

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “C” KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.360/Kol/2013
Assessment Year:2004-05

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| M/s Siemens Ltd., [as successor to Siemens VAI Metal Technologies Pvt Ltd.(formerly known as VAI Engineering and Automation (P) Ltd.)] Block EP, Plot-Y5, Commercial Complex, Sector-V, Salt Lake City, Kolkata-700 009 [PAN No.AABCV 8348 D] | बनाम / V/s. | Income Tax Officer, Ward-2(4), P-7, Chowringhee Square, Kolkata-69 |
| अपीलार्थी /Appellant | | |
| प्रत्यर्थी /Respondent | | |

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| अपीलार्थी की ओर से/By Appellant | Shri Saurabh Kedia, |
| प्रत्यर्थी की ओर से/By Respondent | Shri Arindam Bhattacharjee |
| सुनवाई की तारीख/Date of Hearing | 05-10-2017 |
| घोषणा की तारीख/Date of Pronouncement | 08-11-2017 |

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-XX, Kolkata dated 18.12.2012. Assessment was framed by ITO Ward-2(4), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 28.12.2006 for assessment year 2004-05.

Shri Saurabh Kedia, Ld. Authorized Representative appeared on behalf of assessee and Shri Arindam Bhattacharjee, Ld. Departmental Representative appeared on behalf of Revenue.

2. The grounds of appeal and additional grounds of appeal raised by the assessee are as follows:-

“1. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in law in confirming the disallowance of contribution to the gratuity fund amounting to Rs.4,00,438/- which was pending for approval, without appreciating the fact that the fund was approved however due to change in name of the fund, the revised petition for approval had been filed with the Commission.

2. That on the facts and in the circumstances of the case the Ld. CIT(Appeals) erred in not appreciating the fact that the appellant had filed the petitions for granting of approval and conducted regular follow-ups in connection with the approval process, in spite of which no formal approval had been granted to the appellant and has thus penalized the appellant without any violations being committed.

3. That the appellant craves leave to add to and/or amend, alter, modify or rescind the grounds hereinabove before or at the hearing of the appeal.

Additional ground:

“The appellant company begs to take the following additional grounds of appeal in the subject appeal, which do not involve any fresh investigation of facts, but pertains to question of law and therefore may please be admitted and adjudicated upon based on the decision of the Supreme Court in the case of National Thermal power Commission. Ltd. reported in 229 ITR 383.

1.(a) That on the facts and in the circumstances of the case, the appellant is entitled to deduction of Rs.7,57,713/- on account of proportionate claim being 1/5th of the restructuring expenses incurred in AY 2002-03 amounting to

Rrs.37,88,563/-, in the relevant assessment year under consideration.

(b) That on the facts and in the circumstances of the case, the Ld. CIT may please consider and allow the claim of the appellant on account of claim of 1/5th of the restricting expenditure incurred in AY 2002-03, following the principles laid down by Hon'ble ITTA in the case of VAI Engg & Automation (P.) Ld-vs-ITO[2008] 21 SOT 1 (Kol)

2. (a) That on the facts and in the circumstances of the case, the appellant is entitled to deduction of Rs.12,61,664/ on account of proportionate claim being 1/5th of the restricting expenses incurred in AY 2003-04 amounting to Rs.63,08,319/-, in the relevant assessment year under consideration.

(b) That on the facts and in the circumstances of the case, the Ld. CIT may please consider and allow the claim of the appellant on account of claim of 1/5th of the restricting expenditure incurred in AY 2003-04, following the principles laid down by Hon'ble ITAT in the case of VAI Engg & Automation (PP.) Ltd-vs-ITO[2008] 21 SOT 1 (Kol).

3. That the appellant craves leave to add to and to alter, amend, rescind or modify the grounds raised hereinabove before or at the time of hearing of the appeal.”

3. The assessee has raised the additional grounds of appeal before us and we for the sake of convenience are treating the same in continuation of earlier grounds while considering the same on merits. The ld. DR raised no objection on the admission of additional grounds of appeal. Therefore the additional grounds have been admitted after having reliance on the principles laid down in the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Company* reported in 229 ITR 383 (SC).

4. The issue raised in its grounds of appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by sustaining disallowance of ₹4,00,438/- on account of contribution made to the gratuity fund.

5. Briefly stated facts are that assessee is a limited company and engaged in the business of consultancy, engineers and related services. The old name of assessee was VAI Engineering & Automation (P) Ltd. which was re-named as VAI Engineering and Automation (P) Ltd. vide order dated 14.08.2003 by ROC.

6. The assessee (VAI (P) Ltd) was maintaining a gratuity fund for its employees which was approved by Ld. CIT vide order dated 27.01.2003 with effect from 01.01.1997. The assessee in the year under consideration contributed a sum of ₹4,00,438/- towards the gratuity fund and claimed the deduction in the profit and loss account but offered the same to tax in the computation of income.

