IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No. 9491/DEL/2019 [A.Y.: 2015-16]
&
ITA No. 9492/DEL/2019 [A.Y.: 2016-17]

Cairn Energy Hydrocarbon Ltd., DLF Atria Building, Jacaranda Marg, N-Block, DLF City Phase-II, Gurgaon-122002 PAN- AACCC3279J	Vs	JCIT (OSD), International Taxation Circle, Gurgaon.
APPELLANT		**RESPONDENT**

ITA No. 8983/DEL/2019 [A.Y.: 2015-16]
&
ITA No. 8984/DEL/2019 [A.Y.: 2016-17]

JCIT (OSD), International Taxation Circle, Gurgaon.	Vs	Cairn Energy Hydrocarbon Ltd., DLF Atria Building, Jacaranda Marg, N-Block, DLF City Phase-II, Gurgaon-122002 PAN- AACCC3279J
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Ravi Sharma, Adv. & Shri Kshitij Bansal, CA
Department represented by	Shri Vizay B. Vasanta, CIT(DR)
Date of hearing	31.05.2023
Date of pronouncement	07.06.2023

O R D E R

PER KUL BHARAT, JM:

The captioned cross appeals, preferred by the assessee as well as the Revenue, are directed against separate orders of the learned Commissioner of Income-tax (Appeals)-43, New Delhi, both dated 02.09.2019, pertaining to the assessment years 2015-16 & 2016-17, respectively. Since common issues are involved for adjudication for both the assessment years in question, all these appeals were heard together and are being disposed of by a consolidated order for the sake of convenience.

2. At the outset learned counsel for the assessee submitted that the issues involved in these appeals are covered by the decision of Coordinate Bench of this Tribunal in assessee's own case for A.Ys. 2010-11, 2013-14 and 2014-15. He submitted that facts and circumstances of the present case being identical to earlier years, the order of the Coordinate Bench is to be followed for these assessment years also. In support of his contention, the learned counsel has filed summary of common issues assessed in AYs 2010-11, 2013-14 to 20116-17 and a copy of Tribunal's consolidated order dated 31.01.2023 passed in ITA no. 6357/Del/2013 & others.

3. The learned DR was fair enough to concede the fact that the issues involved are covered by the decision of the Coordinate Bench of the Tribunal in assessee's own case for earlier assessment years.

4. The grounds of appeal raised by the assessee are as under:

ITA No. 9491/Del/2019 (A.Y. 2015-16) (Assessee's appeal):

> "1. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in confirming action of Ld. AO in allowing claim of additional depreciation under section 32(l)(iia) of the Act and recomputed the deprecation of Rs 611,23,45,284 after giving effect to Assessment order of AY 2014-15 despite the Appellant had not claimed the additional deprecation in Income Tax Return of the AY 2015-16.
>
> 1.1. That on the facts and circumstances of the case & in law, the Ld. C1T(A) erred in confirming Ld. AO's allegation that the claim of additional depreciation was to be mandatorily allowed in terms of Explanation 5 to section 32(1) of the Act, without appreciating that additional depreciation being optional in nature, is not covered within the purview of the said Explanation.
>
> 1.2. That on the facts and circumstances of the case & in law, the Ld C1T(A) erred in not appreciating that the additional depreciation, provided under Section 32(1)(iia) of the Act is in the nature of an incentive and cannot, therefore, be treated at par with 'normal depreciation'."

ITA No. 9492/Del/2019 (A.Y. 2016-17) (Assessee's appeal):

> "1. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in confirming action of Ld. AO in allowing claim of additional depreciation under section 32(l)(iia) of the Act and recomputed the deprecation of Rs 572,39,92,656 after giving effect to Assessment order of AY 2015-16 despite the Appellant had not claimed the additional deprecation in Income Tax Return of the AY 2016-17.
>
> 1.1. That on the facts and circumstances of the case & in law, the Ld.

C1T(A) erred in confirming Ld. AO's allegation that the claim of additional depreciation was to be mandatorily allowed in terms of Explanation 5 to section 32(1) of the Act, without appreciating that additional depreciation being optional in nature, is not covered within the purview of the said Explanation.

