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

\+ ITA 12/2019

THE COMMISSIONER OF INCOME TAX -
INTERNATIONAL TAXATION -1 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC.

versus

COBRA INSTALACIONES Y
SERVICIOS SA ..... Respondent
Through: Mr. Satyen Sethi & Mr. Arta Trana Panda, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

<u>O R D E R</u>

% **16.04.2024**

1. The Commissioner of Income Tax challenges the order of the Income Tax Appellate Tribunal ["**ITAT**"] dated 28 June 2018 and has proposed the following questions of law for our consideration:

> "2.1 Whether in the facts & circumstances of the case and law, the ld. ITAT is justified in deleting the disallowance exchange fluctuation loss to the tune of Rs.16,10,71,640/- and in holding that the assessee company has not violated any terms of Article 7(3) of the India-Spain DTAA while holding that the remittance received from the head office are in the nature of loan?
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> 2.2 Whether in the facts & circumstances of the case and in law, the ld. ITAT erred in deleting the disallowance of exchange fluctuation loss to the tune of Rs.16,10,71,640/- particularly in view of the fact that Article 7(3) of the India-Spain DTAA does not allow any notional expenditure/loss as deduction?
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> 2.3 Whether in the facts & circumstances of the case and in law, the Id. ITAT erred in holding that the Assessee company obtained a loan from its Head office disregarding the fact that the Project office was under no obligation to remit the sum of

the HO and there was no requirement of restatement of remittance from the HO at prevailing foreign exchange rate?

2.4 Whether in the facts & circumstances of the case and in law, the Id. ITAT erred in deleting the disallowance of exchange fluctuation loss to the tune of Rs.16,10,71,640/- disregarding the fact that the HO was in any case obliged to draw consolidated accounts including its PO and the claim of notional fluctuation loss was a book entry and an in-genuine device to reduce the profit of the PO for Indian tax purposes?

2.5 Whether in the facts & circumstances of the case and in law the ld. ITAT erred in taking recourse to assessment framed under section 143(3) for earlier A.Y. 2012-13 and A.Y. 2013-14 holding that he claim of fluctuation loss has been accepted for these years disregarding the fact that he claim was not specifically examined as such during those proceedings and also disregarding the fact that the principle of res judicata is not applicable to the income tax proceedings?"

2. We note that the solitary issue which arises is with respect to the losses suffered by the assessee company on account of foreign exchange fluctuations. While dealing with the aforesaid, the ITAT has on consideration of the relevant facts, held as follows:

"**8.** We have considered the rival submissions and perused the material available on record. In this case, assessee- company is a P.E. of Foreign-Company. Whatever income has accrued or arisen, have been assessed in India against the P.E. The assessee-company explained that for completing the Project in India, either the advance received from the client, or the advance/loan have been received from the Head Office situated in Spain. The loans are admittedly received from Head Office in EURO and have been repaid in EURO as per RBI guidelines to carry out operations in India and was outstanding in balance-sheet. It is also not in dispute that the money so received from the Head Office is revenue in nature because the amount of the loan is utilized in day-to-day operations i.e. working-capital required for Project execution and to obtain material as per the terms of the Contract. The utilization of the amounts received from Head Office did not bring any capital asset into existence. Therefore, the amounts so received from the Head Office have been utilized to incur the operating cost. The assessee-company has filed copy of the balance-sheet to show that the amount in question have been shown as liability in assessment year under appeal. The outstanding payable to the Head Office as on 31.03.2014 increased to Rs.154,38,08,645/- as compared to Rs.142,13,94,340/- as on 31.03.2013. Therefore, the contention of assessee-company is correct that for the purpose of completing the turn-key Project, the funds are required, which have been provided by the Head Office. It is also explained that for receiving such funds from the Head Office, Reserve Bank of India permission have also been obtained. Though the Ld. CIT(A) referred to FEMA Act, but, no provisions have been highlighted which assessee-company has violated. The Ld. CIT(A) noted that Project Office located in India does not come under the list of eligible borrowers, therefore, Project Office is not eligible for external commercial borrowings. Assessee-Company, however, explained that it has received loans from Head Office and Assessee-Company being P.E. of foreign Company, is not entitled to raise loans through ECB as ECB can only be raised by Indian borrowers. Findings of Ld. CIT(A) are, therefore, not relevant to point in issue. The Assessee-Company has been receiving the funds in EURO for the last so many years from the Head Office and have been admittedly repaying the amounts to the Head Office in EURO and such claim of assessee-company of foreign exchange fluctuation loss in A.Ys. 2012-2013 and 2013-2014 preceding to assessment year under appeal, have been accepted by the A.O. under section 143(3) of the I.T. Act, 1961. No material have been brought on record, if assessee-company has violated any provisions of FEMA Law or any other Act, for receiving such funds from the Head Office. Therefore, merely referring to FEMA is not enough to disallow the claim of assessee- company. It is also not in dispute that due to depreciation in the Rupee prices in the International Market in the year under consideration, assessee-company has claimed foreign exchange fluctuation loss on the amount outstanding in foreign currency towards Head Office which consists of advance payment made by the Head Office towards execution of the Project and the amount of Engineering charge billed in their home currency by the Head Office towards the services provided. Therefore, the character of the sundry payable to the Head Office is in the nature of payables/liability. Therefore, it is, on account of revenue account and the loss represents the revenue loss. The assessee-company further explained that it has not paid any interest on the funds borrowed from Head Office. Since, there is no dispute that amount received from the Head Office was in EURO and repaid in EURO, therefore, difference in INR and EURO was correctly claimed as foreign exchange fluctuation loss. The decision of the Hon'bIe Calcutta High Court relied upon by the A.O. in the case of Betts Hartley Huett and Co. Ltd., vs. CIT 116 ITR 425 (supra), is distinguishable from the facts of the case because in the present case, no profit have been earned by the same person. The Article 7(3) of India-Spain DTAA is not applicable in this case because nothing is paid by the assessee-company to the Head Office on account of loss and no deduction claimed. The items of expenses specified in DTAA are not applicable in case of assessee. It was a differential amount on account of foreign exchange fluctuation loss that assessee-company suffered which was claimed as deduction in the P & L A/c. The assessee-company has not violated any terms of Article 7(3) India-Spain DTAA as reproduced above because whatever bar have been provided in this Article are not applicable to the case of the assessee-company. The assessee-company being P.E. of foreign company in India could not obtain any borrowings from any Bank in India, therefore, working capital was required to complete the turnkey projects. The facts and circumstances of the case as mentioned above and considering the assessment orders passed by the A.O. in preceding A.Ys. 2012-13 and 2013-14 clearly show that the amount received by the assessee- company from the Head Office is a "loan". Therefore, authorities below were not justified in holding it to be capital remittance. The assessee-company did not claim any notional expenses. Therefore, findings of the authorities below are wholly unjustified. It may also be noted here that in subsequent A.Y.2015-2016, the assessee-company has earned foreign exchange fluctuation gain on the same set of facts in a sum of Rs.13,37,29,120/- which have been declared as income. If the A.O. is of the opinion that assessee-company is not entitled for deduction on account of foreign exchange fluctuation loss, he should not have accept the similar claim of assessee-company in preceding assessment years and should have refunded the amount of tax paid on the foreign exchange capital gain shown in subsequent assessment year. It is well settled Law that rule of consistency do apply to the Income Tax proceedings. Therefore, on the same set of facts, the A.O. cannot take a different view in the assessment year under appeal. We may note here that the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India P. Ltd., (supra) held that the "loss" suffered by the assessee on account of fluctuation of rate of foreign exchange as on the date of the balance-sheet is an item of expenditure under section 37(1) of the I.T. Act, which, clearly support our findings that assessee-company is entitled for deduction on account of foreign exchange fluctuation loss. It is an undisputed fact that assessee-company received the amount from Head Office in EURO and repaid to Head Office in EURO, therefore, even if the amount may be called by any name i.e., loan, borrowing or otherwise, but the assessee-company has suffered foreign exchange fluctuation loss on account of amount received from Head Office in EURO and repaid in EURO on account of differential value in INR, therefore, such fluctuation loss is allowable as deduction in favour of the assessee-company. Considering the totality of the facts and circumstances of the case,

> we are of the view that assessee-company is entitled for deduction on account of foreign exchange fluctuation loss. We, accordingly, set aside the orders of the authorities below and delete the entire addition."

3. As is manifest from the above, the ITAT had apart from answering the issue on merits also noted that the fluctuation loss had been duly accepted by the Assessing Officer for the preceding Assessment Years 2012-13 and 2013-14. It has also come on the record that once the Permanent Establishment ["**PE**"] reflected a profit in the subsequent year, the aforesaid amount was offered to tax. It is in the aforesaid backdrop that the ITAT has additionally sought to follow the principles of consistency. We consequently find no illegality in the procedure as adopted by the ITAT.

4. In view of the aforesaid, we are of the considered opinion that no substantial question of law arises. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 16, 2024/kk