



ITA.No.4288/Mum/2011 & 3550/Mum/2012
Thermo Fisher Scientific India Private Limited
Assessment Year-2006-07

आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI

श्री डी.टी. गरसिया, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI D.T. GARASIA, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.4288/Mum/2011
(निर्धारण वर्ष / Assessment Year: 2006-07)

Thermo Fisher Scientific India Private Limited [Formerly known as Thermo Electro LLS India Pvt. Ltd.] 403-404, 'B' Wing, Delphi Hiranandani Business Park Powai, Mumbai-400 076	बनाम/ Vs.	Commissioner of Income Tax-10 Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABCT-3207-A		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No.3550/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2006-07)

Thermo Fisher Scientific India Private Limited [Formerly known as Thermo Electro LLS India Pvt. Ltd.] 403-404, 'B' Wing, Delphi Hiranandani Business Park Powai, Mumbai-400 076	बनाम/ Vs.	Assistant Commissioner of Income Tax Circle-10(3) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABCT-3207-A		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Girish Dave, Ld. AR
Revenue by	:	Manjunatha Swamy, Ld. DR

सुनवाई की तारीख / Date of Hearing	:	20/12/2017
घोषणा की तारीख / Date of Pronouncement	:	17/01/2018



आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeals, both by assessee for Assessment Year [AY] 2006-07 contest separate orders of lower authorities on different grounds. ITA No. 4288/Mum/2011 contest the invocation of revisional jurisdiction u/s 263 by Ld. Commissioner of Income Tax-10 [CIT], Mumbai whereas ITA No. 3550/Mum/2012 contest the quantum additions in consequential order as confirmed by first appellate authority. Since the assessee has challenged the issue of jurisdiction u/s 263, we take up the same first.

ITA 4288/Mum/2011

2.1 Facts, in brief, are that the assessee being *resident corporate assessee* engaged in the business of *manufacturing, installation and sale of medical equipments* was assessed for impugned AY on 12/12/2008 u/s 143(3) at Rs.41.90 Lacs which was same as returned income. Subsequently, Ld. CIT, vide order dated 28/03/2011 invoking revisional jurisdiction u/s 263 directed Ld. AO to frame fresh assessment after considering certain points as noted by Ld. CIT in the impugned order. The revisional jurisdiction, as evident from the impugned order, stems out of certain reporting made in Tax Audit Report of the assessee where it was noted that the following items, though required to be added back to the income of the assessee, were omitted to be added back and



hence, the quantum assessment order was erroneous and prejudicial to the interest of the revenue and therefore, required revision u/s 263:-

No.	Item	Amount (Rs.)
1.	Share Issue Expenses	1,95,120/-
2.	Sales Tax Penal Charges	80,740/-
3.	Provision for Gratuity	35,17,971/-
4.	Advances Written Off	1,77,455/-
5.	Provision for Doubtful Debts	5,000/-
6.	Commission on Warranty Income	51,18,356/-
	Total	90,94,642/-

Aggrieved by the exercise of said jurisdiction, the assessee is in further appeal before us.

2.2 The Ld. Counsel for the assessee [AR] drew our attention to the *show cause notice* dated 17/06/2010 as placed before us to plead that Ld. CIT could not elaborate as to how the quantum assessment order was erroneous or prejudicial to the interest of the revenue. Per *Contra*, Ld. Departmental Representative [DR] drew our attention to the quantum assessment order to plead that no inquiry, whatsoever, were made by the Ld. AO on the matters enumerated by Ld. CIT and omission to do the same has resulted into under-assessment of assessee's income and therefore, invocation of jurisdiction u/s 263 was perfectly justified. Our attention is further drawn to the fact that the revenue has no recourse against the shortcomings / omissions / errors made by Ld. AO except invoking revisional jurisdiction u/s 263 and therefore, the same was rightly invoked.

2.3 We have carefully heard the rival contentions and perused relevant material on record. At this stage, we are not concerned with the merits of the case but limited to the issue that whether twin conditions viz.



erroneous and prejudicial to the interest of the revenue as envisaged by the provisions of Section 263 are, *prima facie*, fulfilled or not. The perusal of the quantum order reveals that Ld. AO has nowhere discussed the allowability / admissibility of the above six items as enumerated by Ld. CIT in the show-cause notice. The Ld. CIT, after perusal of Tax Audit Report, noted that these items were required to be disallowed or added back to the income of the assessee but Ld. AO omitted to do so. After perusing the quantum order, show-cause notice, we are of the opinion that Ld. AO has omitted to note those six points as reported in the Tax Audit Report while framing the quantum assessment order. The Ld. AR could not show any evidence to demonstrate that discussions on any of these items were, at all, made during quantum assessment proceedings and they same were duly noted by Ld. AO. Hence, on the point of jurisdiction, we find ourselves in agreement with the revenue that the quantum assessment order rightly called for invocation of revisional jurisdiction u/s 263 by Ld. CIT. Therefore, finding the same in order, we dismiss assessee's appeal.

ITA 3550/Mum/2012

3.1 By way of this appeal, the assessee has contested the quantum additions made by Ld. AO in consequential order passed u/s 143(3) *read with Section 263* on 16/12/2011 and as sustained by *Ld. Commissioner of Income Tax (Appeals)-22 [CIT(A)], Appeal No.CIT(A)-22/ACIT-10(3)/IT.429/2011-12 dated 02/03/2012.*

3.2 Consequent to invocation of revisional jurisdiction u/s 263, the assessee has been saddled with aggregate additions of Rs.90,94,642/-



against six items which was further contested without any success before Ld. CIT(A) vide impugned order dated 02/03/2012. Aggrieved, the assessee is in further appeal before us.

3.3 The Ld. Counsel for Assessee, taking us through various documents placed in the paper-book contested the additions whereas Ld. DR defended the stand of lower authorities.

4.1 We have carefully heard the rival contentions and perused the relevant material on record. At the outset, it is noted that *Share issue Expenses* of Rs.1,95,120/- incurred by the assessee are capital in nature being incurred to expand the capital base of the company and hence, disallowable. Therefore, additions to that extent stand confirmed. Similarly, the Ld. AR contended that *Sales Tax Penal charges* of Rs.80,740/- as claimed by the assessee do not represent any penalty payment but only the additional sales tax liability of earlier years. Since Ld. AR could not produce any documentary evidence to prove the same, the matter being factual one, is being restored to Ld. AO for the limited purpose of verification of the stated fact as contended by Ld. AR. If the amount represents additional sales tax liability as contended by Ld. AR, the impugned addition shall stand deleted and needless to say that the penal charges are not allowable to the assessee. The assessee is directed to produce the relevant documentary evidences in this regard before Ld. AO. Accordingly, this ground stands allowed for statistical purposes.

4.2 The advances written-off for Rs.1,77,455/-, as per the contention of Ld. AR, represents write-off of certain advances given to various employees to incur expenditure on tours, miscellaneous advances etc.



and similarly the amount of Rs.5,000/- represent write-off of earnest money deposits while making tender / bid to a potential customer. We find that these expenses are routine business expenditure for the assessee and incurred to ensure day-to-day running of assessee's business and therefore, allowable. Resultantly, both these additions stand deleted.

4.3 Regarding *Commission on warranty income* for Rs.51,18,356/-, it has been contended that the assessee undertakes the warranty of the equipment supplied by the foreign group companies. The period of warranty is usually from one year to two years and varies from case to case basis. During warranty period, the assessee carries out various activities like replacement of parts, servicing of equipment etc. and accordingly, commission income received against the same is accrued over the period of warranty by following the *matching concept* of income. Our attention is drawn to the financial accounts of the company and detailed workings thereof as made by the assessee. The Ld.AR further contended that the assessee is consistently following the same method of accounting over the past several years and the same has also been accepted by the revenue. Our attention is further drawn to a vital fact that the assessee, following the same method of accounting, has already offered the said income in subsequent assessment years and hence, double taxation of the same amount was against the principle of natural justice and hence, not permissible.

4.4 Upon perusal, we find that it is uncontroverted fact that the assessee is consistently following the same method of accounting for recognition of commission income over past several years. A perusal of



detailed working of the same as placed on *Page No. 151* reveals that the said income has been apportioned on the basis of number of expired and unexpired warranty days, which lends strength to various arguments of Ld. AR. Therefore, without delving much deeper into the issue, the impugned addition stands deleted subject to verification of the fact by Ld. AO that this impugned income has been offered by the assessee to tax in subsequent years. Accordingly, the matter is restored back to the file of Ld. AO for factual verification of this fact. This ground of appeal stands allowed for statistical purposes.

4.5 The last addition under dispute is addition of Rs.35,17,971/- on account of *provision for gratuity*. As per contention of Ld. AR, the provision of gratuity liability represent ascertained liability arrived at by the assessee and provided in the books on the basis of actuarial valuation undertaken by the assessee. The revenue, on the other hand, contends that the same represent mere provisions and hence not allowable to the assessee. During the course of hearing, it was pointed out that there was large variation in the provision of gratuity made by the assessee during the impugned AY vis-à-vis provision made in the earlier years and it was also disproportionate to the increase in salary expenses incurred by the assessee. The Ld. AR contended that the same was arrived at on the basis of report of actuarial valuation and therefore, allowable in terms of ratio of decision of Hon'ble Supreme Court in *Bharat Earth Movers Vs. CIT [245 ITR 428]*.

4.6 It is settled proposition that deduction could be allowed to assessee only against ascertained liabilities and not mere provision. The Ld. AR could not demonstrate the working of arriving at the said provision. It is



also noted that the assessee did not produce any evidence in this regard before any of the lower authorities and the documents being presented before us in the form of actuarial valuation report constitute additional evidences. Hence, without delving much deeper into the issue, we restore the same to the file of Ld. AO for re-appreciation of assessee's contention & documentary evidences and decide as per law. The assessee, in turn, is directed to substantiate his claim in this regard before Ld. AO and also demonstrate the crystallization / accrual of the liability failing which Ld. AO shall be at liberty to dispose-off the same on the basis of material available on record. This ground stands allowed for statistical purposes.

4.7 Resultantly, the assessee's appeal stands partly allowed in terms of our above order.

Conclusion

5. To sum up, ITA No. 4288/Mum/2011 stands dismissed whereas ITA No. 3550/Mum/2012 stands partly allowed in terms of our above order.

Order pronounced in the open court on 17th January, 2018

Sd/-
(D.T. Garasia)
न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 17.01.2018
Sr.PS:- Thirumalesh



ITA.No.4288/Mum/2011 & 3550/Mum/2012
Thermo Fisher Scientific India Private Limited
Assessment Year-2006-07

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**