IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I" DELHI

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.2109/DEL/2022
Assessment Year 2017-18

Bhartiya International Ltd. E-52 New Mangla Puri Mehrauli, New Delhi.	Vs.	**Dy. Commissioner of Income-Tax,** Circle-4(2), New Delhi.
TAN/PAN: AAACB0728M		
(Appellant)		(Respondent)

Appellant by:	Shri Amit Goel, Adv. Shri Nippun Mittal, CA Mr. Pranav Yadav, Adv.		
Respondent by:	Shri Rajesh Kumar, CIT-DR		
Date of hearing:	08	11	2023
Date of pronouncement:	02	01	2024

O R D E R

PER PRADIP KUMAR KEDIA-A.M. :

The captioned appeal has been filed at the instance of the assessee against the final assessment order dated 29.07.2022 passed under Section 143(3) r.w. Section 144B r.w. Section 144C(13) passed in pursuance of directions issued by Dispute Resolution Panel (DRP) dated 02.06.2022 read with rectification order dated 28.06.2022 passed by DRP under Rule 13 of the Dispute Resolution Panel Rules, 2009.

2. The concise Grounds of Appeal filed by the assessee are reproduced hereunder for adjudication purposes:

"1. On the facts and circumstances of the case and in law, the impugned assessment order is invalid and non-est in law (as it is only a draft order and not final order) and, therefore, the said order along with the demand created and notice issued u/s. 156 are liable to be quashed.

2. On the facts and circumstances of the case and in law, the Id. assessing officer erred in making addition/variation of Rs. 11,64,88,755/- on account of commission, brokerage and discount expenses.

3. On the facts and circumstances of the case and in law, the Id. assessing officer/ Hon'ble DRP erred in making disallowance of Rs. 61,64,363/- u/s. 14A of the Act. r.w.r 8D of the Income Tax Rules.

4. On the facts and circumstances of the case and in law, the Id. assessing officer/Hon'ble DRP erred in making addition of Rs. 2,03,96,540/- on account of disallowance of ESOP expense.

5. On the facts and circumstances of the case an in law, the ld. assessing officer has erred in making addition of Rs. 15,17,87,755/- on account of disallowance of purchases.

6. On the facts and circumstances of the case and in law, the ld. assessing officer/ Id. TPO/ Hon'ble DRP have erred in making adjustment of Rs.23,06,351/- on account of commission on standby letter of credit."

3. Grounds No.1 of the concise ground (supra) is dismissed as not pressed in the wake of averments made by the assessee in the course of the hearing.

4. Ground No.2 concerns additions of Rs.11,64,88,755/- on account of disallowance of commission, brokerage and discount expenses claimed by the assessee.

4.1 In the draft assessment order, the AO *inter alia* observed that assessee has claimed Rs.11,90,44,517/- towards commission, brokerage and discount expenses. The party-wise details of expenses along with details of TDS deducted if any was called for. The reply of the assessee was obtained. It was alleged in the draft

assessment order that the assessee has not provided any details of TDS deduction made on these expenses. The AO also alleged that the contract agreements have not been provided to gauge the nature of expenses. The assessee on its part responded to the queries raised and pointed out that commission expenses have been incurred for procurement of export orders, i.e, for earning income outside India for which the services have been rendered by the overseas commission agents outside India and no services have been rendered in India. Party-wise break up of payments to agents situated outside India were provided and it was pointed that similar payments have been made to these very parties in the earlier years too for obtaining such services of commission agents. Such expenses incurred have been found to be in order in the previous assessments carried out after scrutiny under section 143(3) of the Act. Besides, the matter has been also examined under Transfer Pricing Regulations and no adverse inference has been drawn. The party-wise response of the assessee in tabular form have also been reproduced in paragraph 7.4 of the draft assessment order. It was pointed out that the copy of agreements were duly submitted at the time of transfer pricing assessment and sample copies of agreements were placed before the AO for perusal. It was thus contended that commission, brokerage and expenses etc. have been incurred wholly and exclusively for the purposes of business of the company which has not been disturbed by the Transfer Pricing Officer. Such expenses have also been accepted in the assessment carried out under Section 143(3) in respect of earlier assessment years.

4.2 The AO however in the draft assessment order prepared under s. 144C(1) of the Act observed that the services rendered by

these foreign commission agents also include 'quality checks' which requires technical expertise such payments thus fall within the ambit of 'fee for technical services' and such services are being utilized for the purpose of business carried out in India or for earning any income from source in India and consequently such services are subjected to withholding tax provisions under Section 195 of the Act. The assessee have failed to deduct TDS on remittances made on account of such commission / brokerage and thus such expenses are liable to be disallowed.

5. In the pursuance of the objections filed by the assessee to the draft order, the DRP took note of the submissions made on behalf of the assessee viz; (i) the identical position of the assessee on such commission expenses have been duly accepted in the A.Y. 2014-15, 2015-16 and 2016-17 under Section 143(3) of the Act (ii) the foreign agents continue to be the same and the factual matrix of the assessee continues to be identical (iii) copy of agreements with foreign agents have been produced before the AO and there is no reference to any clause by which it reveals that any quality check of any technical nature is to be done by the foreign agents (iv) the clauses of agreement, filed before the Dispute Resolution Panel, do not undertake or signify that quality checks of the product is to be verified to the foreign commission agents (v) the solitary basis of disallowance are so called assertions made towards quality checks which the assessee denies. The assessee never stated in the course of hearing through virtual conference (VC) that quality check was done by the commission agents as wrongly observed in the draft assessment order.

5.1 In the light of these submissions, the DRP took a view that

the Assessing Officer ought to have passed a reasoned order while making additions on the grounds of failure to deduct TDS on such payments. The DRP thus accordingly issued directions to the AO to incorporate a factual and legal position on the issue of doctrine of consistency and also directed the AO to revisit the copies of agreement to ascertain the factum of quality check purportedly carried out by the foreign agents.

5.2 The Assessing Officer ultimately passed final assessment order and reiterated that the assessee had admitted and stated on record that parties to whom payments have been made have provided services of quality checks for product exported at the time of virtual conferences accorded to the assessee on 21.08.2021. Consequently, the AO applied the ratio on decision of the Co-ordinate Bench in *Hical Infra. Pvt. Ltd. [TS-252-ITAT-2019(Bang.)]* to hold that export commission paid by the Indian tax payer would constitute fee for technical services under Section 9(1)(vii) of the Indian Income Tax Act. Consequently failure to deduct TDS under Section 195 of the Act will lead to disallowance of such expenses by operation of law. The AO accordingly disallowed an amount of Rs.11,64,88,755/- towards commission expenses claimed as business expenses.

6. In the appeal before Tribunal, the ld. counsel for the assessee restated various submissions made before the lower authorities and submitted that in essence, the genuineness of expenses, reasonableness thereof etc. is not in dispute. It is also not in dispute that the commission expenses have been incurred wholly and exclusively for the purpose of business as can be seen from the final assessment order. The sole ground for disallowance

is failure to deduct TDS on remittances of commission payments stipulated in s. 195 of the Act. In this regard, the ld. counsel pointed out that the adverse conclusion drawn by the AO is solely based on so called assertions made on behalf of the assessee in VC meeting that the commission agents are under obligation to indulge in quality checks which tantamount to fee being paid for rendering technical services to such agents under s. 9((1)(vii) of the Act and thus liable for tax deduction at source under s. 195 of the Act and such failure would trigger s. 40(a)(i) of the Act to disallow the commission expenses to such foreign agents. Addressing the point, the ld. counsel submitted that while the assessee has demonstrated total absence of any such clause in the agreement towards quality check, the Revenue has failed to produce any evidence in support of such allegation. No recording of VC meeting has been provided despite request. Besides, the payments are being made for obtaining identical services year after year from the same parties under the same set up where such business expense on account of export commission has been duly accepted in tune with law. No factual deviation has been shown except for a self serving assertions made by the AO that some kind of confession was made on behalf of the assessee towards quality check. The ld. counsel submitted that such commission payments are made for sale of its product in overseas jurisdiction for which the services are rendered and utilized outside India. Such services neither require any kind of technical expertise nor any such services has been rendered in the instant case. Notwithstanding and without prejudice, a pertinent question would also arise whether any and every activity which involves some skill and expertise be called a technical service? The counsel thus

submitted that without going into such aspects as not needed in the instant case, the Assessing Officer has not brought any adverse facts on record to impugn such genuine business payments despite specific directions of the DRP.

6.1 The Ld. Counsel also pointed out that such commission paid to foreign entities for procurement of export orders are not susceptible to Indian taxation and consequently in the absence of any income chargeable to tax in India, no obligation to deduct withholding tax arises in India. The provisions of s. 40(a)(i) are not triggered in the absence of any liability to tax in India as attributable to commission income in the hands of foreign entities as held in plethora of judicial pronouncements.

6.2 The ld. counsel thus submitted that the action of the AO is devoid of any legal or factual foundation and consequently sought reversal of the additions so made.

7. The ld. DR for the Revenue, on the other hand, relied upon the observations made in the final assessment order passed in pursuance of DRP directions and also submitted in furtherance that similar additions have been made in the A.Y. 2018-19 also having regard to the factual matrix determined by the AO and there is no *res judicata* in tax proceedings and one small change in fact can lead to entirely different results.

8. We have carefully considered the rival submissions and perused the orders of the authorities below. The case laws cited have been perused carefully.

9. The disallowance of export commission expenses owing to

non-deduction to tax at source on such remittances is in controversy. The assessee-company is engaged in the business of export of leather and textile products. The assessee company has entered into certain international transactions with agents in an overseas jurisdiction to carry out marketing and sales related activities therein. Commission payments have been made for procurement of export orders to various such overseas agents such as Ultima Italia SRL, Italy; World Fashion Trade Ltd, Hong Kong; Trade World Ltd, Hong Kong and several other parties having establishment abroad. The assessing officer has denied deduction of commission expenses for non deduction of TDS on such payments placing reliance on *Hical Infra (supra)*.

9.1 In defense, it is the case of the assessee that commission payments are attributable to procurement of export orders for earning an income outside India and in lieu of services rendered outside India. The overseas agents are not authorized to conclude any contract on behalf of the Indian company and the pricing of the product is also determined by the Indian Company. The overseas agents carried out their assigned activity wholly outside India as a support for procurement of export orders. It is further case of the assessee that the AO in the final assessment order has disallowed such commission expenses aggregating to Rs.11,64,88,755/- solely on the ground that assessee has failed to deduct TDS under section 195 of the Act on commission payments and consequently invoked provisions of Section 40(a)(i) of the Act. For holding so, the AO has branded such commission expenses as ‘fee for technical services’ [chargeable under the Act under source rule of S. 9 of the Act] on the ground that such commission agents are engaged in providing quality checks

services while obtaining procurement order which observation is, in turn, based on purported assertions made on behalf of the assessee through Video Conferencing (VC). In rebuttal, the assessee had denied making any such assertions before the DRP as well as in the final assessment stage. The AO has not referred to any documentary evidences including clause in the agreements entered into with overseas agents which places such obligations of quality check on the commission agents. It is well settled that onus lies on the person who alleges as observed in *K.P. Verghese vs. ITO (1981) 131 ITR 597 (SC)*. The Revenue cannot put an impossible burden on the assessee to prove a negative point. The AO has merely relied upon certain assertions purportedly made by the representative of the assessee towards quality check. No evidence has been placed to establish the factum of any such assertions. Be that as it may, such allegations cannot be imputed in the absence of any documentary evidence. The whole basis for making such whopping disallowance is shallow and a damp squib. The assessee has repeatedly asserted that services have been rendered outside India by the overseas agents for procurement of orders without any technical or managerial assistance.

10. Under the circumstances, in the absence of any adverse material, the factual matrix did not provide any scope for taxing such payments. The reasonableness and genuineness of expenses are admittedly not in dispute. It is also not in dispute that commission expense has been incurred wholly and exclusively for the purposes of carrying out of the business of the assessee. Similar expenses incurred by the assessee company in the earlier years have been stated to be allowed in the assessment framed under Section 143(3) as emerging from records. The DRP has also

observed that agreements with overseas agent do not signify that any quality checks of the products are carried out by foreign commission agents. Thus, the commission payments cannot be regarded as fee for technical services. Despite such observations, no facts have been brought on record to the contrary in the final assessment order. Thus, in the absence of any services of technical nature, commission payments to selling agents outside India is outside the ambit of provisions of Section 9(1)(vii) r.w. Section 5 of the Act.

9.2 Plethora of judgments govern the field on the issue. Useful reference can be made to the decision rendered by the Co-ordinate Bench in *CIT vs. EON Technology P. Ltd., (2011) 15 taxmann.com 391 (Del)* and in the case of *Prithvi Information Solutions Ltd. Vs. ITO (2014) 47 taxmann.com 214 (HYD.); Well Spring Universal vs. JCIT (2015) 56 taxmann.com 174.*

9.3 Under the provisions of s. 195 of the Act, taxes are required to be deducted at source on the payments made to non resident, only if the income payable to the non resident is chargeable to tax in India. The income is chargeable to tax in India in the hands of the non resident where income received or deemed to have been received in India or the income has accrued or arisen or deemed to have accrued or arisen in India. The assessee has appointed several non-resident entities to act as agent for services such as soliciting customers, securing orders, assisting in deliver of goods outside India etc. The commission in the instant case has thus derived its genesis from sales. The property in goods have been transferred in overseas jurisdiction. We thus find force in the plea of the assessee that in the instant case where the overseas agents

were paid commission for securing order etc., and such services were utilised for the purpose of making or earning income from a source outside India, the assessee is under no obligation to apply with provisions of Section 195 of the Act for the reasons that commission to such overseas agents are not taxable under the Act. The AO has not alleged or established any thing to the contrary. The AO was thus not justified to disallow such commission expenses under the Act. We thus direct the AO to reverse and cancel the additions on this score.

10. Hence, Ground No.2 of the appeal of the assessee is allowed.

11. Ground No.3 concerns a disallowance of Rs.61,64,363/- under Section 14A of the Act.

11.1 In the matter, the ld. counsel for the assessee submits at the outset that the assessee has earned exempt income of Rs.1,01,073/- only during AY 2017-18 in question as evident from the statement of total income and the audited financial statements placed in the paper book. As against such exempt income, the assessee has made *suo motu* disallowance of Rs.2,52,249/- on the basis of 1% of average value of investment from which tax free dividend income was received. The assessee thus contends that in view of *suo motu* disallowance which far exceeds the exempt income, no further disallowance is permissible under Section 14A r.w. Rule 8D of the Income Tax Rules, 1963.

11.2 In the light of the submissions made on behalf of the assessee, no further disallowance under Section 14A is called for in the light of the judgment rendered in the case of *Joint Investments P. Ltd. Vs. CIT, (2015) 372 ITR 694 (Del) and Pr.CIT*

vs. Caraf Builders and Constructions P. Ltd. (2019) 414 ITR 122 (Del) (SLP dismissed by SC). It is well settled law that disallowance under Section 14A can be made only in respect of those investments which have yielded tax free income during the year as held in *Caraf Builders (supra)* and *ACB India Ltd. vs. ACIT (2015) 374 ITR 108 (Del).* The AO is thus directed to delete the disallowance under Section 14A made over and above the disallowance offered by the assessee.

11.3 Ground No.3 of the appeal of the assessee is allowed.

12. Ground No.4 concerns additions of Rs.2,03,96,540/- on account of disallowance of ESOP expenses.

12.1 As per the draft assessment order, the AO observed that the assessee has claimed Rs.2,03,96,540/- under Section 37(1) of the Act under the head 'employees ESOP compensation expenses'. It was submitted by the assessee that during the year under consideration, the company granted 1,64,650 options comprising equal number of equity shares in one or more tranches to eligible employees of the company. The options are granted with specific exercise period from the date of vesting of shares and the options are exercisable at a pre-determined price of Rs.50 each resulting in issue of share on discount to the market price of the company shares on the date of grant.

12.2 As pointed out, it was asserted before the lower authorities that the expenses are incurred with a view to retain the talent / staff for the benefit of the company and consequently such expenses are allowable as business expenditure in the light of the judgments rendered in *Biocon Ltd. vs. DCIT (2013) 35*

taxmann.com 335 (SB); CIT vs. Lemon Tree Hotels Ltd. (supra)

12.3 Before the DRP, the assessee reiterated that the expenses are neither notional nor capital in nature. The expenses incurred are revenue in character and is incurred wholly and exclusively for the purpose of business. The AO has wrongly placed reliance on decision of Co-ordinate Bench of Delhi Tribunal in *Ranbaxy Laboratories* which has been overturned by the Special Bench thereafter in *Bicon Ltd.*.

12.4 The issue is no longer *res integra* and covered in favour of the assessee by the Hon'ble Jurisdictional High Court in Lemon Tree (supra). The DRP however confirmed the proposal moved by the AO essentially on the ground that judgment rendered in the case of *Lemon Tree Hotel Ltd. (supra)* has been admitted in the Revenue Appeal by the Hon'ble Supreme Court as reported in *(2019) 104 taxmann.com 27 (SC)*. The additions based on admission of SLP by Hon'ble Supreme Court is not tenable. While holding in favour of the Assessee, we also notice the assertions made on behalf of the assessee that similar claim has been allowed in the earlier years by the AO. No reason to take different stance in captioned assessment year has been brought to our notice. Thus, contrary view is not warranted.

12.5 We thus find force in the plea of the assessee for reversal of such disallowance. We direct the AO accordingly.

12.6 Ground no.4 is allowed.

13. Ground No.5 of the concise grounds(supra) concerns disallowance of Rs.15,17,87,755/- towards bogus purchases.

13.1 As per the draft assessment order, the AO proposed disallowance on account of bogus purchases of denim fabric from SunGold Trade Pvt. Ltd.(STPL) amounting to Rs. 15,17,87,755/- which was, in turn, sold to two parties namely Shivoham Trading Pvt. Ltd. - Rs.5,05,85,780/-; and Shakumbri Tradelink Pvt. Ltd. - Rs.10,22,38,920/-. The AO held the purchases made from STPL as bogus purchases and proposed additions under Section 69C of the Act in the draft assessment order.

13.2 The assessee submitted before the DRP that the assessee is also engaged in the business of trading of fabric. The impugned purchase from STPL represents trading activity by the assessee where the goods purchased have been sold to two parties without any modification. Such trading transactions have resulted in profit at Rs.10,36,945/- to the assessee-company. It was contended that the sale of goods to these two parties could not be carried out without corresponding purchase which is assailed as bogus purchase by the AO.

13.3 In its draft assessment order, the DRP referred to the judgment rendered by the Hon'ble Gujarat High Court in the case of *Pr.CIT vs. Tejua Rohit Kumar Kapadia (2018) 94 taxmman.com 324 (Guj.); and CIT vs. Bholanath Polyfab P. Ltd., (2013) 355 ITR 290 (Guj.)* to observe that since the impugned purchases have been sold and the sales have been accepted, there is no rationale for disallowing the purchases. The DRP also referred to judgment in the case of *Balaji Textiles Industries P. Ltd. (1994) 49 ITD 177 (Mum.)* providing similar view. The DRP accordingly expressed a view that there cannot be any sale without purchases in any business transaction as the accounting is complete only by taking

into account both the sides of the transactions. The sale and purchase transactions are thus requires to be simultaneously considered. The AO was accordingly directed to make verifications in the light of such observations.

13.4 The AO in the final assessment order however continued to treat the purchases of fabric from STPL as bogus and refused the claim made under Section 37 of the Act without bringing any fresh facts on record.

13.5 Before the Tribunal, the ld. counsel broadly reiterated the submissions made before the lower authorities and submitted that in trading activity, the assessee has ultimately earned a profit of Rs.10,36,945/-. The details of purchases and sales are given in the assessment order itself. All the purchases and sales are duly recorded in the books of account. The AO has duly accepted the sales but refused to accept the purchases and consequently failed to appreciate that no sales can be carried out without corresponding purchases. The action of the AO has resulted in double taxation one by way of sales recorded and second by disallowance of corresponding purchases of the same goods sold. The ld. counsel also contends that even in terms of directions passed by the DRP, the AO was not justified in making addition as the DRP has held that there cannot be sale without purchase. When the sale figure is taken into account by the AO for computing the income of the assessee, purchase figure is required to be necessarily considered.

13.6 We find that the additions made by the AO is not only erroneous but is also contrary to directions of DRP and settled legal position as held in *Tejua Rohit Kumar Kapadia (supra)*; *CIT*

vs. JMD Computers and Communications P. Ltd. (Del); Pr.CIT vs. Bansal Strips P. Ltd. (Del) and plethora of other judgments.

13.7 In the light of observations made by the DRP and plea raised on behalf of the assessee, we find *prima facie* merit in the plea of the assessee. While the AO has cast doubt on propriety of purchases of fabric made from Sungold Trade P. Ltd. on the basis of assessment order passed in the hands of such supplier, the AO has accepted the corresponding sale transactions. The exclusion of purchases from the trading results is not permissible without corresponding exclusion of the sales in such trading activity for arriving at a fair and balanced view. The action of the AO patently offends the rudimentary principle of accounting. We accordingly direct the AO to reverse the additions made and restore the position taken by the assessee.

13.8 Ground No.5 of the appeal is thus allowed.

14. Ground No.6 concerns adjustment of Rs.23,06,351/- on account of commission on standby letter of credit.

14.1 The Transfer Pricing Officer (TPO) observed that the assessee has claimed Rs.68,64,578/- incurred by it towards bank charges paid to bankers for standby letter of credit. While incurring such expenses, the assessee has not charged any amount to its Associate Enterprises (AEs) for risk borne by it. The TPO held that assessee was required to be compensated @2.5% by its AEs on account of exposure of SBLC issued by the banks. The AO determined the Arms' Length Price of such charges at Rs.23,06,351/- and accordingly recommended adjustment of such amount under Section 92CA(3) of the Act.

14.2 Before the DRP, the assessee submitted that it has recovered full charges from the AEs and the AO / TPO was thus not justified in making further adjustment. In the alternative, the adjustment made by the AO/TPO is on a very high side. It was submitted that SBLC has been issued by the company bankers without any margin or any specific security. No cost has been borne by the assessee company. The actual bank commission charged by the bank has been duly recovered from the AEs. Therefore, there is no outgo. In any case, the guarantee charges charged by the bank are on market rate and the assessee has also recovered the same at the rate at which the bank has charged. The DRP however did not find any infirmity in the action of the AO/TPO. As per the rectification order passed under Rule 13 of DRP, 2009, the DRP has simply affirmed the action of the AO/TPO regarding the proposed adjustment of Rs.23,06,351/- without any discernible reason.

14.3 Before the Tribunal, the ld. counsel contended that the TPO/DRP/AO have committed error in making adjustment of Rs.23,06,351/- on account of commission on standby letter of credit. The ld. counsel submitted that no cost has been borne by the assessee-company as submitted repeatedly before the lower authorities. The actual bank commission charged by the bank at the market rate has been duly recovered from the AEs and therefore the AO/TPO/DRP was not justified in making further additions/adjustments. The ld. counsel reiterated that SBLC has been issued by the company's bankers without any margin or any specific security. In the alternative and without prejudice, the ld. counsel referred the judgment of the Co-ordinate Bench in *Havells India vs. ACIT (2023) 101 ITR (Trib) 81 (ITAT Delhi)* and submitted that the adjustment in respect of corporate guarantee

provided to AEs be determined @0.5% instead of 2.15% determined by the Revenue in the instant case. To support the adjustment at 0.5%, the assessee also referred to the decision delivered by the Hon'ble Bombay High Court in the case of *Everest Kento Cylinders Ltd.*

14.4 In the light of the undisputed fact emerging from record that no cost has been borne by the assessee company and in the absence of any rebuttal to the assertion that actual bank commission charges incurred has been fully recovered from the AEs, we hardly see any justification in the Transfer Pricing Adjustment on this score. We thus are not inclined to address the alternative plea of excessive estimation.

14.5 Ground No.6 is allowed.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 02/01/2024

Sd/-

[SAKTIJIT DEY]
VICE PRESIDENT

Sd/-

[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: **/01/2024**

Prabhat