



\$~39

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 29.8.2022*

+ **ITA 264/2022**

PCIT, DELHI-7

.....Appellant

Through: Mr Sunil Agarwal, Sr Standing
Counsel with Mr Tushar Gupta and
Mr Utkarsh Tiwari, Advs.

versus

RATNAGIRI GAS AND POWER PVT. LTD.

.....Respondent

Through: Mr Ved Kumar Jain with Mr Nischay
Kantoor and Ms Richa Mishra, Advs.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Court Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (Oral):

1. This appeal is directed against the order dated 25.01.2021 passed by the Income Tax Appellate Tribunal [in short, the “Tribunal”].
2. The only issue, which according to Mr Sunil Agarwal, learned senior standing counsel for the respondent/revenue arises for consideration in the present appeal is: whether the disallowance of Rs.12,99,68,406/- was correctly ordered by the Assessing Officer [in short, “AO”]?
3. To be noted, the AO *vide* order dated 29.03.2015 disallowed the aforesaid amount, on the ground that the liability *qua* the same had not arisen.
4. It may also be noted, that at the relevant point in time, the AO did not



have the benefit of the “Comprehensive Service Agreement” [hereafter referred to as “CSA”] obtaining between the respondent/assessee and GE International Ltd. i.e., the contractor.

4.1 The CSA is dated 20.06.2009. It is not in dispute that the CSA expires on 31.03.2025.

5. Under the CSA, the respondent/assessee is required to pay bonus, which is dependent on the efficiency parameters, concerning generation of power, as stipulated in the aforementioned CSA being achieved.

5.1 The record shows that the respondent/assessee was required to pay bonus to GE International Ltd. in case it ensured 90% availability of the Power Plant for operation. In the event that the availability fell below 90%, the respondent/assessee was entitled to levy penalty.

6. Furthermore, the CSA also provides for the following clauses, which according to the appellant/revenue are suggestive of the fact that the liability to pay the bonus is contingent. In other words, the contention of the respondent/assessee, that liability to pay bonus subsists i.e., arises in *praesenti* is untenable. The clauses on which emphasis is laid by Mr Agarwal are extracted hereunder:

“(i) In case owner is entitled to an availability bonus for the term of an AGP from the purchaser of the facility's power, the owner shall be, through Letter of Credit or prior to the expiry of 30 days from the same AGP, to the contractor the bonus amount due to the owner under this agreement “

(ii) “In case owner is not entitled to an availability bonus for the term of an AGP from the purchaser of the facility's power, the contractor agrees that the owner may choose to either pay in cash to the contractor the bonus amount due or credit the bonus amount as an offset against any future amount due from the contractor to the owner under this agreement.”



7. Mr Agarwal, based on the aforesaid clauses, says that a perusal of the same would show that once the owner is entitled to an “availability bonus” for the term of an Available Guarantee Period (“AGP”) from the purchasers of the power produced in the respondent/assessee’s plant, the respondent/assessee is obliged to pay bonus to GE International Ltd. *via* a letter of credit.

8. It is emphasized by Mr Agarwal that the liability, in such a situation, is definitive and ascertained, which is required to be defrayed by the respondent/assessee, before the expiry of 30 days, as stipulated in clause (i) above.

8.1 However, insofar as the other scenario is concerned i.e., when the respondent/assessee is “not entitled” to the availability bonus for the term of an AGP from the purchasers of the respondent/assessee’s power, the respondent/assessee may choose to either pay the bonus in cash to GE International Ltd., or credit the bonus amount as an offset against any future amount due from GE International Ltd. to the respondent/assessee under the CSA.

9. Furthermore, Mr Agarwal argues, that there is also power available under the CSA with the contractor to waive the receipt of bonus from the respondent/assessee at the time of settlement, which occurs when the contract is finally closed i.e., on 31.03.2025. In support of his submission, Mr Agarwal has relied upon the following judgments:

- (i) ***Indian Molasses Co. (P) Ltd. vs. CIT, West Bengal*** (1959) 37 ITR 66;
- (ii) ***Commissioner of Income Tax vs. Excel Industries Ltd.*** (2014)



13 SCC 459.

10. On the other hand, Mr Ved Kumar Jain, who appears on behalf of the respondent/assessee, has made the following broad submissions:

11. Although the respondent/assessee was remiss in producing the CSA before the AO, it was produced before the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”]. Therefore, this objection no longer survives.

12. The contention advanced by Mr Jain, that the liability to pay bonus in the second scenario, so to speak, is contingent, is completely misconceived.

12.1 The fact that liability has accrued in the relevant year is not in dispute. If this fact is accepted, then merely because the liability is defrayed in future, cannot convert the liability which arises in *presenti* into one that is contingent.

13. The argument advanced on behalf of the appellant/revenue, that the contractor i.e., GE International Ltd. could waive the obligation undertaken by the respondent/assessee to pay bonus will also not turn what is an accrued liability, in the relevant year, into a contingent liability.

13.1 In support of his submission, Mr Jain has relied upon the judgment of the Supreme Court dated 09.08.2000 rendered in ***Bharat Earth Movers vs. Commissioner of Income-Tax***, (2000) 245 ITR 428 (SC).

14. We have heard the learned counsel for the parties and perused the record.

15. Briefly, the facts which arise in this case, over which there is hardly any dispute are as follows:

- (i) The AO made an addition of Rs.12,99,68,406/- on account of bonus payable by the respondent/assessee to GE International Ltd.
- (ii) The respondent/assessee is a public sector undertaking, in which



National Thermal Power Corporation Pvt. Ltd. [“NTPC”] and Gas Authority of India Ltd. [“GAIL”] have a substantial equity stake.

(iii) The respondent/assessee being a public sector undertaking, its accounts are audited by the Comptroller and Auditor General of India (CAG).

(iv) During the relevant year, the respondent/assessee had debited Rs.12,99,68,406/- as expenditure on account of bonus payable to GE International Ltd., under the head “Repair and Maintenance expenses”.

(v) On 20.06.2009, the respondent/assessee and GE International Ltd. entered into a CSA. The CSA expires on 31.03.2025. Under the CSA, GE International Ltd. is obliged to ensure 90% availability of the Power Plant for operation, owned by the respondent/assessee.

(vi) The respondent/assessee is obliged to pay a bonus if the availability is above 90%. Furthermore, in case the availability of the Power Plant for operation is less than 90%, then GE International Ltd. is to become liable to pay penalty.

(vii) The payment of bonus or penalty accrues from year to year, and is finally settled on closure of the contract.

(viii) The CSA, as noticed above, was not produced before the AO, but was produced before the CIT(A), who took into account its contents while passing the order. The methodology for calculating the available power is contained in Exhibit-A and B, appended to the CSA.

(ix) In case the customers of the respondent/assessee were not to make payments to the respondent/assessee, the respondent/assessee has two options available to it under the contract. The first option is to pay the bonus to GE International Ltd. in cash. The second option is to claim an “offset”



against any future amount due from GE International Ltd. to the respondent/assessee under the CSA.

(x) The Tribunal, based on these facts, has ruled against the appellant/revenue and thus, reversed the order of the CIT(A). The rationale provided by the Tribunal is set forth in paragraph 7 of the impugned order. For the sake of convenience, the same is extracted hereafter:

“7. We have heard both the parties and perused the material available on record. It is pertinent to note that the assessee has entered into a long term Comprehensive Service Agreement (CSA) with GE International, a renowned International organization, on 20.06.2009 for the power plant and the said agreement is valid till March 31, 2025. As per the agreement with GE, the party has to ensure 90% availability of the Power Plant for operation and if they ensure availability above 90% then they are eligible for Bonus otherwise they are liable for penalty. This will accrue on year to year basis and will be finally settled on closure of the contract. During the year under consideration, the contractor has ensured the 90% availability of the power plant to the assessee. Accordingly, the assessee booked an expenditure of Rs.12,99,68,406/- on account of bonus payable to the contractor. These facts were not disputed by the revenue at any point of time. There was no uncertainty regarding the incurrence of the expenditure and assessee becomes liable to pay the bonus to the contractor as soon as the contractor fulfills the conditions of annual availability of power plant in terms of the factors given under the said contract. Thus, the assessee has established that a business liability has definitely arisen in the accounting year which is year to year basis. The assessee is following the mercantile system of accounting which is not disputed by the revenue. Therefore, the liability is ascertained liability and is allowable u/s 37(1) of the Act which was not taken cognizance by the Assessing Officer as well as the CIT(A). Thus, appeal of the assessee for A.Y.2012-13 being ITA No. 6548/Del/2016 is allowed.”



16. Having regard to the aforesaid, Mr Agarwal's contention, that since the respondent/assessee had the option to defray the liability towards bonus against future amount due from GE International Ltd. to the respondent/assessee, it would morph the liability which accrues from year-to-year into one which is contingent, in our view, is a submission which is unsustainable in law. The reason is not far to see. It is well-established, that the mere fact, that payment to be made towards liability is deferred to a future debt, cannot be construed as a circumstance that would transform a liability, which arises *in praesenti*, to one which is contingent.

16.1 The other argument of Mr Agarwal, that GE International Ltd. could waive the receipt of bonus amount, and hence would convert the subsisting liability into a contingent liability is also an argument which, according to us, is misconceived.

17. The principles for ascertaining as to when a liability does not metamorphosize into a contingent liability are set forth in the judgment of the Supreme Court rendered in ***Bharat Earth Movers***. The relevant extracts of the said judgment are set out hereafter:

“The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

In Metal Box Company of India Ltd. Vs. Their Workmen (1969) 73 ITR 53 the appellant company estimated its liability under



two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the P&L account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employees service either due to retirement, death or termination of service – the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this court, the relevant of which for our purpose are extracted and reproduced as under :-

- (i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is paid; permissible only in case of amounts actually expended or*
- (ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;*
- (iii) A condition subsequent, the fulfillment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;*
- (iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.*

So is the view taken in Calcutta Co. Ltd. Vs. Commissioner of Income-Tax, West Bengal (1959) 37 ITR 1 wherein this court



has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.

Applying the above-said settled principles to the facts of the case at hand we are satisfied that provision made by the appellant company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary.”

18. A careful perusal of the principles enunciated by the Supreme Court would show that both the arguments advanced by Mr Agarwal are answered.

19. As noted by the Supreme Court, in that case [as is the situation in the present case also], the respondent/assessee is following the mercantile system of accountancy. The liability to pay bonus to GE International Ltd., insofar as the respondent/assessee is concerned, accrued from year-to-year

19.1 In the relevant year, this liability arose and was payable. The fact that in a given year, when the respondent/assessee may not receive the requisite funds from its purchasers i.e., customers who purchase power from it, does not, in any manner, do away with the liability of the respondent/assessee to pay bonus to GE International Ltd.

19.2 The only options available to the respondent/assessee, perhaps,



depending on its funds flow situation, was to either pay the same immediately, in the form of cash, or adjust the same against amounts owed by GE International Ltd., under the CSA. To our minds, as adverted to above, that will not convert the liability into a contingent liability.

20. The other argument, (and in this regard we may only reiterate the principles enunciated in *Bharat Earth Movers*), that because in future the liability could be reduced or become extinct, and hence should be treated as a contingent liability, is completely untenable. The possibility of liability being scaled down or becoming extinct cannot convert it into a contingent liability. Therefore, this submission is without merit.

21. The reliance by Mr Agarwal on *Excel Industries Limited* is equally misconceived. This was a case, where the Court was called upon to rule as to whether any income had accrued to the assessee on account of an entitlement to make duty-free imports of raw materials obtained by the assessee *via* advance licences and duty entitlement passbook issued against export obligations.

21.1 The Court, after discussing the principles of law came to the conclusion that the mere fact that the assessee was entitled to certain benefits under the advance licences or under the duty entitlement passbook, without there being a corresponding liability of the Customs authority to pass on the benefits of duty-free imports to the assessee until the goods were actually imported and made available for clearance, would not result in income accruing to the assessee.

21.2 The fundamental principle that was underscored in said judgment was, that income tax is leviable on income. The mileage that Mr Agarwal sought to draw from this case was, that unless a corresponding liability for



payment is assessed, there could be no income.

21.3 It is in this context, that at the very beginning, we had asked Mr Agarwal, as to whether GE International Ltd. had been assessed to tax. Mr Agarwal was not in a position to answer that query.

21.4 However, we can find no fault with that, as this query was raised for the first time, and perhaps Mr Agarwal could not have anticipated such a query being raised by us. We may, however, note that Mr Verma says that tax at source has been deducted on the bonus paid to GE International Ltd.

22. That apart, we are of the view that the judgment rendered in *Excel Industries Ltd.* would not further the cause of the appellant. The other judgment that Mr Agarwal relies on is *Morvi Industries Ltd. vs. Commissioner of Income Tax (Central) Calcutta*, (1972) 4 SCC 451. We need not elaborate on this judgment, as the said judgment has been discussed and referred to in *Excel Industries Ltd.*

23. Thus, for the foregoing reasons, we are unable to persuade ourselves, that a substantial question of law arises for consideration.

24. Therefore, we find no reason to interfere with the impugned order passed by the Tribunal.

25. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

AUGUST 29, 2022