

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "K" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 3687/Mum/2016 (A.Y. 2010-11)

I.T.A. No. 972/Mum/2017 (A.Y. 2011-12)

IOT Infrastructure & Energy Services Ltd. (formerly known as Indian Oiltanking Ltd.) Plot No. Y2, Ceat Tyre Road Near Nahur Railway Station Bhandup West Mumbai-400 078.	Vs.	Addl. CIT-10(3) ACIT-15(2)(1) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

I.T.A. No. 3531/Mum/2016 (A.Y. 2010-11)

I.T.(TP) A. No. 1660/Mum/2017 (A.Y. 2011-12)

ACIT-15(2)(1) Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	IOT Infrastructure & Energy Services Ltd. (formerly known as Indian Oiltanking Ltd.) Plot No. Y2, Ceat Tyre Road Near Nahur Railway Station Bhandup West Mumbai-400 078.
(Appellant)		(Respondent)

PAN : AABCH3858F

Assessee by	Ms. Vasanti B. Patel
Department by	Shri Ashish Kumar
Date of Hearing	16.08.2023
Date of Pronouncement	22.08.2023

ORDER

Per B.R.Baskaran (AM) :-

These cross appeals relate to AY 2010-11 and 2011-12. They are directed against the orders passed by Ld CIT(A)-56, Mumbai. Since common

issues are urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee company is engaged in the business of providing terminalling, engineering and construction services to petroleum sector.

3. The common issues urged by the assessee in both the years are:-

- (a) Transfer pricing adjustment made in respect of share application money by characterizing it as Loans.
- (b) Disallowance made u/s 14A of the Act.
- (c) Rejection of claim for deduction of proportionate expenses incurred to procure right of way.

3.1 In AY 2010-11, the assessee has raised grounds on disallowance of expenditure on development and other charges on leasehold land, short credit of TDS, interest charged under section 234A & 234C and claim for deduction of Education cess. At the time hearing, learned AR did not press those grounds. Accordingly, all those grounds are dismissed as not pressed.

3.2 In AY 2011-12, the assessee has also raised ground claiming deduction of Education cess. At the time of hearing, the Ld A.R did not press the same and accordingly, the said ground is dismissed as Not Pressed.

4. The common grounds urged by the revenue in both the years relate

- (a) Deduction claimed towards Provision for Warranty
- (b) Reversal of excess provision of warranty.

4.1 In AY 2011-12, the revenue is contesting the decision of Ld CIT(A) in directing the AO to compute interest at LIBOR rates. It is the contention of the revenue that the ALP should have been directed to be computed at LIBOR plus Credit spread on account of the risk profile of the borrower.

5. We shall first take up the appeals filed by the assessee for both the years.

6. The first common issue relates to the transfer pricing adjustment made by the TPO/AO in respect of share application money paid by the assessee. The TPO noticed that the assessee has paid a sum of Rs.38,58,739/- as share application money to its AE named M/s IOT Engineering & Construction Services P Ltd, Singapore during the period relevant to AY 2010-11. During the period relevant to AY 2011-12 also, the assessee paid share application money of Rs.8,75,010 to the above said Singapore company and a sum of Rs.2,12,84,012/- was paid to another AE, viz., M/s PT IOT Energy Services Ltd. The TPO noticed that the assessee was not allotted shares in both the years under consideration against the payment of share application money referred above. Hence the TPO took the view that the amount so paid should be treated as loan and accordingly made transfer pricing adjustment by imputing interest thereon. The TPO allowed a period of 15 days and computed interest for the remaining period. The TPO adopted SBI prime lending rate of 8.75% in AY 2010-11 and 9% in AY 2011-12. Accordingly, he made transfer pricing adjustment of Rs.2,61,252/- in AY 2010-11 and Rs.7,54,528/- in AY 2011-12.

6.1 Before Ld CIT(A), the assessee contended that the re-characterisation of Share application money into loan made by TPO is not permissible under Transfer Pricing provisions. In the alternative, the assessee contended that the TPO was not justified in adopting SBI prime lending rate for computing interest, i.e., he should have adopted LIBOR rates for computing interest. The Ld A.R further submitted that the time period of 15 days allowed by TPO is not correct. She submitted that the RBI allows a period of six months for allotment of shares and accordingly contended that the interest should have been computed for the period exceeding six months.

6.2 We heard Ld D.R on this issue and perused the record. Considering the smallness of the transfer pricing adjustment, we are of the view that the alternative prayer of the assessee may be considered, i.e., we are leaving the contention on eligibility of TPO to recharacterize the transactions open. With regard to the alternative contention, we agree with the assessee that the interest should not have been computed on the basis of SBI prime lending rate. It is well settled proposition that the LIBOR rate prevailing for the country in which the loan was given should be considered, subject to some adjustments. However, we notice that the Ld CIT(A) has already directed the AO to adopt SIBOR/LIBOR rate only in both the years. Accordingly, we are of the view that the order passed by Ld CIT(A) on this issue in both the years under consideration do not call for any interference.

6.3 In AY 2011-12, the revenue is contending that there should be a mark-up to LIBOR rate to cover credit risks. However, we notice that the revenue has accepted SIBOR/LIBOR rate for AY 2010-11. Accordingly, under the principle of consistency, we uphold the order passed by Ld CIT(A) in AY 2011-12 also. In view of this, the ground raised by the revenue in AY 2011-12 on this issue is liable to be dismissed.

7. Next issue urged by the assessee relates to the disallowance made under section 14A of the I.T. Act. In A.Y. 2010-11, the assessee earned dividend income of Rs. 1.16 crores from four companies. The assessee voluntarily disallowed a sum of Rs. 5 lakhs under section 14A of the Act. The Assessing Officer, however, disallowed a sum of Rs. 5.51 crores by applying provisions of rule 8D of the I.T. Rules. The learned CIT(A) upheld the addition made by the Assessing Officer by following the decision rendered by Hon'ble Bombay High Court in the case of *Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT* (2010) 328 ITR 811.

7.1 We have heard the parties on this issue and perused the record. We noticed that the Assessing Officer himself has discussed in paragraph 5.7 of the assessment order relating to AY 2010-11 that the own funds available with the assessee is sufficient to cover the value of investment. Accordingly the Assessing Officer has observed that no disallowance under section 14A is called for out of interest expenditure. However, after having observed so, the Assessing Officer has again computed the disallowance out of interest expenditure to the tune of Rs. 4.79 crores. The above said computation made by the Assessing Officer is contrary to the observations made by him in paragraph 5.7 above. If the own funds available with the assessee is more than the investment, no disallowance out of interest expenditure is called for as held by Hon'ble Bombay High Court in the case of HDFC Bank Ltd. Vs. DCIT (366 ITR 505). Accordingly we direct the Assessing Officer to delete the disallowance made out of interest expenditure.

7.2 with regard to the disallowance out of administrative expenses made under rule 8D(2)(iii) of the I.T. Rules, it is the submission of learned AR that the Assessing Officer has considered the value of foreign investments and also investments which did not yield dividend income for the purpose of computing average value of investment. The Learned AR submitted that, as per the decision rendered by Delhi (Special Bench) of the Tribunal in the case of Veerit Investments Pvt. Ltd., investments which did not yield dividend income should not be considered for computing average value of investments. Accordingly, the learned AR prayed that the Assessing Officer may be directed to exclude the foreign investments as well as investment which did not yield dividend income for computing average value of investments. We agree with the above said submission made by learned AR. Accordingly we direct the Assessing Officer to compute average value of investment by excluding value of foreign investment of the value of investment which did

not yield dividend income. Thereafter the disallowance to be made under rule 8D(2)(iii) may be computed.

7.3 In A.Y. 2011-12 also, we direct the Assessing Officer to follow the decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank (supra) and Delhi bench of Tribunal in the case of Vireet Investments P Ltd (supra) as per the directions made for A.Y. 2010-11 supra.

8. Next common ground relates to the claim for deduction of expenditure incurred by the assessee on right of way. The assessee had incurred certain expenses for securing right of way. The assessee incurred a sum of Rs. 44.12 crores for that purpose and proposed to claim a sum of Rs. 2.66 crores on proportionate basis. However, the assessee neither made claim in the profit and loss account nor in the statement of total income. However, the assessee appended a note to the Statement of total income by stating that total income has been computed subject to its claim for deduction of proportionate amount of expenditure incurred on right of way. It was stated that the first year of claim was A.Y. 2002-03 and it is stated that the said appeal is pending before the Tribunal.

8.1 The Learned AR submitted that an identical claim made in A.Y. 2004-05 was restored to the file of the Assessing Officer by the Coordinate Bench, vide its order dated 17.5.2013 passed by ITA No. 2585/Mum/2009 with the direction that the Assessing Officer shall decide this issue afresh in accordance with law after taking into consideration the decision rendered by the Tribunal in A.Y. 2002-03. Following the above said decision of the Coordinate Bench rendered in A.Y. 2004-05, we restore this issue to the file of the Assessing Officer with similar direction.

9. We shall now take up the appeals filed by the revenue. The first issue relates to the disallowance of Provision for warranty expenses and the second issue relates to reversal of excess provision created for warranty expenses. We notice that the co-ordinate bench has held in AY 2004-05 that the assessee is required to justify the provision created for warranty on the basis of past data. In AY 2004-05, the Tribunal has confirmed the order passed by Ld CIT(A) in restricting the provision to 0.20% on the basis of past data. It was held that the reversal of excess provision of warranty in the subsequent years will not justify the allowance of the same in the year of creation. The sum and substance of the decision rendered by the co-ordinate bench is that the assessee should justify the quantum of Provision for warranty on the basis of past data.

9.1 From the assessment order of AY 2010-11, we notice that the AO himself has discussed in paragraph 6.3 of the assessment order that the provision for warranty was allowed @ 0.20% by the Tribunal in AY 2004-05. With regard to the reversal of provision for warranty, the Tribunal had held that the said reversal is taxable to the extent the provision was allowed in the earlier year. The AO has discussed about the same in paragraph 6.4, but still chose to disallow the expenditure treating it as contingent liability, i.e., the AO did not follow the decision rendered by the Tribunal also. The AO made disallowance in AY 2011-12 also on identical reasoning.

9.2 We notice that the Ld CIT(A) has deleted the disallowance under the impression that identical additions made in the earlier years have been deleted by the Tribunal, i.e., the Ld CIT(A) has not examined the claim of the assessee in accordance with the principles discussed by the Tribunal in AY 2004-05. In our view, the AO should have followed the decision rendered by the Tribunal in AY 2004-05 to 2007-08. Accordingly, we set aside the orders passed by Ld CIT(A) on this issue in both the years under consideration and

restore them to the file of the AO with the direction to examine the claim of the assessee in accordance with the decision rendered by the Tribunal in the assessee's own case in AY 2004-05 to 2007-08.

10. In the result, both the appeals of the assessee are partly allowed. The appeal of the revenue for AY 2010-11 is treated as allowed. The appeal of the assessee for AY 2011-12 is treated as partly allowed.

Order pronounced in the open court on 22.8.2023.

Sd/-
(Narender Kumar Choudhry)
Judicial Member

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

Mumbai.; Dated : 22/08/2023

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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