IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "E" BENCH, MUMBAI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 6033/Mum/2017
(**निर्धारण वर्ष /** Assessment Year : 2011-12)

The Dy. Commissioner of Income Tax 15(3)(1), Romm No. 451, 4th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai 400020	**बनाम**/ Vs.	**M/s. Tokheim India Pvt. Ltd.** A-201, Supreme Business Park, Supreme City, Hiranandani Gardens, Powai, Mumbai - 400076
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCK3414F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by** :	Shri Abi Rama Karthikeyan, Sr.D.R.
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Jitendra Singh, A.R.

सुनवाई की तारीख / **Date of Hearing**	11/06/2019
घोषणा की तारीख /**Date of Pronouncement**	14/06/2019

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-24, Mumbai, ('CIT(A)' in short), dated 16.06.2017 arising in the assessment order dated 27.03.2015 passed by the Assessing

Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2011-12.

2. The revised grounds of appeal filed by Revenue are reproduced hereunder for adjudication purposes:

> *"1. Whether on the facts and circumstances of the case, the Ld. CIT(A) is right in allowing the provision of warranty expenses ignoring the fact that the assessee was not able to provide the actuarial valuation report.*
>
> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that expenditure incurred on ISOPAR is revenue in nature ignoring the fact that assessee company is engaged in business of fuel dispensers and catering to downstream oil retail industry and has purchased this ISOPAR for testing of dispensers which is capital in nature.*
>
> *3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in allowing the late delivery charges expenses ignoring the fact that such expenses are due to the assessee's own cause and it tantamount to breach of trust which in other words is violation of basic laws for which assessee cannot claim expenses u/s 37(1) of the I.T. Act.*
>
> *4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in allowing the expenses on account of unpaid service tax ignoring the fact that liability is incurred on the date of the sale and it falls in the previous year and hence the corresponding liability also becomes incurred and hence the provision of section 43B is applicable."*

3. When the matter was called for hearing, the learned DR for the Revenue submitted that Ground No.1 concerns disallowance of provision for warranty expenses. It was submitted on behalf of Revenue that warranty expenses are not allowable being provisional in nature in the absence of any scientific bases for debiting an amount of Rs.25,36,505/- in the books of accounts on this score. It was submitted that mere provision of such expenses without

showing the crystallization of liability thereon cannot be reckoned as an eligible expenditure under s.37(1) of the Act.

3.1 The learned AR, on the other hand submitted that company has provided warranty to its customers in accordance with a warranty clause mentioned in the sales order and thus warranty is integral part of sales price. It was next submitted that provision for warranty has been made @ 2% of the gross sale value consistently based on past experiences in the subsequent years as well. In elaboration, it was submitted that provision for warranty is not only towards possible claim made by customers but also include maintenance services to be provided during warranty period. In order to provide warranty services, the company is required to incur material, salary, travelling and other expenses which require outflow of resources to settle the obligation. It was thereafter submitted that the identical issue cropped up in assessee's own case in AY 2007-08 before ITAT wherein the issue was decided in favour of the assessee.

3.2 We straightway notice that identical issue has been dealt with by the co-ordinate bench in assessee's own case in ITA No. 7351/Mum/2010 concerning AY 2007-08 order dated 01.07.2015 wherein the issue has been adjudicated in favour of the assessee in following terms:

> *"5. We have heard the rival contentions and have also gone through the records. The Ld. A.R. of the assessee has submitted before us that in order to meet its future obligation, the assessee provides a provision on the basis of sale incurred which broadly varies 2-3% of sale value subject to change depending upon the factual scenario. The estimate is based on experience and guidance of experts. The actual expenditure stood at more than 2% of gross value. Provision created has been as per accounting policy based on*

prudence as prescribed by AS-1. Warranty expenses are accrued as soon as the sale contract is executed, since warranty forms part of the sales contract. Also, since the sales are recognized, the corresponding expenses are also recognized which satisfies matching concept. Thus, the assessee satisfies the conditions for allowance of provision i.e. obligation based on past experience, probability of outflow of resources and reliable estimate. Provision created at 2% of sales based on past experience and data is reasonable and allowable. Provision for warranty does not require actuarial valuation. Whenever, provision had been made for a particular assessment year in excess of actual expenses incurred in subsequent assessment year. The consistent application of the policy of provision rules our any doubt of malafides or of dishonest intention. He has further submitted that the provision has been created on the basis of reasonable, scientific and consistent approach. The Ld. A.R. has further invited our attention to page 15 of the paper book to show that against the provision of expenses made for a particular assessment year, the total expenditure incurred is subsequent years was more than the provision amount.

6. In view of the above submissions of the assessee, we find that the provision of warranty expenses has been made by the assessee on the basis of past experience and on a scientific basis. Even the actual expenditure incurred on subsequent years is more than that for which the provision was made. We, therefore, do not find any justification on the part of the lower authorities in disallowing the claim of the assessee on this issue. The orders of the lower authorities are hereby set aside and the claim of the assessee on this issue is allowed."

The facts being similar and continuing, we do not see any reason to depart from the findings already given on the point. In parity, we decline to interfere with the order of the CIT(A).

3.3 Ground No.1 of the Revenue's appeal is dismissed.

4. Ground No.2 concerns eligibility of expenses claimed in respect of ISOPAR expenditure amounting to Rs.3,93,101/-. The learned DR for the Revenue relied upon the order of the AO and submitted that the use of ISOPAR is enduring in nature and essentially a capital expenditure.

4.1 The learned AR for the assessee, on the other hand, pointed out that ISOPAR is a substitute for petrol and diesel and is used to test whether dispensers are dispensing accurate quantity of output or not. The self life of ISOPAR is maximum one year and it is to be replaced every year as a part of this liquid gets rusted or evaporates in the dispenser only and is rendered unusable.

4.2 On consideration of the rival submissions, we take note of the essential argument on behalf of the assessee that such expenditure is incurred in relation to carrying on the business of the company and is a integral part of profit making process. The company has not earned any enduring benefit from it and no new asset was created. The expenditure is clearly revenue in nature under s.37(1) of the Act. We also notice that the co-ordinate bench had also an occasion to adjudicate the identical issue in assessee's own case in AY 2010-11 in ITA No.2737/Mum/2016 & Ors. order dated 19.01.2018 and affirmed the claim of the assessee. Thus, we see no merit in the arguments of the Revenue to assail findings of the CIT(A).

4.3 Ground No.2 of the Revenue's appeal is dismissed.

5. Ground No.3 of the Revenue's appeal concerns maintainability of expenses incurred towards late delivery charges amounting to Rs.98,91,785/- deducted by the customers of the company on account of delay in performing certain functions as agreed under the terms of contract with such customers. The AO disallowed the expenses incurred towards late delivery charges on the ground that such expenses are incurred by the company due to its own lapse and same tantamount to breach of trust which is violation of law for which company cannot claim deduction under s.37(1) of the Act. 5.1 The learned AR for the assessee pointed out that identical issue came up in

AY 2009-10 as well where the CIT(A) accepted the claim of the assessee against which no appeal was filed by the Revenue before the higher forum and therefore they are now prevented from agitating the same issue in this year. On facts, it was submitted that assessee company had incurred late delivery charges amounting to Rs.98,91,785/-. These charges were deducted by its customers while settling their accounts on account of delay in doing preventive maintenance report under annual maintenance contract; in delay in supply of dispensers as per purchase orders etc. It was thus contended that such impost incurred by the assessee by way of damage arising from commercial contract is allowable expenditure.

5.2 We find that the delivery charges are incurred for non-compliance of terms of business contract which cannot be equated with any infraction of law. Such expenses are clearly incurred in the regular course of business and are a normal incident to carrying on of the business. In the absence of any infringement of public policy, such expenses are clearly allowable as revenue expenditure under s.37(1) of the Act. Thus, we find no infirmity in the conclusion drawn by the CIT(A).

5.3 Ground No.3 of the Revenue's appeal is accordingly dismissed.

6. Ground No.4 concerns disallowance of service tax under s.43B of the Act aggregating to Rs.42,75,695/-. The AO disallowed the unpaid service tax during the year by applying provisions of Section 43B of the Act. The CIT(A) followed the order passed in AY 2009-10 and allowed the claim of the assessee.

6.1. In this regard, we note the essential argument on behalf of the assessee that the aforesaid service tax amount was not received from

the customers and the same was shown as liability in the balance sheet. We also take note of the significant plea of the assessee that aforesaid service tax receivable from the customers and payable to the Government treasury, does not form part of the income and therefore not credited to P&L account. There being no claim of deduction towards expenditure in the form of service tax the disallowance under s.43B of the Act do not resonate the provision of law. The CIT(A), thus, in our view has appreciated the factual position properly and applied the law correctly. We thus see no reason to interfere therewith.

6.2 Ground No.4 of the Revenue's appeal is accordingly dismissed.

7. In the result, the appeal filed by the Revenue is dismissed.

This Order pronounced in Open Court on 14/06/2019

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Mumbai: Dated 14/06/2019

True Copy

S. K. SINHA

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

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार,
आयकर अपीलीय अधिकरण, मुंबई ।