



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

आयकरअपीलीयअधिकरण“एफ” न्यायपीठमुंबईमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री शक्तिजीत दा न्यायिक सदस्य एवं
माननीयश्रीमनोजकुमारअग्रवाल, लखासदस्यकक्षसमक्ष।
BEFORE HON'BLE SHRI SAKTIJIT DEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.1691/Mum/2012
(निर्धारणवर्ष / Assessment Year: 2006-07)

Thyssenkrupp Industrial Solutions (India) Private Limited [CIN : U74200MH1977PTC020041] [formerly known as Uhde India Private Ltd.] Uhde House, L.B.S.Marg Vikhroli (West),Mumbai-400 083	बनाम/ Vs.	Additional Commissioner of Income Tax, Range-10(3) Mumbai
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACU-1416-H		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Percy Pardiwala,M.M.Golvala, Ld. ARs
Revenue by	:	Vidisha Kalra, Nitin R. Waghmode, Ld. DRs

सुनवाईकीतारीख/ Date of Hearing	:	18/01/2019
घोषणाकीतारीख / Date of Pronouncement	:	09/04/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year [AY] 2006-07 contest the order of the Ld. Commissioner of Income-Tax



(Appeals)-22[CIT(A)], Mumbai, Appeal No. CIT(A)-22/Addl.CIT-10(3)/IT.612/09-10 dated 16/12/2011 on following grounds of appeal: -

1. *The learned Commissioner of Income Tax (Appeals) erred in disallowing provision for costs incurred on completed contracts amounting to Rs.9,49,35,320/-*
2. *The learned Commissioner of Income Tax (Appeals) erred in not considering that the provisions were made as per the regular method of accounting followed by the appellant.*
3. *The learned Commissioner of Income tax (Appeals) failed to consider the detailed facts submitted in case of provision made on Kanoria Chemicals & Industries Ltd. Contract, including for liquidated damages payable.*
4. *The learned Commissioner of Income Tax (Appeals) erred in holding that liquidated damages for delay in completion were optional.*
5. *The learned Commissioner of Income Tax (Appeals) erred in disallowing provisions for cost overruns on incomplete contracts-Rs.1,92,34,146/-*
6. *The learned Commissioner of Income tax (Appeals) erred in not deleting provisions for costs on completed contracts amounting to Rs.14,66,21,872/- which has been disallowed in earlier assessment years and were utilized/written back in the current year.*
7. *The learned Commissioner of Income Tax (Appeals) erred in confirming taxation of an amount of Rs.28,84,90,428/-, as income, in respect of contracts accounted under "Percentage of Completion" (POC) Method.*
8. *The learned Commissioner of Income Tax (Appeals) erred in not considering that the appellant was following a regular method of accounting, sanctified by Accounting Standards.*
9. *The learned Commissioner of Income Tax (Appeals) failed to consider that the addition made o Rs.28,84,90,428/- has resulted in taxing gross receipts, without allowing deduction for expenditure required to earn such receipts.*
10. *Without prejudice to ground Nos. 7 to 9 above, the Assessing Officer erred in not allowing deduction (following his own method) where the sale proceeds recognized by the Appellant were higher than the billings done during the year.*
11. *The appellant submits the finding of the learned Commissioner of Income Tax (Appeals) that the appellant failed to produce evidence that monies under contract were received in advance, is with due respect, a perverse finding.*
12. *The learned Commissioner of Income Tax (Appeals) erred in taxing the excess of progress billings over inventories, amounting to Rs.3,96,15,600/- as income, in respect of contracts accounted under the*



ITA No.1691/Mum/2012
 Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
 Assessment Year :2006-2007

- “Completed Contract Method” and which were incomplete as on 31st March, 2006.*
13. *The learned Commissioner of Income Tax (Appeals) erred in rejecting the regular method of accounting followed by the appellant and accepted by the department in the past.*
 14. *The learned Commissioner of Income Tax (Appeals) erred in disallowing software maintenance expenses amounting to Rs.1,11,10,064/- on the ground that the same was capital expenditure.*
 15. *The learned Commissioner of Income Tax (Appeals) erred in not granting credit in respect of TDS o Rs.3,82,678/- withdrawn in Assessment Year 2005-06, and pertaining to contracts completed in Assessment Year 2006-2007.*
 16. *The learned Commissioner of Income Tax (Appeals) erred in not granting depreciation @60% on opening balance of software expenses capitalized in earlier assessment years amounting to Rs.44,77,753/-.*
 17. *The learned Commissioner of Income Tax (Appeals) erred in not excluding the amount of Rs.30,000/- being Short Term Capital Gain, taxed twice by the Assessing Officer.*
 18. *The learned Commissioner of Income Tax (Appeals) erred in confirming levy of interest u/s 234B.*

The assessment for impugned AY was framed by *Ld. Additional Commissioner of Income Tax, Range-10(3), Mumbai [AO]* in scrutiny assessment u/s 143(3) of the Income Tax Act, 1961 on 23/12/2009 wherein the income of the assessee was assessed at Rs.65.80 Crores after certain additions / disallowances as against returned income of Rs.20.46 Crores e-filed by the assessee on 31/10/2006. During impugned AY, the assessee being *resident corporate entity* was stated to be engaged in *supply of processors, designing, construction and commissioning of complete plants for chemical fertilizers, petrochemical, refining & other related industries.*

2.1 The name of the assessee company has undergone change from *Uhde India Private Limited* to *Thyssenkrupp Industrial Solutions*



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

(India) Private Limited vide certificate of incorporation pursuant to change of name issued by Registrar of Companies, Mumbai on 07/10/2014. Incorporating the same, revised Form No. 36 has been filed on 03/11/2017. Finding the same in order, we proceed to dispose-off the appeal as per the arguments of respective representatives.

2.2 For ease of reference, the grounds of appeal could be grouped & tabulated in the following manner: -

Ground Nos.	Nature of Addition	Amount (Rs.)
1 to 4	Provision for costs on completed contracts	9,49,35,320/-
5.	Cost overruns on completed contracts	1,92,34,146/-
6.	Not Pressed	NA
7 to 11	Income on Contracts accounted under Percentage of Completion Method	28,84,90,428/-
12 & 13	Excess of Progress Billings	3,96,15,600/-
14.	Software Maintenance Expenses	1,11,10,064/-
15.	TDS Credit withdrawn in AY 2005-06	3,82,678/-
16.	Not Pressed	NA
17.	Not Pressed	NA
18.	Levy of interest u/s 234B	NA

Our ground-wise adjudication is given in the succeeding paragraphs.

2.3 Ground Nos. 1 to 4: Provision for costs on completed contracts

2.3.1 During assessment proceedings, it transpired that the assessee created provisions for cost on completed contracts amounting to Rs.9,49,35,320/-. Although, the assessee, vide its reply dated 06/11/2009, defended the provisions, however, not convinced, Ld. AO relying upon Tribunal's order for AY 2002-03 disallowed the



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

same. It was held by Ld. AO that the liabilities were unascertained liabilities and no documentary evidence could be furnished by the assessee to prove that the costs were expected in each of the project and such estimates were made on any scientific basis. The relevant extract of assessee's reply has already been reproduced in quantum assessment order on *page nos. 2 to 10*.

2.3.2 Before first appellate authority, it was explained that the assessee carried out two types of contracts- *Lumpsum Turnkey Projects [LSTK] and Cost-plus fees contracts*. On *LSTK* projects, the revenue was recognized upon commissioning of the plant. Commissioning was the stage at which the plant is started and commissioning operations are commenced to demonstrate the guaranteed parameters to the client. Commissioning also means feeding raw material for the first time into the plant following mechanical completion and lining up various sections of the plant leading to operation for production. After commissioning of the plant, the company was to conduct guaranteed test runs and demonstrate the technical parameters guaranteed by the company under the contract before final acceptance of the plant by the customer. Such technical parameters guaranteed under the contract would include consumption of raw materials, production capacity, meeting effluent norms etc. The company was also responsible to demonstrate the fulfilment of guaranteed technical parameters as envisaged under the



respective contracts. Since the profit on these projects were recognized upon commissioning of the plant itself which event takes place much before the final acceptance of the plant by the client, it was essential for the company to provide for estimated costs likely to be incurred during the period between commissioning of the plant and final acceptance of the plant by the customer. These costs would generally include project specific travelling costs of the engineers, testing cost, supplies of replacement spares, replacement cost, modification costs etc. It was also necessary to make provisions for additional costs if sustainable production capability was not demonstrated within the guarantee period.

2.3.3 Similarly, under the *cost-plus fees contracts*, profits were recognized upon mechanical completion of the plant. The provisions were made mainly for re-engineering services to be provided and quantum of provision would relatively be lesser as compared to *LSTK* project since the company's liability under such contracts would be related to re-engineering services only. Mechanical completion was stated to be the stage at which the plant, after mechanical completion, was ready for acceptance of feedstock leading to production of guaranteed products.

2.3.4 On the basis of above, it was submitted that in both types of contracts future costs were still to be incurred by the company until



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

the final acceptance of the plant by the client and sometime expenses were to be incurred even after final acceptance of the plant.

2.3.5 Regarding estimation of future costs, it was submitted that at year-end, the project implementation team consisting of project manager, lead engineers and engineering manager would evaluate the status of each project being executed by the company and estimate the costs likely to be incurred on each contracts / project. On the basis of technical evaluation, the team identifies the additional number of engineering hours required to be provided under the contract, the additional costs expected to be incurred on account of travelling, site related expenses, expenses for replacement/modification of equipment etc. The attention was further drawn to the fact that the assessee was engaged in designing, construction and commissioning of plants for a diverse variety of industries and the services were highly technical in nature and the projects were carried out over a very wide geographical area which made the estimation complex. Since recognition of profits is done much in advance to the final acceptance of the plant by the client, it was necessary to provide for the cost of each of such project which was likely to be incurred in future before final acceptance of the plant by the customer. The contract wise breakup of the provisions made by the assessee was also provided before Ld. first appellate authority, the details of which has already been reproduced in the impugned



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

order. The attention was drawn to the fact that similar accounting methodology was being followed by the assessee in earlier years and the creation of provisions was in line with applicable guidelines and accounting standards issued by *The Institute of Chartered Accountants of India [ICAI]*.

2.3.6 The Ld. CIT(A), relying upon the decision of this Tribunal rendered in AY 2002-03, observed that the provisions could be allowed only if they could be estimated with reasonable certainty. It was also observed that no evidence could be produced by the assessee that the exercise of estimation was ever carried out by the project implementation team rather the estimations were made by a single person only. It was also observed that, in few projects, substantial provisions made against completed contracts were reversed / written back in subsequent years. These observations are already given in para 2.5 of the impugned order. To bolster these observations, after examining the provisions made against contracts entered into by the assessee with an entity namely *Kanoria Chemicals & Industries Ltd.*, it was noted that the assessee reversed provisions to the extent of 45% in subsequent years and further out of total provisions of Rs.5.78 Crores made against this project, the amount of Rs.3.34 Crores were merely *Liquidated damages* for delay in time schedule, which were not mandatory but optional as per contractual terms. All the aforesaid factors led the Ld. first appellate authority to



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

conclude that the provisions were made merely on the basis of surmises, suspicions, play safe based financial plans and were not capable of estimation with reasonable certainty and therefore, the same could not be allowed to the assessee.

2.3.7 The Ld. Sr. Counsel for Assessee [AR], *Shri Percy Pardiwala*, drawing our attention to the documents placed in the *paper-book*, submitted that the provisions were made on scientific basis in relation to each project as per input received from technical team. The assessee has made payment against these provisions in subsequent years and these provisions were reviewed each year-end and the excess provisions no longer required were written back in the profit & loss account and offered to tax in those years and therefore, the transactions would ultimately be tax / revenue neutral in terms of decision of Hon'ble Apex Court rendered in *Excel Industries Ltd. [358 ITR 295]*. The details of such payments and reversal on subsequent years has been placed on record. It is submitted that the stated issue arose for the first time during AY 2001-02 which reached up-to the level of this Tribunal wherein the claim was allowed in its entirety on the ground that the liability was identified, determined and ascertained on the basis of technical assessment. For AY 2002-03, the Tribunal held that making of a provision by the assessee, in principle, was justified. However, since the assessee was unable to provide the requisite information to prove that the liabilities were identifiable,



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

determined and ascertained, the Tribunal did not agree with the quantification of provision in the absence of information and therefore, allowed the provision to the extent it was actually utilized subsequently. For AY 2003-04, the Tribunal allowed a deduction in respect of provisions where explanations & workings were submitted and balance provisions were disallowed in the absence of requisite information. Similar view has been taken by the Tribunal for AY 2004-05 also. The attention has been drawn to the fact that assessee's appeal against this order of Tribunal for AYs 2002-03, 2003-04 & 2004-05 has already been admitted by Hon'ble Bombay High Court whereas revenue's appeal for AY 2004-05 has already been dismissed. For AY 2005-06, the Tribunal allowed the claim of the assessee upon finding that the provisions were made on scientific basis. While adjudicating the appeal for AY 2005-06, the decisions passed in earlier years were duly considered by the Tribunal. The Ld. Sr. Counsel, thus submitted, that the latest order of the Tribunal prevailing in assessee's case was for AY 2005-06, wherein the deduction of provisions have been allowed in its entirety and since the factual matrix in the impugned AY was *pari-materia* the same, the order for AY 2005-06 should be followed.

2.3.8 The Ld. AR further submitted that the provisions were made on technical estimates and the same were in line with applicable *Accounting Standards* as per Section 145(2) which necessitated



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

creation of provisions for all known liabilities and losses. Our attention is drawn to the fact that project-wise provision made by the assessee was submitted to Ld. AO and complete details in respect thereof was available on record. It has been submitted that consistent method of accounting was being followed by the assessee for the past several years, in this regard. It has also been submitted that the provisions were allowable in full and if the provisions were allowed only to the extent of utilization in a subsequent year, then the same would indirectly, tantamount to allowance of expenditure on cash basis as against the accrual principle of mercantile system of accounting. Reliance has been placed on the judgment of Hon'ble Bombay High Court rendered in *Shrikant Textiles Vs CIT [81 ITR 222]*. Reliance has also been placed on the decision of Hon'ble Apex Court rendered in *Excel Industries Ltd. [358 ITR 295]* & decision of Hon'ble Mumbai Tribunal rendered in *Toyo Engineering Corp. Vs. DDIT [ITA No. 6600/Mum/2002 22/03/2004]* for various submissions.

2.3.9 Per Contra, Ld. CIT-DR relied upon the orders of Tribunal in assessee's own case for AYs 2002-03 to 2004-05 and submitted that provision for unascertained liabilities could not be allowed to the assessee. It has been submitted that provisions have been estimated in an arbitrarily and unreasonable manner which are not as per settled principles of accounting. The CIT-DR also submitted that each year's tax was to be computed separately as per the provisions of act and



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

therefore the plea of revenue neutrality could not be accepted. The case laws of *Srikant Textiles & Triveni Engineering* were sought to be distinguished on the facts and reliance has been placed on the judgment of this Tribunal rendered in *IOT Infrastructure Ltd. Vs ITO* wherein it is held that reversal of provisions in the subsequent year could not justify the provisions made in the year under consideration, the correctness of which is to be decided mainly on the basis of past data relating to expenditure actually incurred.

2.3.10 The Ld. Sr. counsel, in the rejoinder, submitted that the Tribunal in its order for AY 2002-03, in principal, approved the creation of provision but did not agree with the quantification of provision in the absence of requisite information. Nevertheless, the Tribunal allowed the provisions to the extent it was subsequently utilized by the assessee. Similarly, for AY 2003-04, the Tribunal allowed deduction in respect of provisions where explanations and workings were submitted by the assessee and balance provisions were disallowed only in the absence of requisite information. Similar stand has been taken by the Tribunal for AY 2004-05. Our attention is again drawn to the fact that assessee's appeal for all these three years has been admitted by Hon'ble Bombay High Court and the same is pending for adjudication whereas the revenue's appeal for AY 2004-05 has already been dismissed. It has further been submitted that for AY 2005-06, Tribunal allowed the assessee's claim on the ground that the



ITA No.1691/Mum/2012
 Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
 Assessment Year :2006-2007

provisions were made on scientific basis. This decision, as per Ld. AR, was rendered after considering the decision in earlier years. Reliance has been placed on several judicial pronouncements for various submissions, which has been placed on record. It has been submitted that the revenue is unable to controvert the principle laid down by Hon'ble Apex Court rendered in *Excel Industries Ltd.* [358 ITR 295] and therefore, there was much force in the plea of revenue neutrality.

2.3.11 We have heard the rival contentions and perused relevant material on record including documents placed in the *paper-book* & judicial pronouncements relied upon by respective representatives. Since the issue is recurring in nature, for ease of understanding, at the outset, the status of appeal filed by the assessee in past years before the Tribunal could be tabulated in the following manner: -

No.	AY	ITA No.	Order Dated	Remarks
1.	2000-01	ITA 8053/Mum/2004	23/10/2007	Assessee's appeal on the issue allowed
2.	2002-03	ITA 1926/Mum/2006	10/09/2008	Assessee's appeal on the issue partly allowed
3.	2003-04	ITA 6510/Mum/2009	30/09/2011	Assessee's appeal on the issue partly allowed
4.	2004-05	ITA 6511/Mum/2009	08/08/2012	Assessee's appeal on the issue partly allowed
5.	2005-06	ITA 1690/Mum/2012	04/07/2014	Assessee's appeal on the issue allowed

The observation / conclusion in the latest order of the Tribunal for AY 2005-06 could be extracted in the following manner: -

2.5. We have heard the rival submissions and perused the material before us. In our opinion PCCC is based on identified liability, though it is only an estimate. In the year under appeal the assessee had made provisions for eleven unfinished



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

projects and in subsequent two years after completing the projects wrote off the provisions and offered the balance for taxation. We further find that in those years the assessee had written back the balance amount and same was taxed by the AO. In our opinion, the AO cannot take two stands—he cannot tax the assessee in later years for a part of transaction for which provision has been made for earlier years. In the commercial world provisions are made for contingencies and court are of view that same have to allowed. AS-7 recognizes the principal of making provisions for certain expenses. It is a normal feature of business world that at the end of a particular AY., it may not be possible for an assessee to determine the probable future expenditure of an ongoing project or scheme. If it recognizes income from such project in that year, it will have to make some reasonable provisions for the expenditure to be incurred in subsequent year. Provision will vary from project to project and from year to year. It would also depend on stage of completion of the project. For that purpose, assessee will have to rely on earlier years' experience and report of the technical personnel. Question of provisions for warranty was discussed at length by the Hon'ble Apex Court in the matter of Rotork Controls India P. Ltd. (314 ITR62). We are aware that warranty cannot be equated with provisions made for the projects to be completed by an assessee, but the principle laid down by the Hon'ble Court are applicable to the case under consideration. Provision after all is only an estimation of probable expenditure to be incurred after the end of a particular year. Besides, in our opinion travelling cost of the engineers and technical staff, testing cost, supplies of replacement spares, site related costs, cost of completion of punch list work, cost of modification for uncompleted projects has to be considered while making provisions when an assessee carries out a business of providing diversified engineering services. We find that the assessee had to make provisions for additional cost if sustainable production capability is not demonstrated within the guarantee period. In such cases cost provisions had to be made even after acceptance/conditional acceptance of a plant.

We find that the FAA has disallowed provisions on the basis that the assessee had written back the amounts in subsequent years. He has not analyzed the data of earlier years and subsequent years to determine the alleged unreasonableness of the provisions. It is a fact that res judicata is not applicable to income tax proceedings and every year is an independent unit, but rule of consistency contemplates that the AO should not suddenly disallow any item without assigning some reason. From the order of the AO/FAA we are unable to find as how the facts and circumstances for the year 2001-02 were different from the facts for the year under consideration. Assessee was following the same system of making provisions for uncompleted projects for last so many years. There is nothing in the order of the FAA that could prove that provisions made by the assessee were not based on estimate given by experts. We have perused the paper book—it is found that internal memos are signed by one



ITA No.1691/Mum/2012
 Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
 Assessment Year :2006-2007

person, but the estimate of provision was prepared by three/four competent authorities, dealing with financial and technical sides of the projects (page 83, 89, 124, 138 of the PB). In short, the assessee was following some system in estimating provisions. Therefore, without pointing out major defects it was not proper on part of the FAA to state that system was. FAA has given his finding without giving the reasons. In our opinion writing off of provisions in subsequent years cannot be basis for disallowing it. Accounting standards expect that assessee should write back such amounts in later years. FAA has overlooked the fact that out of the provisions made by the assessee, Rs. 3.70 Crores were actually spent by the assessee in the subsequent years to complete the unfinished projects or to render further services. Therefore, in our opinion, he was not justified in confirming the disallowance of Rs. 8.14 Crores, without analyzing the terms and conditions of the projects threadbare for which provisions were made during the year under appeal. Reversing his order, we decide first effective ground of appeal (ground no. 1-3) in favor of the assessee.

2.3.12 Upon careful consideration of factual matrix, the undisputed position that emerges is the fact the assessee's complex nature of business require estimation of future expenditure to be incurred on the projects and create a provision thereof since the revenue from the project is recognized after commissioning of the plant whereas some expenditure is certainly required to be incurred by the assessee between the stage of commissioning of the plant and final acceptance of the plant by the customer. In our opinion, these estimations are mere projections which may or may not crystallized in the subsequent years and the provisions may require suitable adjustment by way of further debit to profit & loss account of subsequent years or reversal by way of credit to profit & loss account in subsequent years. The prime reason to disallow the provisions by first appellate authority is the fact that the estimates were not made on any scientific basis, the



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

same are without requisite documentary evidences and a major portion of the same has been reversed in the subsequent years. However, the said reasoning, in itself, could not deprive the assessee to claim legitimate business expenditure under mercantile system of accounting following matching concept of income. Nothing on record suggest that reversal in the subsequent years has not been offered to tax by the assessee. The details as placed on record, reveal that out of such provisions of Rs.949.35 Lacs, the assessee has incurred expenditure of Rs.751.60 Lacs (which is more than 79% of the provisions) in the subsequent year and the excess provision i.e Rs.393.14 Lacs have been offered to tax in AYs 2007-08 & 2008-09 by way of reversal. Further, the assessee is following consistent method of accounting and estimating the provisions on similar basis which is in line with the applicable *accounting standards* notified u/s 145(2) and as per statutory mandate. Nothing on record suggest that there was any change in method of accounting during impugned AY to recognize the revenue or expenses.

2.3.13 The assessee's submission before Ld. AO dated 06/11/2009 as placed from page nos. 55 onwards, reveal that project wise estimation were made by assessee for the expenditure to be incurred under each head. The same were arrived at after identifying expected cost required to be incurred in future on various projects. The elaborate working of the same along with relevant contracts



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

entered into by the assessee with the customers has already been placed in the *paper-book* which establishes the fact that the estimates were not mere guess work or made out of thin air. Another undisputed fact is that the assessee has incurred actual expenditure in subsequent years against these estimations which itself prove that the assessee had certain liability under these contracts. It is altogether different aspect that the matter of estimation may not be accurate one or commensurate with actual expenditure incurred by the assessee in future years. It may only necessitate the assessee to adjust the same suitably in subsequent years on the basis of actual outcome. So long as the provisions were made on scientific basis and the basis of the same was substantiated by the assessee, there could be no occasion to disallow the same. It is also noteworthy point that subsequent reversal in future years has been offered to tax by the assessee which lend credence to *tax neutrality* plea raised by Ld. AR.

2.3.14 Proceeding further, it is undisputed position that part of the provisions has always been allowed to the assessee by the Tribunal right from AY 2001-02 onwards which is evident from the table given at *para 2.3.11*. The claim has fully been allowed in AY 2001-01 & in AY 2005-06 whereas part claim, to the extent details have been furnished by the assessee, has been allowed for AYs 2002-03 to 2004-05. In the impugned AY, we find that complete project wise



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

provisions made by the assessee has been placed on record and provision made under each project has been uniquely identified.

2.3.15 The Ld. CIT-DR has placed reliance on the decision of Delhi Tribunal rendered in *IOT Infrastructure & Energy Services Ltd Vs ITO [ITA No. 2585/Mum/2009 dated 17/05/2013]*, the perusal of which reveal that in that case, the assessee had made adhoc provision of 5% for warranty expenditure whereas the past data revealed that no warranty expenditure was incurred by the assessee in the earlier years and therefore, the Tribunal upheld the stand of Ld. first appellate authority in restricting the same to 0.2% only. However, the facts in the present case is that the assessee has certain liability under the project and estimates have been made project wise, the working of which has been placed on record, Therefore, we find this case law to be factually different.

2.3.16 The due consideration of above factual matrix leads us to inevitable conclusion that the impugned provisions made by the assessee were allowable in full during impugned AY. Therefore, by reversing the stand of Ld. first appellate authority, we allow Ground Nos. 1 to 4 of the assessee's appeal.

2.4 Ground No. 5: Cost overruns on incomplete contracts

2.4.1 The cost overruns on incomplete projects for Rs.192.34 Lacs stem from the fact that these costs represent expected loss to be incurred on a particular contract after considering the revenue



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

generated from that contract, cost already incurred on the said project and estimated future costs to be incurred in future to complete the projects. It was submitted that such cost overruns in excess of the contract value which could not be recovered from the client was crystallized, identified, determined and the same was provided in the books in tune with *Accounting Standard-7 [AS-7]* issued by ICAI and hence, allowable to the assessee. The contract wise details of provisions for cost overruns on incomplete contracts was also provided before Ld.AO, the details of which has already been extracted in the impugned order on *page no.7*. However, not convinced with assessee's submissions, the same was disallowed by Ld. AO. The Ld. CIT(A) confirmed the disallowance by relying upon the order of Tribunal for AY 2003-2004. Aggrieved, the assessee is in further appeal before us.

2.4.2 The Ld. Sr. Counsel controverted the same by submitting that the claim of the assessee in AY 2003-04 was approved in principle but in the absence of relevant information, only part relief was provided. Our attention is drawn to the fact that the assessee's appeal against the same has already been admitted by Hon'ble Bombay High Court. Nevertheless, the claim has been allowed by the Tribunal for AY 2004-05 whereas similar claim for AY 2005-06 has been allowed by Ld. AO himself in the light of assessee's



submissions. The Ld. CIT-DR placed reliance on the order of Tribunal for 2003-04.

2.4.3 After careful perusal of material on record, we find substantial force in the arguments of Ld.AR. It is undisputed fact that such provisions were made by the assessee in AY 2005-06 which has been allowed by Ld. AO himself. Secondly, out of these provisions of Rs.192.34 Lacs, an amount of Rs.134.11 Lacs has actually been utilized / paid by the assessee in subsequent years (which is more than 69% of the provisions) and balance amount i.e. Rs.58.23 Lacs has been offered to tax in subsequent years. Moreover, the assessee has already placed on record project wise estimation and nothing on record suggest that there was any change in method of accounting being followed by the assessee. This being the case, the impugned additions could not be sustained. We order so. Ground No. 5 of the appeal stands allowed.

2.5 Ground Nos. 7 to 11: Income in respect of Contracts Accounted under Percentage of Completion Method

2.5.1 By way of these grounds, the assessee is contesting the addition of Rs.28.84 Crores which represent understatement of profits in respect of projects accounted under the project completion method. During assessment proceedings, it transpired that the *progress billing* representing the aggregate of invoices raised in respect of different projects exceeded the sale revenue recognized by the assessee in the



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

books of accounts to the extent of Rs.28.84 Crores. The sales revenue from these projects were accounted for on *Percentage Completion Method [PCM]*. The Ld. AO opined that the progress billing represented the actual work done by the assessee under each project and further, costs incurred up-to date on these projects were also debited in the profit & loss account and therefore, there was understatement of income. In other words, in the opinion of Ld. AO, the billing done by the assessee under these projects were to be recognized as sales revenue in the books of account as against recognized by the assessee on the basis of percentage of completion method of accounting since progress billing was nothing but the actual work completed by the assessee under the project. Although the assessee defended the same vide reply dated 25/11/2009 by submitting that the revenue is recognized on the basis of percentage of completion method, however, not convinced, Ld. AO opined that revenue recognized in the books was less than *progress billing* and therefore, the *PCM* adopted by the assessee as per *AS-7* to recognize the revenue did not represent real profits earned by the assessee. Further, by adopting this method, the true sales were not being reflected in the books. Finally, disregarding the assessee's submissions, an amount of Rs.28.84 Crores representing understatement of profits in respect of 28 contracts was disallowed and added to the income of the assessee. The details of the same has



already been reproduced on *page nos. 12 to 14* of the quantum assessment order. The stand of Ld. AO, upon confirmation by first appellate authority, is under appeal before us.

2.5.2 The Ld. Sr.Counsel submitted that the assessee was following *percentage of completion method [PCM]* with respect to contracts commencing after 01/04/2003 to recognize the revenue from these contracts. This was done in view of the amended AS-7 which necessitated the assessee to follow this method to recognize the revenue. As per this method, the revenue is recognized on the basis of stage of percentage of completion of contracts. To determine the percentage of completion, the following formula was adopted: -

$$\frac{\text{Total Cost incurred till the end of the accounting year}}{\text{Budgeted Cost}}$$

It was explained that the revenues were recognized by applying this fraction to the contract value. However, to ensure that the project was sufficiently funded, the assessee raised *progress billings* from time to time based on pre-decided milestones. These bills were raised only for the purpose of meeting funding requirements and had nothing to do with determination of extent of completion of contract or recognition of revenue since recognition was done the basis of formula mentioned above so as to ensure matching cost and revenues. Our attention is drawn to the explanation furnished by the assessee before first appellate authority to justify *progress billings* under the projects. The



ITA No.1691/Mum/2012
 Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
 Assessment Year :2006-2007

Ld. Sr. Counsel further submitted that the objective of *progress billing* was to ensure working capital availability and it was nothing but advances from customers and therefore, could not be regarded as assessee's income. Reliance has been placed on the decision of this Tribunal rendered in *IOT Infrastructure & Energy Services Ltd. [ITA No. 7035/M/2010 17/05/2013]* which has been upheld by Hon'ble Bombay High Court in *ITA No. 2296 of 2013 dated 18/04/2016*. Reliance has also been placed on the decision of this Tribunal rendered in *Toyo Engineering Corp. Vs. DDIT [ITA No. 6600/Mum/2002 22/03/2004]* & the decision of Kolkata ITAT rendered in *M.N. Dastur & Co. Ltd. [61 ITD 167]*.

2.5.3 Per contra, Ld. CIT-DR submitted that *progress billing* was nothing but invoice that was intended to obtain payment from the customer for that portion of project which had already been completed to date. Therefore, *progress bills* were nothing but actual work done and the method adopted by assessee was faulty as it was cost based revenue while the correct method would be actual cost spent by the assessee. The progressive billing has to be as per value of each contract and not as per the cost of the contract. Our attention is drawn to the fact that the project was completed to the extent of 98.3% whereas the assessee has taken the completion to the extent of 96.8% only by taking the direct actual cost. The case law of *IOT infrastructure* has sought to be distinguished on the ground that in that



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

case *progressive billing* was done not for the amount of work done but for the mobilization and other advances receivable by the assessee as against the fact of the present case where the billing has been done wholly on the basis of work completed and there was no advance involved.

2.5.4 However, Ld. Sr. Counsel, in the rejoinder, submitted that *progress billing* had nothing to do with the recognition of the revenue since revenue were recognize on the basis of percentage of work done to ensure matching of cost and revenues in accordance with the accounting standards and therefore, progress billing could not be construed to be an invoice raised for the portion of the contract that has been completed to date rather it is only a billing done as per pre-decided milestones. Our attention is drawn to the fact that *progress billing* also takes into account an amount received initially as advance even though no work was carried out at that stage and accordingly, there will be a mismatch between work completed and amount invoiced to client throughout the project. It has been submitted that revenues have been recognized as per AS-7 and the same method of accounting was being followed by the assessee since AY 2004-05 onwards.

2.5.5 Upon careful consideration, the undisputed position that emerges is that the assessee is following consistent method of accounting to recognize the revenue under these contracts. The



percentage of completion of the project has been worked out as per total cost incurred on the project to date vis-à-vis total budgeted cost and that fraction is applied to the contract value for the purpose of revenue recognition. Similar formulae have been adopted by the assessee in preceding two years which has been accepted by the revenue. No case of revenue leakage has been established before us. Nothing on record suggest that remaining income under the project has not been offered by the assessee in subsequent years, following the same method of accounting. Simply because *progress billing* was more than the stage of percentage of completion, the same, in itself, could not be the basis to usurp the consistent method of accounting being followed by the assessee. Therefore, the additions made by the revenue, under the circumstances, could not be sustained. We order so. Accordingly, ground Nos. 7 to 11 of assessee's appeal stands allowed.

2.6 Ground Nos. 12 to 13: Excess of Progress Billings-understatement of profit in respect of incomplete contracts obtained prior to 31/03/2003 and accounted under Completed Contract Method

2.6.1 This addition of Rs. 396.15 Lacs represents *alleged* understatement of profit in respect of incomplete contracts accounted under *Completed Contract Method [CCM]*. It was noted that as per accounting policies, the assessee was following *Completed Contract*



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

*Method[CCM]*for contracts received / started up-to 31/03/2003 and for contracts after this cut-off date, *percentage completion method* was being followed to recognize the revenue in the books of accounts. The dispute, under these grounds, is with respect to contracts started before 31/03/2003 wherein the assessee followed *completed contract method*. During assessment proceedings, it transpired that the assessee raised invoices against these 13 projects for Rs.22.52 Crores and reflected the same on the liabilities side of the Balance Sheet. Similarly, the costs of Rs.18.56 Crores were accumulated against these projects and reflected on the asset side of the Balance Sheet. The Ld. AO opined that though substantial work was done under these projects and invoices were also raised, no profit was shown against the same. Resultantly, the differential of the two amounts i.e. Rs.396.15 Lacs was added to the income of the assessee. The stand of Ld. AO, upon confirmation by first appellate authority, is under appeal before us.

2.6.2 Th Ld. Sr. Counsel submitted that the costs as well as revenues are recognized under these projects on *completed contract method*. These revenues as well as costs were accumulated in the similar manner for AYs 2004-05 & 2005-06 also which has been accepted by the revenue and therefore, there was no reason to disturb the same in this AY. *Per contra*, Ld. CIT-DR submitted that, upon



change of method of accounting, the revenues from such projects were to be offered to taxation.

2.6.3 Upon careful consideration, we find that the assessee has accumulated cost as well as revenue under these projects in the *Balance Sheet* by following *completed contract method*. The revenue has accepted such accumulation during AYs 2004-05 & 2005-06 and this is the third year of accumulation under the projects. It is not the case of the revenue that the income under these projects have not been offered to tax in subsequent years. No case of revenue leakage has been established before us. Therefore, the action of revenue in disturbing the consistent method of accounting being followed by the assessee could not be held to be justified. Hence, we delete the impugned additions and allow these grounds of appeal.

2.7 Ground No. 14: Disallowance of Software Maintenance Expenses

2.7.1 During assessment proceedings, it transpired that the assessee claimed an amount of Rs.111.10 Lacs towards *computer software charges*, which in the opinion of Ld. AO, were capital in nature. Although the assessee submitted that these charges were in the nature of *Annual Maintenance Charges* of various software being used by the assessee & therefore, revenue in nature, however, not convinced Ld. AO allowed capitalization of the same and allowed



depreciation against the same @25%. Aggrieved, the assessee is in further appeal before us.

2.7.2 The Ld.Sr. Counsel submitted that these expenditures were in the nature of annual payments for maintenance of various software being used by the assessee and therefore, the same were revenue in nature. Our attention is drawn to the fact that similar issue in earlier years stood squarely covered in assessee's favor by the orders of the Tribunal. Further, the appeal filed by the revenue against the order of the Tribunal for AY 2004-05 was also dismissed by Hon'ble Bombay High Court.

2.7.3 Upon careful consideration, we find that when the expenditure is in the nature of *annual maintenance charges*, the same could not be held to be capital in nature. Keeping in view the fact that the issue stood covered in assessee's favor by the orders of Tribunal for earlier years, we hold the expenditure to be revenue in nature and hence, fully allowable to the assessee. Consequently, the depreciation allowed against the same shall stand reversed. This ground stand allowed.

2.8 Ground No. 15: Non-grant of TDS Credit withdrawn in AY 2005-06

By way of this ground, the assessee seeks certain directions to the lower authorities to grant TDS credit withdrawn in AY 2005-06. Our attention is drawn to the fact that rectification application u/s 154 has



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

already been filed by the assessee and the first appellate authority had already instructed Ld. AO for expeditious disposal of the same. Reiterating the same, Ld. AO is directed to verify the assessee's claim in this regard and allow the credit, as permissible under the law. This ground stand allowed for statistical purposes.

2.9 Ground Nos. 18: Interest u/s 234B

The same being merely consequential in nature, do not require our indulgence and therefore, not delved into.

Conclusion

3. The appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 09th April, 2019.

Sd/-

Sd/-

(Saktijit Dey)

(Manoj Kumar Aggarwal)

न्यायिकसदस्य / **Judicial Member**

लेखासदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 09/04/2019
Sr.PS:-Jaisy Varghese



ITA No.1691/Mum/2012
Thyssenkrupp Industrial Solutions (India) Pvt. Ltd.
Assessment Year :2006-2007

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**