7. However, assessee during the course of assessment proceedings claimed the deduction for the amount contributed to the gratuity fund but the same was disallowed by the AO without adducing any reason and accordingly, same was added to the total income of assessee.

8. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the amount contributed to gratuity fund was offered to tax in the computation of income inadvertently. But during the course of assessment proceedings, the claim of expenditure was made before the AO. But the claim of it

was rejected by the AO without adducing any reasons thereon. The expenditure was claimed during the assessment proceedings on the ground that it already had the approval for its gratuity fund from the Income Tax Authority. Indeed, the name of the assessee was changed and this was duly intimated to the Commissioner of Income Tax vide letter dated 04.02.2005 and 01.02.2006 respectively and the necessary changes were also made in the Deed of Gratuity Fund on 19.11.2004.

9. The basic object of the assessment is to compute the income accurately and as per the provision of law. The assessee should not be penalised for the mistake done by it inadvertently. However, Ld. CIT(A) disregarded the contention of assessee and confirmed the order of AO by observing as under:-

“6-2 I have perused the assessment order and considered the submission of the appellant. The appellant company claimed the contribution of gratuity as deduction before the AO which was erroneously offered for taxation while computing the taxable income. The appellant company made an additional claim at the time of assessment proceedings on the ground that VAI India Pvt. Ltd. which was subsequently renamed as VAI Engineering & Automation (P) Ltd i.e. had the approval from the Income Tax Authorities for such fund. I find that the company M/s VAI Engg. & Automation (P) Ltd did not have approval for such fund and those funds belonged to that period prior to rename of the company. In view of the facts that the company did not have recognition for such fund from the competent authorities, the claim of the appellant is not found to be allowable.”

Aggrieved by this, the assessee has come up in appeal before us.

10. Ld. AR before us reiterated the same submissions that were made before Ld. CIT(A). Ld. AR further submitted that the same issue arose in the assessment year 2009-10 in the own case of the assessee where the Tribunal was pleased to allow the claim of assessee in **ITA No.1944/Kol/2013** for A.Y 2009-10 vide order dated 28.02.2017.

On the other hand, Ld DR before us submitted that Hon'ble Tribunal in assessee's own case in *ITA No.1944/Kol/2013 (supra)* was pleased to restore the matter back to the file of AO for verification of the facts whether necessary changes has been approved by the CIT in the Deed of Gratuity Fund of assessee. In rejoinder Ld. AR submitted that matter can be restored back to the file of AO with a direction to allow the claim of assessee if Ld. CIT approved the change made in the Deed of Gratuity Fund

subsequently. In this regard Ld. DR did not raise any objection if the matter be restored back to the file of AO.

11. We have heard the rival contentions of both the parties and perused the material available on record. In the case before us the deduction was claimed by assessee during the assessment proceedings for the amount contributed towards the gratuity fund but Authorities Below denied to entertain the claim of assessee for the reason as discussed above. However, we find that in the assessee's own case in *ITA No.1944/Kol/2013 (supra)* matter was restored back to the file of AO for fresh verification of the case. For the sake of clarity, the relevant operative portion of this order is reproduced below:-

2. We have heard Shri R.S. Biswas, Id. CIT, D.R. and Ms. Akshata Mehta, Id. counsel for the assessee. The first appellate authority in his order at para 2.3 observed as follows:-

"2.3. I have carefully considered the above observation of the assessing officer and also the submission of the Ld. AIR. During the course of the appellate proceedings, the Ld. AIR has explained that the gratuity fund of the appellant company is maintained with Life Insurance Corporation of India. During F. Y. 2008-09, the appellant company incurred Rs.46,33,5771- on account of gratuity fund. The fund of the appellant company is in the name of "**VAI India Pvt. Ltd.**" and not in its present name i.e. "**Siemens VAI Metals Technologies Pvt. Ltd.**" Accordingly, the A.O. has held that the appellant did not have any gratuity fund of its own and disallowed the contribution of Rs.46,33,5771-. The Ld. AIR has further explained that as per the order of the Hon'ble Calcutta High Court, the appellant company was merged with VAI India Pvt. Ltd. with effect from 01.01.2002 and its present name is M/s. "**Siemens VAI Metals Technologies Pvt. Ltd.**" The appellant has filed a letter before the CIT on 27.01.2012 informing the above changes with necessary documents. The Ld. AR has also furnished a copy of the letter No. CIT Kol-IIGF ISF 112- 1317390 dated 18.02.2013 issued by the A.C.LT. Hqrs-1, Kolkata: a which is reproduced as under:-

"Sub: Approval of Deed of Variation of Siemens VAI Metals Technologies Pvt. Ltd. Employees Superannuation Fund & Siemens VAI Metals Technologies Pvt. Ltd. Employees Gratuity Fund.

Ref: Your letter dated 23.01.2013.

Sir,

With reference to the captioned letter this to inform you that the matter is being considered and the approval of deed of variations are under process."

The l.d. A/R has also explained that the necessary approvals for the Siemens VAI Metals Technologies Pvt, Ltd Employees Superannuation Fund and Siemens VAI Metals Technologies Pvt Ltd. Employees Gratuity Fund would be received shortly. In view of the above, the A.O is directed to delete (i) the addition of Rs.23,42,193/- on account of contribution to superannuation fund and (ii) the addition of

Rs.46,33,577/- all account of contribution to gratuity fund subject to the condition that the Deed of Variation of aforesaid Superannuation Fund and the Gratuity Fund of the appellant company are approved by the Commissioner of Income-tax at time of giving effect to this order, if the Commissioner of Income-tax does not approve the Deed of Variation of aforesaid Superannuation Fund and the Gratuity Fund, the additions of Rs.23,42,193/- and Rs.46,33,577/- on account of contributions to the Superannuation Fund and the Gratuity Fund respectively are to be treated as confirmed. For statistical purpose, these grounds of appeal are allowed".

3. We do not find any infirmity in this order of the first appellate authority. The Id. CIT(Appeals) has directed the Assessing Officer to verify the facts and pass necessary consequential orders. The directions are specific. Under these circumstances, we see no reason to interfere with the same."

Respectfully following the same, we remit the appeal to the file of AO for fresh verification in terms of our above direction and in accordance with the law. Hence, this ground of assessee's appeal is allowed for statistical purpose.

Now coming to the additional grounds of appeal:

12. The issue raised in additional ground is that assessee is entitled for deduction of ₹7,57,713/- and ₹12,61,664/- being 1/5th of the restructuring expenses of ₹37,88,563/- and ₹63,08,319/- respectively. The assessee in its additional ground sought the deduction of restructuring expenses for ₹7,57,713/- and ₹ 12,51,664/- being 1/5th of total restructuring expense in view of the order of Hon'ble Tribunal in assessee's own case in ITA No. 874/Kol/2007 for A.Y 2002-03 dated 28.09.2007. At the threshold it is important to understand the history of the case which goes as under:-

The assessee in the assessment years 2002-03 and 2003-04 claimed the restructuring expenses for ₹37,88,563/- and ₹63,08,319/- respectively. These expenses were incurred by assessee in pursuant to the transfer of its registered office from Delhi to Kolkata.

For both the years, the expenses claimed by assessee were disallowed by AO under the provision of 37(1) of the Act. But the AO allowed the deduction of same u/s. 35D of the Act i.e. 1/5th of the total expenses claimed by assessee in respective years.

13. The assessee against the order for the AY 2002-03 preferred an appeal before Ld. CIT(A) who upheld the order of AO and subsequently order of Authorities Below was affirmed by Hon'ble Tribunal in ITA No.874/Kol/2007 (supra) the relevant extract of the order is reproduced below:-

“... .. In the light of these facts of this case, we are of the considered opinion that the expenditure of Rs.37,88,563/- was incurred for purposes of amalgamation/merger of the two companies and, therefore, the Ld. CIT was justified in holding that this expenditure was not allowable as revenue expenditure u/s 37 of the Act and was to be allowed on proportionate basis as penalty the provision of section 35DD.”

However, assessee also preferred an appeal for AY 2003-04 before Ld. CIT(A) which is still pending before him. However, in AY 2003-04 AO disallowed the claim of assessee u/s. 37(1) of the Act but allowed the same under the provision of 35DD of the Act.

14. As the matter was now sub juice before the Tribunal, therefore, the assessee did not make any claim being 1/5th of restructuring expenses in the subsequent year. However, assessee is very much entitled for 1/5th of the expenditure in the five assessment years as held by the Hon'ble Tribunal in ITA No.874/Kol/2007 (supra). In view of above, Ld. AR before us submitted a specific direction can be issued to the AO for allowing the deduction of restructuring expenses @ 1/5th pertaining to the year under consideration.

On the other hand, Ld. DR raised no objection if the matter is restored back to the file of AO for fresh adjudication in accordance with law.

15. After hearing both sides and perusing the material available on record, we note that assessee is very much entitle for restructuring expense u/s. 35DD of the Act. Accordingly, we direct the AO to allow the restructuring expense claim as per provision of law and in the light of above discussion. Hence, this additional ground of assessee's appeal is allowed for statistical purpose.

16. In the result, for statistical purpose, the appeal of assessee is treated as allowed.

Order pronounced in open court on 08/11/2017

Sd/-

(न्यायिक सदस्य)

(S.S.Viswanethra Ravi)

Judicial Member

*Dkp, Sr.P.S

दिनांक:- 08/11/2017

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

Accountant Member

कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Siemens Ltd. [formerly known as VAI Engineering & Automation (P) Ltd] Block EP, Plot-Y5, Commercial Complex Sector-V, Salt Lake City, Kolkata-09
2. प्रत्यर्थी/Respondent-ITO Ward-2(4), P-7, Chowringhee Sq, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता