

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1957/Mum/2022 (A.Y. 2016-17)

DCIT-8(3)(1) Aayakar Bhavan Room No. 615 New Marine Lines Mumbai-400 020.	Vs.	M/s. Voltas Limited 4 <sup>th</sup> Floor, Voltas House A-Block, Dr. Baba Saheb Ambedkar Road, Chinchpokli Mumbai-400 033.  PAN : AAACV2809D
(Appellant)		(Respondent)

Assessee by	Shri Nitesh Joshi
Department by	Shri Samuel Pitta
Date of Hearing	25.01.2023
Date of Pronouncement	27.01.2023

O R D E R

Per B.R.Baskaran (AM) :-

The Revenue has filed this appeal challenging the order dated 9.6.2022 passed by the learned CIT(A)-58, Mumbai and it relates to A.Y. 2016-17.

2. The revenue is in appeal assailing the order passed by the learned CIT(A) in the following issues :-

- a) Transfer Pricing Adjustment made by way of charging commission on corporate guarantee given by the assessee.
- b) Transfer Pricing Adjustment made by way of charging interest on share application money given by the assessee.
- c) Transfer Pricing Adjustment made by way of charging interest on balances outstanding with associated enterprises.
- d) Rate of tax chargeable on capital gains arising on sale of depreciable assets, viz., building and residential flats.

3. The assessee company is having diversified business activities in engineering, manufacturing and marketing organization. It manufactures air condition and refrigeration equipment, material handling equipment, construction and mining equipment, execution of electro mechanical projects etc. The Assessing Officer completed the assessment by making additions towards Transfer Pricing Adjustments and disallowance of expenses under section 14A of the I.T. Act. The appeal filed by the assessee before the learned CIT(A) was partly allowed. Aggrieved by the relief granted by the learned CIT(A) on the above said issues, the Revenue has filed this appeal before the Tribunal.

4. The first issue relates to Transfer Pricing Adjustments made by way of charging commission on corporate guarantee given by the assessee to its associated enterprises (AE). The Transfer Pricing Officer (TPO) noticed that the assessee has given corporate guarantee by way of issuing "Comfort letter" to the banks in UAE and Saudi Arabia on behalf of its associated enterprises. The learned TPO noticed that the Associated Enterprises had availed credit facility of Rs. 30.57 crores on the strength of those comfort letters. The TPO noticed that the assessee company did not charge any commission for giving the "comfort letter", which is in the nature of guarantee given by it and he took the view that the assessee should have charged guarantee commission on its AE. Hence the TPO collected data from the bankers with regard to the guarantee commission charged by them. He noticed that the average guarantee commission worked out to 1.47%. The learned TPO held that the transfer pricing adjustment should be made by taking guarantee commission @ 1.50%. Accordingly, he proposed an adjustment of Rs. 45,85,799/-. The learned CIT(A) reduced the rate of guarantee commission to 0.50%.

5. We have heard the parties on this issue and perused the record. The Ld A.R relied upon the orders passed by ITAT in the earlier years. The Ld D.R,

on the contrary, submitted that the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Everest Kento Cylinders Ltd. (58 taxman.com 254) is distinguishable on facts and hence the ITAT should not have followed the said decision in the earlier years by ITAT. We notice that an identical transfer pricing adjustment by way of guarantee commission was examined by the Coordinate Bench in assessee's own case in the above said years in ITA No. 7029/Mum/2018 and ITA No. 3307/Mum/2019 respectively and the Tribunal affirmed the order of the learned CIT(A) in determining the guarantee commission at 0.50% by following the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Everst Kento Cylinders Ltd. (supra). We noticed that the learned CIT(A) has also rendered his decision by following the decision rendered by the Tribunal in assessee's own case in A.Y. 2013-14. Since this transfer pricing adjustment has been made by TPO on identical set of facts in this year also, we do not find any reason to deviate with the view taken by the co-ordinate bench in the earlier years. Accordingly, we do not find any infirmity in the decision rendered by the learned CIT(A) on this issue.

6. The next issue relates to transfer pricing adjustment by way of charging interest on the Share application money given by the assessee. The assessee had paid Share application money of Rs. 20.44 crore to M/s. Saudi Ensas Company for Engineering Services WLL, which is wholly owned subsidiary of the assessee in the Kindom of Saudi Arabia. The TPO noticed the above said money was given in April 2008 and March 2009 and the shares have been allotted only in December 2015. Since the delay in allotment of shares was inordinate, the TPO took the view that the assessee should have charged interest on the above said amount. Accordingly, the TPO treated the share application money as "debt" and charged @ 7.61%, which resulted in transfer pricing adjustment of Rs. 1.56 crore.

7. The learned CIT(A) noticed that the TPO had made identical transfer pricing adjustment in A.Y. 2013-14 also and the same has been deleted by the ITAT. Accordingly, following the decision rendered by the Tribunal, the Ld CIT(A) directed for deletion of the transfer pricing adjustment made by way of charging of interest on share application money.

8. We have heard the parties on this issue and perused the record. The Ld D.R submitted that the funds given by the assessee as share application money has been used by the subsidiary for its business purposes and since shares have not been allotted for more than 6 months, the TPO has rightly taken it as "debt" and charged interest. We noticed that this issue has been decided in favour of the assessee since A.Y. 2009-10 onwards. In A.Y. 2014-15 also the Tribunal has deleted the addition by following the earlier decisions rendered by ITAT in A.Y. 2010-11 & 2011-12. The Tribunal also noticed the fact that the shares has been finally allotted to the assessee in the month of December, 2015 after getting desired regulatory approval. The Tribunal also noticed that the delay in allotment was genuine and the assessee has properly substantiated the same. In this regard the Tribunal had referred to the decision rendered by Hon'ble Bombay High Court in the case of PCIT Vs. Agies Ltd. and also decision rendered by the Chennai Bench of the Tribunal in the case of Pane Biscuits Ltd. Accordingly, the Tribunal held in A.Y. 2013-14 that the learned CIT(A) has correctly deleted the addition in that year. Since the facts relating to this issue are identical in nature in this year also and since shares have been allotted to the assessee during the year under consideration, following the decision consistently rendered by the Tribunal on this issue in the earlier years, we uphold the order passed by the learned CIT(A) on this issue.

9. The next issue relates to transfer pricing adjustment by way of charging interest on the amount outstanding with the AEs. The TPO noticed that one

of the its AEs owed sum of Rs. 4,85,000/- to the assessee since F.Y. 2007-08. It has been reduced to Nil during the year under consideration by writing of the same on the last date of financial year. The TPO treated the amount as “debt” and accordingly made transfer pricing adjustment of Rs.36,909/- by charging interest at rate of 7.61%.

10. The learned CIT(A) noticed that an identical addition was made by the Assessing Officer in A.Y. 2012-13 and the learned CIT(A) had directed the Assessing Officer to apply interest rate at US\$ LIBOR rate plus 3% markup. In this year, the Ld CIT(A) gave similar direction.

11. We have heard the parties on this issue. The Learned AR submitted that the decision rendered by the learned CIT(A) directing the Assessing Officer to charge interest at LIBOR rate + 3% was challenged by the assessee in earlier years but due to smallness of the amount, did not press the same. Accordingly, the Tribunal in earlier years, has upheld the decision rendered by the learned CIT(A) to adopt rate plus 3%.

12. We have heard learned DR and perused the record. We noticed that the decision rendered by the learned CIT(A) has not been disturbed by the Tribunal in earlier years on this issue. Thus, the interest has been charged at LIBOR rate + 3% in the earlier years. For maintaining consistency in this matter, we confirm the order passed by the learned CIT(A) on this issue in this year also.

13. The last issue relates to question as to whether capital gain on sale of building and residential flats, being depreciable assets, are liable to be taxed at the concessional rate under section 112 of the Act or at regular rate when the said properties were held for more than three years i.e. long term capital asset.

14. The assessee had sold certain buildings and flats during the year under consideration. The assessee had claimed depreciation on the above said assets and hence as per the provisions of sec. 50 of the Act, the capital gain arising on transfer of depreciable assets shall be deemed to be “short term capital gain”. The case of the assessee is that the above said buildings and flats were held by it for more than three years and hence they qualify as long term capital assets. In case of capital gains arising on transfer of long term capital assets, the provisions of sec.112 provide for charging of tax at special rate of 20%. Accordingly, the assessee raised an additional ground before the learned CIT(A) contending that the tax should be charged on the capital gains arising on sale of buildings and flats (being long term capital gains) at the rate prescribed u/s 112 of the Act. The first appellate authority noticed that the assessee has raised an identical ground in A.Y. 2012-13 and 2013-14 also, which was decided the same in favour of the assessee. Following the said orders, the learned CIT(A) directed the Assessing Officer to charge tax on the capital gains as per section 112 of the Act.

15. We heard the parties on this issue and perused the record. The Ld D.R submitted that, as per the provisions of sec.50, the capital gains arising on sale of depreciable assets is short term in nature. Since it is a deeming fiction, the Ld CIT(A) was not justified in directing the AO to charge tax at concessional rate on deemed short term capital gains. We notice that the revenue had challenged the identical decision rendered by Ld CIT(A) in 2012-13 before the ITAT and the Tribunal, vide its order dated 21.02.2022 passed in ITA No.94/Mum/2021, has confirmed the order passed by Ld CIT(A) by following the decision rendered by the co-ordinate bench on an identical issue in AY 2013-14 in ITA No.7029/Mum/2018, wherein it was held as under:-

“39. Upon careful consideration we find that Hon’ble Higher Courts as above have held that deeming fiction of section 50 is limited and cannot be extended beyond method of computation of capital gain. That the

distinction between short term and long term capital gain is not obliterated by this section. Hence, we respectfully follow the same and reject this submission of learned departmental representative. This additional ground is allowed and the Assessing Officer is directed to re-examine the detailed facts and allow as per the ratio of above said decisions as discussed above.”

We notice that the co-ordinate benches are consistently affirming the view taken by Ld CIT(A) that the long term capital gains arising on sale of buildings and flats, even though depreciable, is liable to be taxed as per the rates stated in sec.112 of the Act. Consistent with the view taken by the co-ordinate benches, we uphold the order passed by Ld CIT(A) on this issue also.

16. In the result, the appeal filed by the revenue is dismissed.

Pronounced in the open court on 27.1.2023

Sd/-  
(RAHUL CHAUDHARY)  
Judicial Member

Sd/-  
(B.R. BASAKARAN)  
Accountant Member

Mumbai; Dated : 27/01/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

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