000 equity shares of Rain Commodities Ltd. for a consideration of Rs.26,57,84,297/-. Except this transaction, the assessee had neither made any other transaction, nor has received any other amount over and above the sale consideration

of Rs.26,57,84,297/-. Learned DRP recorded a categorical finding that the other two transactions aggregating to Rs.53,14,19,634/- are duplication of the single transaction made by the Assessing Officer. Accordingly, learned DRP directed the Assessing Officer to delete the addition of Rs.53,14,19,634/-. In this regard, the following observations of learned DRP are of much relevance:

*“2.7 The submissions have been perused along with the materials on record. In the remand report, the AO has not disputed the veracity of the documents filed by way of additional evidence and listed at para 2.4 above, Instead, the only grounds on which the AO contended that the additional evidence may not be admitted are that sufficient opportunity had been given to the assessee in the re-assessment proceedings and that the bank statement had not been provided by the assessee for reconciliation. The Panel is of the view that the documents submitted by way of additional evidence are wholly relevant to determine the transactions and hence are required to be examined. As regards the AO's reference to sale **in** National Commodity Exchange of Rs. 27,05,30.735/- in the abovementioned reply dated 28.01.2021, **it is** seen that there is no addition on this account in the draft assessment order.*

2.8 There is no dispute that the assessee had undertaken sale transaction of 92,50,000 shares of Rain Commodities Limited, which resulted in net sale consideration of INR.26,57,84,297/- as reflected in Table in para 2.3 above. As per the contract note dated 14.11.2011 issued by M/s DSP Merrill Lynch Limited (viz. document at sl. No. 1 of para 2.4 above) the consideration payable to the assessee on account of the sale of 92,50,000 shares of Rain Commodities Ltd. with the trade date of 14.11.2011 and settlement no. 12154 was INR 26,57,84,297/- which was net of brokerage, service tax and STT. As per the Transaction Statement issued by NSDL (viz, document at sl. No. 2 of para 2.4 above), the same transaction of 14.11.2011 is recorded against DSP Merrill Lynch Ltd Rolling Mkt. Lot 112154. As per the client statement of account for the period 01.04.2011 to 31 03 2012 issued by M/s. DSP Merrill Lynch Limited (viz. document at sl. no. 3 of para 2.4 above), the same transaction of 14.11.2011 stands recorded as under:

Trade Date	Due Date	Exch.	Narration	Voucher No.	Debit (Rs.)	Credit (Rs.)	Balance (Rs.)
14.11.2011	16.11.2011	BSE	Settlement Obligation N/1112154	20111114/775/2		265,784,297	265,784,297
22.11.2011	22.11.2011	BSE	DP charges deducted for Client Oxbow Carbon And Minerals LLC from total remittance	20111122/16/0	148,960		265,635,337
22.11.2011	22.11.2011	BSE	Payment Entry/BSE/1112154	20111122/61/1	265,635,337		00.00
			Total		265,784,297	265,784,297	
			Closing Balance		0.00	0.00	

2.9 The aforesaid documents are seen to be consistent with one another and reflect the same transaction details including number of shares, trade date and sale consideration amount. *The same is also reflected in Form 15CA dated 16.11.2011 and Form 15CB auditor certification dated 15.11.2011, which shows remittance of INR 26,47,84,297 on account of the said share sale transaction. The difference between the amounts reflected in sl. no. 1 and sl. no. 2 and 3 of the Table at para 2.1 above is seen to be due to Depository Participant charges of INR 148,960. The assessee also furnished a copy of the extract of the relevant bank statement in DRP proceedings which shows wire transfer as follows:*

Date posted	Amount (\$)	Description	Bank Reference
11/22	5,062,558.62	Wire type : Wire IN Date: 111122 Time : 1239 Et T r n . 2011112200172474 Seq: 06132614C9D01/304163 Orig: Dsp-Bse Client Account ID. 0012061099 SndBk: Cltibank N A ID: 0008PmtDet: 51006 Sale of Proceeds For 9250000 Shares Of Rain Commodities Ltd.	903711220172474

2.10 Given the above, the Panel is of the view that the same transaction bearing the same trade date, share details and sale consideration has been reported separately by Mis DSP Merrill Lynch, NSDL and Bombay Stock Exchange vide documents listed in para 2.1 above. There is nothing on record to show that there are three separate transactions. it is seen that the AO has accepted the transaction with value of INR 26,56,35,33Th in the

order without any adverse inference regarding the taxability of the same under the Act. In the light of the foregoing observations of the Panel, the AO is directed to delete the addition of the balance two transactions amounting to 1NR 53,14,19,634/- as being duplicates in the draft assessment order.”

10. As could be seen on a perusal of the final assessment order under challenge in the present appeal, while implementing the directions of learned DRP, the Assessing Officer, though, deleted the addition made of Rs.53,14,19,634/-, however, he made the addition of Rs.26,56,35,337/-, accepted as explained in the draft assessment order. The aforesaid action of the Assessing Officer is totally unacceptable as he has exceeded his jurisdiction provided under the statute. As could be seen from the observations of learned DRP reproduced above, a clear direction was issued to the Assessing Officer to delete the addition of Rs. 53,14,19,634/- proposed in the draft assessment order. There is no other direction by learned DRP. Instead of implementing the direction of learned DRP in letter and spirit, the Assessing Officer has attempted to overreach the direction of learned DRP by making addition of an item of income, which was not made at the draft assessment stage, hence, not a subject matter of dispute before learned DRP.

11. At this stage, it is necessary to refer to certain provisions of section 144C of the Act. As per sub-section (8) of section 144C, the DRP may confirm, reduce or enhance the variation proposed in the draft assessment order and issue necessary direction to the Assessing Officer. Sub-section (10) of section 144C makes it clear that every direction issued by learned DRP shall be binding on the Assessing Officer. Sub-section (13) of section 144C provides that after receiving the direction of learned DRP, the Assessing Officers shall in conformity with the direction complete the assessment without providing any further opportunity of being heard to the assessee. The requirement of providing a personal hearing to the assessee at the final assessment stage has been dispensed with only for the reason that the Assessing Officer has no other scope but to implement the direction of learned DRP.

12. In the facts of the present appeal, the only direction of learned DRP is to delete the addition made in the draft assessment order. Therefore, the clear mandate given to the Assessing Officer by learned DRP is to restrict himself to delete the addition of Rs.53,14,19,634/-. Whereas, the Assessing

Officer has travelled beyond the direction given by learned DRP and made addition of Rs.26,56,35,337/-, which he himself accepted as explained in the draft assessment order. Thus, the impugned assessment order has been passed in clear violation of the directions of learned DRP. Therefore, the assessment order is a nullity in the eyes of law as it is against the provisions contained under sub-section (10) and (13) of section 144C of the Act. That being the factual and legal position, we quash the final assessment order.

13. Before parting, we must observe, in recent times, we have come across several instances of open defiance and non-implementation of directions issued by DRP by the Assessing Officers. This, in our view, is a very disturbing trend and reflects poorly on the credibility of the department and shakes the confidence of tax payers. Therefore, it goes against the Government's policy of adopting taxpayer friendly approach. In any case of the matter, the DRP is constituted by three senior Commissioner level officers of the department and is a dispute resolution mechanism set up by the Government under the statute. As per the Statute, the Assessing Officer is duty-bound

to implement the directions of the DRP. The Assessing Officer, being a statutory authority, is bound to act in accordance with the procedure laid down in Statute and cannot deviate. Since, we have come across several instances of non-implementation of directions given by the DRP to the Assessing Officers, it is high time to take appropriate corrective measures to stem the deficiencies. Therefore, we direct the matter to be brought to the notice of the concerned higher Authorities so that necessary advisory/guidelines are issued to sensitize the Assessing Officers in the matter of implementation of directions of the DRP. We leave the matter at this.

14. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 31st January, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 31st January, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi