

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI '1-2' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 1980/DEL/2015
[A.Y 2010-11]

M/s B.G. India Energy Solutions P Ltd
C/o Nangia & Co.
Suite 4A, Plaza M6
Jasola, New Delhi

Vs.

The Dy. C.I.T
Circle - 1(1)
Gurgaon

PAN : AABCVB 9739 J

[Appellant]

[Respondent]

Date of Hearing : 11.12.2018
Date of Pronouncement : 31.12.2018

Assessee by : Shri Vishal Kalra, Adv
Smt. Sumisha Murgai, CA

Revenue by : Ms. Namita Pandey, Sr.DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the dated 16.12.2014 framed u/s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to assessment year 2010-11.

2. Ground No. 1 is general in nature and needs no separate adjudication.

3. Ground Nos. 2 to 4, with all its sub grounds, relates to the adjustment of Rs. 1,45,06,572/- made on account of disallowance of payment of management services and unit charges [MSU charges] by the assessee to its AEs.

4. Briefly stated, the facts of the case are that the appellant-company is a wholly owned subsidiary of BG Asia Pacific Holdings Pvt Limited. It commenced midstream gas marketing operations in India after obtaining the approval of the Foreign Investment Promotion Board [FIPB] of the Government of India to undertake marketing and distribution of natural gas as well as LNG.

5. The assessment year under consideration was the first year of purchase and sale of LNG operations. The international transactions reported by the appellant company are as under:

Sl. No	Name of AE	Nature of Transaction	Value	Method Adopted
1.	BG LNG Trading LLC, USA	Purchase of LNG	1,70,16,51,402	TNMM
2	BG Exploration and Production India Ltd., Cayman Islands, Project Office, India	Receipt of support services	7,10,45,995	TNMM
		MSU charges	1,45,06,572	NA
		Reimbursement of expenses	11,30,776	NA
3	BG International Ltd. UK	Reimbursement of expenses	32,43,124	NA

6. The international transactions mentioned hereinabove were accepted at Arm's length except Management Services Unit Charges [MSU] paid to the tune of Rs. 1,45,06,572/-. The TPO was of the opinion that TNMM cannot be used as the most appropriate method for bench marking the corporate intra group services and considered CUP as the most appropriate method for bench marking receipt of corporate services. The assessee was asked to justify the need for receipt of services for which payment has been made.

7. In its reply, the assessee explained that it is engaged in the gas operating operations in India primarily involving marketing and distribution of natural gas as well as LNG. It was explained that the assessee does not have in-house skilled man power. Therefore, it

9. The assessee raised objections before the DRP and the DRP, after considering the submissions of the assessee, dismissed the same by observing that BGEFIL is getting management services from BGIL, then how can it pass on these services to the assessee when it itself is getting these services from BGIL. The DRP further observed that the assessee is getting business support services from BGEFIL but has not explained how the management support services are different and distinct from support services. The DRP concluded by holding that since the assessee has already paid for the support services and the payment for which has been accepted by the TPO, then there is no need for management support services as these services are duplicative in nature and no independent entity shall make payments for such services.

10. Aggrieved by this, the assessee is before us.

11. The ld. counsel for the assessee vehemently stated that neither the TPO nor the DRP has appreciated the facts in true perspective. It is the say of the ld. counsel for the assessee that there is no over-lapping of services and both the lower authorities have grossly erred in treating the services as one and the same.

The ld. counsel for the assessee drew our attention to the agreement executed on 15.12.2009 between BGEFIL and the assessee and the same is exhibited at pages 260 to 266 of the paper book. The ld. counsel for the assessee pointed out that if this agreement is considered, then it would clear that there is no duplicity of the services and the payments for management support services is distinct and no TP adjustment is required.

12. Per contra, the ld. DR strongly supported the findings of the DRP and reiterated that the MSU services are duplicative in nature.

13. We have carefully considered the orders of the authorities below and with the assistance of the ld. AR, we have considered the relevant documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

14. It is true that the international transactions reported by the assessee have been accepted except for MSU charges amounting to Rs. 1,45,06,572/-. The same has not been accepted because the TPO/DRP were of the opinion that the payments for these services

are duplicative and when the assessee has already paid for support services and the payments for which have been accepted by the TPO.

15. The agreement mentioned elsewhere explains the scope of work and in Article 2, it has been mentioned as under:

"2.1 BGEPIIL shall endeavour to provide the following services to BGIES (the "Services"):

(a) assist BGIES to procure LNG and natural gas from International and domestic sellers.

(b) assist BGIES to sell LNG and natural gas to various customers of BGIES.

(c) obtain information concerning industrial and commercial matters, which are of interest to BGIES especially in connection with upcoming projects in the oil, gas and energy sector.

(d) provide services towards the promotion, marketing or sale of LNG and natural gas.

(e) provide incidental support services such as, without limitation, the billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customers or vendors, and public relations services. This Includes services such as that of commission agent, as well as information technology services Including but not limited to any service in relation to designing, development or maintaining of computer software, or computerized data processing or systems networking, or any other service in relation to the operation of computer systems."

16. Article 3 provides for consideration and the same reads as under:

"3.1 In consideration of the Services provided by BGEPIIL under Article 2, BGEPIIL agrees to pay BGEPIIL for ail costs and expenses incurred by BGEPIIL related to the provision of the Services plus a mark-up of 12% on all such costs and expenses. Ail payments under this agreement shall be made in Indian Rupees and shall be subject to deduction of tax at source as applicable,

3.2 BGEPIIL shall pay service tax as may be correctly and reasonably Invoiced and paid to the authorities by BGIES. BGIES shall provide BGEPIIL with evidence of payment of such service tax upon request by BGEPIIL"

17. It appears that this agreement has not been properly appreciated by the lower authorities. In the light of this agreement, we are of the considered opinion that there is no payment for duplicative services and the payment of Rs. 1,45,06,572/- is distinct as MSU charges and adjustment made by the TPO is uncalled for and deserves to be deleted

18. Before closing, it would be pertinent to mention here that in the financial statement of the assessee, there is no expenditure relating to the employees cost and in the notes annexed and forming part of the financial statement at clause 10A it has been specifically mentioned that no provision for retirement benefits has been made in these accounts as there were no employees about the payroll of the company during the year. The sales of LNG amounting to Rs. 2,27,37,88,338/- could not have been achieved without the aid of support staff and the same was provided by BGEFIL. Considering the facts in totality, Ground Nos. 2 to 4 taken together are allowed.

19. Ground No. 5 relates to the disallowance of the expenditure on account of time-writing charges amounting to Rs. 14 lakhs.

20. Facts relating to this issue are that during the year the assessee has debited Rs. 14,00,976/- to its profit and loss account under the head “other cost recharge”. The assessee was asked to explain the same and vide reply dated 13.03.2014, the assessee explained that this debit is in the nature of provision for ‘time writing charges’ based on estimated time cost of employees of the assessee company’s sister concern British Gas International Ltd. The assessee was further asked to explain the basis of making the said provision and to explain why TDS has not been deducted on the said provision. The assessee filed a detailed reply explaining that the said provision is based on the estimated time cost of employees of BGIL to be deployed for the purpose of business of the assessee. However, the same was reversed in April 2010.

21. The explanation of the assessee did not find favour with the Assessing Officer. The Assessing Officer observed that no invoice had been raised by BGIL as on 31.03.2010 and the assessee failed to give any scientific or historical basis for arriving at the said provision. The

Assessing Officer concluded by holding that the assessee failed to establish that the provision for time writing charges was an ascertained liability. Accordingly, addition of Rs. 14,00,976/- was made.

22. The assessee raised objections before the DRP.

23. After considering the submissions and objections raised by the assessee, the DRP observed that payments being FTS in nature, were subject to TDS u/s 195 of the Act and since the assessee has not deducted tax at source, the payment needs to be disallowed u/s 40(a)((i) of the Act. Disallowance made by the Assessing Officer was upheld but though on different ground.

24. Before us, the ld. AR vehemently stated that the impugned payment cannot be considered as FTS, as nothing was made available to the assessee by BGIL. It is the say of the ld. AR that invoices were raised in INR and thereafter, converted to US dollars. The ld. AR pointed out that the provision was more or less to actual liability and the excess/deficit has been accounted for in the subsequent year. The ld. AR further pointed out that in the case of BGIL, the Tribunal in ITA

No. 470/DEL/2013, 815/DEL/2014 and 107/DEL/2015 has held that the receipt from BGEPIIL should be taxed as per provisions of section 44BB of the Act. The ld. AR further pointed out that the withholding of taxes at 4.4% and referring to the debit note, the ld. AR pointed out that withholding tax has been deducted by BGEPIIL while making payment to BGIL. Sample invoices are exhibited at pages 12, 16 and 20 of the paper book.

25. The ld. DR strongly supported the findings of the DRP. It is the say of the ld. DR that the facts relating to applicability of section 44BB of the Act and withholding tax by BGEPIIL needs to be verified by the TPO.

26. We have given thoughtful consideration to the orders of the authorities below qua the issue. The provisions for time writing charges comprise of the following:

Particulars	Amount (in INR)
Reversal of provision created in March	(5,87,307)
Service Tax paid in May 2009	1,24,634
Amount recorded in FY 2009-10	6,51,878
Provision created in March 2009 based on	12,11,771
Total	14,00,976

27. As mentioned elsewhere, this is the first A.Y of the appellant company who is not an employee of its own. The invoice for the time writing charges were raised by BGIL on BGEFIL which were further allocated to the assessee. It would be pertinent to mention here that the amount received by BGIL from the assessee has already been taxed in India u/s 44BB of the Act and as mentioned elsewhere, taxes have been duly deducted from the payments made for the time writing charges to BGIL. Be that as it may, the time writing charges paid to BGIL cannot be termed as 'FTS' under the Act read with India UK DTAA. Article 13 of the India UK DTAA defines FTS as under:

"4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

28. In our understanding, 'make available' means the person acquiring the services is enabled to apply technology contained therein on his own in future without recourse to the service provider which means that the knowledge must remain with the service recipient once service has ended and thereafter, service recipient is at liberty to use the technical knowledge, skill know-how and processes. In our understanding of the facts, the service provided by employees of BGIL are merely in the nature of routine support services and, therefore, cannot be termed as 'FTS' under Article 13 of the India UK DTAA. Therefore, there was no requirement for the assessee to deduct taxes from such payments in India u/s 195 of the Act. We, accordingly, direct the Assessing Officer to delete the addition of Rs. 14,00,976/-. Ground No. 5 is allowed.

29. Ground No. 6 relates to the initiation of penalty u/s 271(1)(c) of the Act. This ground is premature and is, accordingly, dismissed.

30. In the result, the appeal filed by the assessee in ITA No. 1980/DEL/2015 is partly allowed.

The order is pronounced in the open court on 31.12.2018.

**Sd/-
[SUDHANSHU SRIVASTAVA,]
JUDICIAL MEMBER**

**Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: December, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	31.12.2018
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	