1.2. That on the facts and circumstances of the case & in law, the Ld C1T(A) erred in not appreciating that the additional depreciation, provided under Section 32(1)(iia) of the Act is in the nature of an incentive and cannot, therefore, be treated at par with 'normal depreciation'."

5. The grounds of appeal raised by Revenue are as under:

ITA No. 8983/Del/2019 (A.Y. 2015-16) (Revenue's appeal):

"1. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the exploration and development expenditure of Rs. 2081,87,03,681/- which had been disallowed by the AO on the ground that the assessee company during the relevant previous year has contravened the provision of chapter XVII-B read with section 40a(i) and 4oa(ia) of the Income Tax Act, 1961 and these expenses were also found unascertainable & unverifiable by the assessing officer. Further the said expenditure has not been approved by the Management Committee (MC) which is also in contravention to the production sharing contract (PSC).

2. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the total time cost and expenses recharged by the operator to the Unincorporated Joint Venture (UJV) amounting to Rs. 364,99,38,786/- which is the appellant share in the cost. The same has been disallowed by the AO as these were all estimated basis and no actual evidence was produced during the course of hearing.

3. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the payment of Rs. 33,57,83,017/- made for parent company overhead which has been made from the books of Rajasthan block to parent company of operator, thus it was considered as head office expenditure covered u/s 44C for the block. The same has been disallowed by the AO as these were all estimated basis without any evidence to support the same.

4. The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal."

ITA No. 8984/Del/2019 (A.Y. 2016-17) (Revenue's appeal):

"1. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the exploration and development expenditure of Rs. 550,89,93,076/- which had been disallowed by the AO on the ground that the assessee company during the relevant previous year has contravened the provision of chapter XVII-B read with section 40a(i) and 40a(ia) of the Income Tax Act, 1961 and these expenses were also found unascertainable & unverifiable by the assessing officer. Further the said expenditure has not been approved by the Management Committee (MC) which is also in contravention to the production sharing contract (PSC).

2. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the total time cost and expenses recharged by the operator to the Unincorporated Joint Venture (UJV) amounting to Rs. 129,83,85,090/- which is the appellant share in the cost. The same has been disallowed by the AO as these were all estimated basis and no actual evidence was produced during the course of hearing.

3. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the payment of Rs. 15,95,78,450/- made for parent company overhead which has been made from the books of Rajasthan block to parent company of operator, thus it was considered as head office expenditure covered u/s 44C for the block. The same has been disallowed by the AO as these were all estimated basis without any evidence to support the same.

4. The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal."

6. First we take up assessee's appeals. The only effective ground raised by the assessee in its appeals for A.Ys. 2015-16 & 2016-17 is in respect of allowance of

additional depreciation u/s 32(1)(iia), after giving effect to the respective earlier assessment year, despite not claimed by the assessee.

7. We find that identical issue came up for adjudication before the Tribunal in assessee's own case for A.Ys. 2013-14 and 2014-15 wherein the Coordinate Bench vide its order dated 31.01.2023 rendered in ITA Nos. 6277 & 6278/Del/2018 for assessment years 2013-14 & 2014-15 has disallowed the assessee's claim by holding the additional claim as mandatory under Explanation 5 to Section 32(1)(iia) of the Act, inter alia, observing as under:

> *"29. It is a fact on record that the assessee ahs not claimed additional depreciation admissible under clause (iia) of section 32(1). The assessing officer decided in the Assessment Order that the assessee ahs not choice not to the claim of additional depreciation under clause (iia) of section 32(1) in pursuance to the Explanation 5 which reads as under:*
>
> > *"[Explanation 5.—For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;]"*
>
> *30. The assessee contended that the said explanation is not applicable to the provisions of clause (iia) of section 32(1) because the explanation is placed before the said clause In the act. The assessee relied on the judgment in the case of Commissioner of Agricultural Income Tax Vs. The Plantation Corporation of Kerala Ltd AIR 2000 SC 3714, M/s. Patel Roadways Ltd. vs. M/s. Prasad Trading Co AIR 1992 SC 1514) and Mohanlal Hargovinddas vs. State of M.P.AIR 1967 SC 1022/ to stress on the relevance of positioning of explanation.*
>
> *31. The Id. CIT(A) held that a general rule, the explanations incorporated in the Income tax act specifically provide that a*

particular explanation applies to a 'section' or sub-section or 'clause'. Therefore, there is no ambiguity in the applicability of a particular explanation in the act.

32. Explanation 5 specifically mentions that it is applicable for the 'sub-section'. The 'sub-section' in this case is 'sub-section' 1 of section 32 of the Act. The scheme of the Act clearly lays out that a sub-clause falls under a clause and a clause falls under a sub-section and further, sub-section falls under section. Therefore, the explanation 5 which is applicable for the sub-section will be applicable for all clauses and sub clauses of the said sub-section. Since 'clause (iia)' falls under 'sub-section 1' of 'section 32', there is no doubt regarding applicability of explanation 5 to the said clause (iia) of section 32(1).

33. Further, the explanation 5 was introduced with effect from 1/04/2002 and clause (iia) was reintroduced from 01/04/2003. The later insertion of clause (iia) con not be the basis for non applicability of explanation 5 to the said clause because if the intention of the parliament was there to restrict the explanation to a particular clause only, it would have amended the phrase "sub-section" to "clause" or "sub-clause" as the case may be. It may be interesting to note that explanation 2 to the sub-section 1 of section 32 was modified from the phrase "[For the purposes of this [clause]" to "For the purposes of this [sub-section]" by the Finance Act, 2002, w.e.f. 1-4-2003.

34. The case laws cited by the assessee do not pertain to Income Tax Act but to Evidence Act and Agriculture Income Tax Act and there may be ambiguity in the scope of applicability of "explanation" in the respective Acts.

35. Accordingly, the AO has rightly allowed the additional depreciation in this case even without its claim by the assessee. The appeal of the assessee on this ground is dismissed."

8. The order of the learned CIT(A) for the assessment years under consideration being in consonance with the decision of the Coordinate Bench of

the Tribunal in assessee's own case for earlier years , we see no reason to interfere with the same. Accordingly, order of learned CIT(A) for A.Ys. 2015-16 & 2016-17 on the issue in question is affirmed. Grounds of appeal taken by the assessee are rejected. Appeals of the assessee for A.Ys. 2015-16 & 2016-17 stand dismissed.

9. Now we take up Revenue's appeals. Ground no. 1 taken by the Revenue in both the assessment years in question relates to exploration & development expenditure u/s 40(i)(ia), allowed by the learned CIT(A).

10. We find that identical issue came up for adjudication before the Tribunal in Revenue's appeals in assessee's own case for A.Ys. 2010-11, 2013-14 and 2014-15 wherein the Coordinate Bench vide its order dated 31.01.2023 rendered in ITA Nos. 6357/Del/2013; and ITA Nos. 5988 & 5989/Del/2018 for assessment years 2010-11, 2013-14 & 2014-15 respectively, affirmed the CIT(A)'s order in deleting the disallowance made by the AO on account of exploration & development expenditure per se and on account of infraction of provisions of Section 40(a)(ia) of the Act, inter alia, observing as under:

> *"39. Heard the arguments of both the parties and perused the material available on record.*
>
> *40. With regard to non-deduction of TDS on the expenditure charged to P&L account, we hold that,*

- The assessee has a Participating Interest (PI) in the unincorporated joint-venture.

- *The business of prospecting and exploration of mineral oil in India could be done only by the way of Production Sharing Contracts (PSC) with Government of India.*

- *ONGC is one part of the PSC on behalf of the Government of India.*

- *The assessee (CEHL) acquired 50% participating interest in exploration, development and production of oil and natural gas in the contract area RJ (the block) with the approval of the Government of India.*

- *ONGC and Cairn Energy India Pvt. Ltd. (CEIL) are the other partners in the block.*

- *CEIL is the operator of this contract area.*

- *CEIL holds 35%, CEHL holds 35% and ONGC holds 30% interest during the development and production stage.*

- *As per the Article 1.4.4 Appendix C of PSC and in terms of the aforesaid Articles, the operator namely CEIL is required to maintain, on behalf of all contractor parties, all the accounts of the Petroleum Operations in accordance with the provisions of the PSC and also timely filing of reports and payment of fees, levies, taxes etc. Such expenditure/sums paid by the operator on behalf of all contracting parties and thus allocated to the parties, based upon which profit/loss accounts are drawn. Thus disallowance under section 4 0 (a) (i) and 40(a)(ai) is totally unwarranted and uncalled for.*

- *Though, even after mentioning that the commercial production has been started which was one of the main reasons for disallowance in earlier years, however, the AO erroneously disallowed the total development and exploration cost amounting to Rs. 205,14,89,785/- alternatively by invoking the provisions of*

Section 40(a)(i).

- *Article 6.4 of PSC reveals that the operating functions will be performed by the operator i.e. CEIL.*

- *The said Article reads as under:*

> *"The operating functions required of the Contractor under this contract shall be performed by the Operator on behalf of the all constituents of contractor, subject to, and in accordance with the terms and provisions of this Contract and generally accepted international petroleum industry practice. "*

- *The operator is also responsiblefor the maintenance of books of accounts and others records including audit thereof in accordance with the terms of the PSC. Article 1.4.4 of Appendix C of the PSC provides that Operator shall be responsible for maintaining at business office in India, on behalf of the contractor, all the accounts of the Petroleum Operations in accordance with the provisions of the Accounting Procedure and the contract. Also, as per the Joint Operating Agreement entered by the parties to the PSC, operator is required to carry out Petroleum Operations in compliance with the obligations imposed upon the Contractor by the laws of India and the Contract including the timely filing of reports and payment of all fees, levies, taxes etc.*

- *Clause 27 of the Tax Audit Report for the UJV certifies that the operator has complied with the requirement of Chapter XVII-B regarding deduction of tax at source & deposit thereof to the credit of Central Govt.*
- *The appellant further submitted that the Hon'ble CIT(A) in its order for AY 2006-07 has held that operator has complied with provisions of TDS contained in Chapter XVII of the Act.*

- *During AY under consideration, commercial production has commenced, therefore, even under provisions of IT Act, exploration and development expenses becomes allowable during AY under consideration.*

- *The Id. CIT(A) has categorically held that the assessee (CEHL) has furnished tax audit report of the operator CEIL perusal of which shows that TDS requirement have been duly complied with the operator.*

hence, the disallowance made by the AO on account of exploration & development expenditure per se and on account of infraction of provisions of Section 40(a)(ia) of the Income Tax Act, 1961 are liable to be deleted. The order of the Id. CIT(A) on this ground is affirmed."

11. The order of the learned CIT(A) for the assessment years under consideration being in consonance with the decision of the Coordinate Bench of the Tribunal, we see no reason to interfere with the same. Accordingly, order of learned CIT(A) for A.Ys. 2015-16 & 2016-17 on the issue in question is affirmed. Ground No. 1 taken by the Revenue in its appeals for A.Ys. 2015-16 & 2016-17 stand dismissed.

12. Ground no. 2 taken by the Revenue for both the assessment years in question relates to time cost expenses which was disallowed by the AO and in appeal stood allowed by the learned CIT(A).

13. We find that identical issue came up for adjudication before the Tribunal in Revenue's appeals in assessee's own case for A.Ys. 2010-11, 2013-14 and 2014-15 wherein the Coordinate Bench vide its order dated 31.01.2023 rendered in ITA Nos. 6357/Del/2013; and ITA Nos. 5988 & 5989/Del/2018 for assessment years

2010-11, 2013-14 & 2014-15 respectively, affirmed the CIT(A)'s order in allowed the assessee's claim of time cost expenses, inter alia, by observing as under:

> *"48. The disallowance is called for only where any expenditure is not incurred solely for Petroleum operations or is incurred as part of or in conjunction with other business, then the Assessing Officer having regard to facts and circumstances, shall allow only a fair proportion thereof. In the present case, it is an admitted position that the assessee does not have any other business in India except PI in the block and has not incurred any expenditure itself, rather it has made contribution to the cash calls made by the operator which has incurred the expenditure.*
>
> *49. It is a settled position of law that for making a disallowance under section 40A of the Act, the onus is on the AO to establish that the payments made by the assessee were excessive and unreasonable. In the present case, the AO made disallowances without discussing even the nature of expenses and its reasonableness. Hence, the disallowance proposed to be made is bad in law and deserves to be deleted. Ergo, the decision of the Ld. CIT(A) is hereby affirmed."*

14. The order of the learned CIT(A) on the issue in question for the assessment years under consideration being in consonance with the decision of the Coordinate Bench of the Tribunal in assessee's own case for earlier years, we see no reason to interfere with the same. Accordingly, order of learned CIT(A) for A.Ys. 2015-16 & 2016-17 on the issue in question is affirmed. Ground No. 2 taken by the Revenue in its appeals for A.Ys. 2015-16 & 2016-17 stand dismissed.

15. Ground no. 3 taken by the Revenue for both the assessment years in question relates to the over head expenditure claimed by the assessee, which were disallowed by the AO and in appeal stood allowed by the learned CIT(A).

16. We find that identical issue came up for adjudication before the Tribunal in Revenue's appeals in assessee's own case for A.Ys. 2010-11, 2013-14 and 2014-15 wherein the Coordinate Bench vide its order dated 31.01.2023 rendered in ITA Nos. 6357/Del/2013; and ITA Nos. 5988 & 5989/Del/2018 for assessment years 2010-11, 2013-14 & 2014-15 respectively, affirmed the CIT(A)'s order in allowed the assessee's claim of overhead expenditure, inter alia, by observing as under:

> *"60. It was argued that the assessee would qualify for head office expenditure, on the grounds that,*
>
> *- that section 44C of the Act begins with a non obstante clause;*
>
> *- it restricts deduction to least of two parameters mentioned in clauses (a) and (c) of section 44C of the Act and in the absence of any one out of the two prescribed parameters, the entire section becomes non-workable. Consequently, the Assessee would become entitled to full deduction under section 37(1) of the Act in respect of its head office expenses. - CIT v. Deutsche Bank A.G. [(20oy) Taxman 37 (Bom.)]*
>
> *61. We find that the Ld. CIT(A) in his order for AY 2010- 11 has allowed these expenses by holding as under:*
>
> > *"(a) It is seen that then CIT(A) in his appellate order for AY 2004-05 and subsequent AY has held that the appellant may claim such expenses over a period of 5 years starting from AY 2010-11. The Id.*

CIT(A) has given a finding that the provisions of section 44C do not apply to these expenses and these are otherwise allowable as deduction. However, he did not allow such deduction for those earlier AYs on the reasoning that there is unreasonable delay in starting commercial production.

(b) That the AO has not given the reasoning as to how these expenses are hit by the provisions of section 44C and has That the AO has not given the reasoning as to how these expenses are hit by the provisions of section 44C and has simply disallowed these expenses on the basis of the stand taken by the Assessing Officer in earlier assessment years.

(c) The expenses are allowable since it is undisputed that the commercial production started in AY 2010-11."

62. In view of the above, we find no infirmity in the order of the Ld. CIT(A) in allowing the parent company overheads."

17. The order of the learned CIT(A) on the issue in question for the assessment years under consideration being in consonance with the decision of the Coordinate Bench of the Tribunal in assessee's own case for earlier years, we see no reason to interfere with the same. Accordingly, order of learned CIT(A) for A.Ys. 2015-16 & 2016-17 on the issue in question is affirmed. Ground No. 3 taken by the Revenue in its appeals for A.Ys. 2015-16 & 2016-17 stand dismissed.

18. In the result, all the appeals preferred by the assessee as well as the Revenue stand dismissed.

Order pronounced in open court on 07.06.2023.

Sd/-	**Sd/-**
(M. BALAGANESH)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI