IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1676/PUN/2011
निर्धारण वर्ष / Assessment Year : 2003-04

Atlas Copco (India) Limited, Sveanagar, Dapodi, Pune – 411 012 PAN : AAACA4074D	**Vs.**	ACIT, Circle-8, Pune
(Appellant)		(Respondent)

आयकर अपील सं. / ITA No.54/PUN/2012
निर्धारण वर्ष / Assessment Year : 2003-04

ACIT, Circle-8, Pune	**Vs.**	Atlas Copco (India) Limited, Sveanagar, Dapodi, Pune – 411 012 PAN : AAACA4074D
(Appellant)		(Respondent)

Assessee by	Shri R. Murlidhar & Shri Prashant Gandhi
Revenue by	Ms. Kesang Y. Sherpa, CIT
Date of hearing	17-07-2019
Date of pronouncement	18-07-2019

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals – one by the assessee and the other by the Revenue - arise out of the order passed by the Commissioner of Income-tax (Appeals) on 28-10-2011 in relation to the assessment year 2003-04.

2. The assessee has raised the following two additional grounds :

> "1. Without prejudice to the ground raised in the AY 2002-03 in relation to disallowance for provision of expenses amounting to Rs.8,25,000/-, being held to be assessable in the year of provision, i.e. AY 2002-03, the Appellant prays for allowance of the same in the year of its reversal/utilization.
>
> 2. Without prejudice to the ground raised in the AY 2002-03 in relation to addition on account of income on sale of scrap reflected as liability in the said year and written-back and offered to tax in the AY 2003-04, being held to be assessable in the assessment year 2002-03, the Appellant prays for a consequential reduction of such amount from the assessed income of the year under consideration, i.e. AY. 2003-04."

3. The above additional grounds are nothing but an outcome from the order dated 16.07.2019 passed by the Tribunal in assessee's own case in ITA No. 1311 and 1414/PN/2011 for the immediately preceding year, that is, 2002-03. We are, therefore, admitting such grounds and taking them for disposal on merits.

4. The first additional ground is in respect of confirmation of disallowance of excess provision of Rs.8,25,000/- for the preceding year by the Tribunal.

5. The facts apropos this ground are that the assessee made a provision of Rs.8,25,000/- in its accounts for the preceding year. Such provision was made for expenses. Since no expenditure was incurred against such provision, the Tribunal held that no deduction

could be allowed in respect thereof. The ld. AR contended in the proceedings for the immediately preceding year that the entry passed for creation of provision for Rs.8,25,000/- in its accounts for the A.Y. 2002-03 was reversed in the instant year. Under such circumstances, we direct the AO to verify the contention of the assessee. If such a provision of Rs.8,25,000/- made in the preceding year has been reversed by the assessee and included in its total income for the year under consideration, then such an amount of reversal of provision in the instant year should not be charged to tax, since the deduction itself has not been allowed by the Tribunal in the preceding year.

6. The second additional ground is in respect of income of Rs.20,10,925/- which was realized in the preceding assessment year but not offered for taxation. Such amount was treated as outstanding liability. The Tribunal did not approve the contention of the assessee in its order for the immediately preceding assessment year and ordered to include the same in the total income. The ld. AR contended that a sum of Rs.20,10,925/- which was not offered for taxation in the preceding year, was, in fact, offered in the year under consideration. Under these circumstances, we direct the AO to verify the assessee's contention regarding inclusion of

Rs.20,10,925/- in the income from sale of scrap in its accounts for the year under consideration. If the amount is found to be included in the total income for the year under consideration and offered for taxation, then the same should be excluded as it has been directed to be charged to tax in the preceding year.

7. Ground no.1 of the assessee's appeal is against not allowing deduction for a sum of Rs.1.00 crore, being, payment made to DSP Merill Lynch Limited (DSPML), towards non-compete and non-solicitation payment.

8. The facts apropos this ground are that the assessee declared net consideration of non-compete/non-solicitation at Rs.9.00 crore as income. On being called upon to file the details, the assessee stated that a sum of Rs.2.50 crore was received from Revati Equipment Limited (REL) on account of non-compete agreement and a further sum of Rs.7.50 crore on account of non-solicitation agreement. The assessee furnished a copy of bill of DSP Merill Lynch dated 23-08-2002 for a sum of Rs.1,74,92,081/- which was a payment indicted in invoice as "Advisory fee for sale of controlling stake" in REL. The assessee claimed that out of said sum of Rs.1.74 crore, an amount of Rs.1.00 crore was towards non-compete and non-solicitation agreement which was actually reduced from

receipt of Rs.10.00 crore from REL and net amount of Rs.9.00 crore was offered. The AO, on perusal of bill of DSPML, observed that the entire consideration was towards Advisory fee for sale of controlling stake in REL and there was nothing to show that a sum of Rs.1.00 crore was attributable to any non-compete or non-solicitation agreement. The AO, therefore, did not allow any deduction for sum of Rs.1.00 crore and accordingly considered full amount of Rs.10.00 crore as non-compete fee. The ld. CIT(A) required the assessee to produce agreement under which such payment was claimed to have been made to DSPML. The assessee failed to produce any such agreement. The ld. CIT(A) noticed that since the entire amount of Rs.1.74 crore and odd was towards Advisory fee for sale of controlling stake in REL, the sum of Rs. 1.00 crore was also liable to be allowed as deduction in the computation of long term capital gain. The assessee is aggrieved by this direction.

9. We have heard the rival submissions and perused the relevant material on record. The assessee sold a larger stake and negotiated non-compete and non-solicitation agreement with REL. This offloading was facilitated by DSPML for which they charged Rs.1.74 crore and odd. The assessee, apart from sale consideration,

also received a sum of Rs.10.00 crore from REL towards non-compete and non-solicitation fee. The assessee attempted to reduce a sum of Rs.1.00 crore from such non-compete fee allegedly on the ground that it paid non-compete fee to DSPML, which was a part of payment to DSPML. We have gone through the invoice of DSPML, whose copy is available at page 233 of the paper book. This invoice dated 23-08-2002 clearly mentions that the said sum of Rs.1.74 crore and odd is towards "Advisory fee for controlling stake in REL" along with the amount of service tax and offered for taxation. The assessee bifurcated Rs.1.74 crore into two components. Whereas a sum of Rs.74.92 lakh was considered as deduction in the computation of long term capital gain arising from the sale of shares, it considered a sum of Rs.1.00 crore towards non-compete fee paid to DSPML, thereby reducing the business income to this extent. The invoice clearly demonstrates that a sum of Rs.1.74 crore was entirely paid towards Advisory fees for sale of controlling stake in REL. The assessee tried to fortify its contention with the help of a letter dated 22-09-2011 received from DSPML. We are unable to give any weight to this letter since it is contrary to the own version given by DSPML in the year 2002 as the payment towards `Advisory fee for sale of controlling stake'. A letter coming into existence after about 9 years from the date of invoice,

cannot be taken into consideration at this stage. The ld. AR was called upon to place on record a copy of the agreement under which said sum of Rs.1.00 crore was paid. He fairly expressed his inability to produce such an agreement, which on specific requisition by the lower authorities also could not be adduced. In view of the foregoing reasons, we are of the considered opinion that the ld. CIT(A) was fully justified in treating the entire amount of Rs.1.74 crore as deductible in the computation of long term capital gain and not accepting the assessee's claim of treating Rs.1.00 crore as deductible from non-compete fee chargeable as business income. This ground is, therefore, not allowed.

10. Ground no.2 of the assessee's appeal is against not allowing proper deduction u/s.35DDA towards Voluntary Retirement Scheme (VRS) on accrual basis.

11. Similar issue came up for consideration before the Tribunal in assessee's own case for the immediately preceding assessment, which has been discussed on page 9 para 12 of the order. The Tribunal has held the assessee to be entitled to deduction u/s.35DDA on the basis of incurring of liability. A further direction has been given to ensure that the assessee is not allowed deduction on actual payment basis. The AO is directed to examine this aspect

and allow deduction only towards incurring of liability, i.e. on accrual of liability towards VRS u/s.35DDA and no amount should be allowed as deduction on payment basis. This ground is, therefore, allowed for statistical purposes.

12. Ground no.3 of the assessee's appeal is against the confirmation of disallowance u/s.35DD of the Act at Rs.2,10,000/-, being, 1/5th of the fees paid to Registrar of Companies for increasing the authorized capital on amalgamation.

13. Both the sides are in agreement that the facts and circumstances of the instant ground are *mutatis mutandis* similar to those of the preceding year. This issue has been considered by the Tribunal in its order for the immediately preceding assessment year. Relevant discussion has been made on page 12 para 17. Such ground in the assessee's appeal has been allowed. Following the precedent, we allow this ground of appeal.

14. Ground no.4 of the assessees' appeal and ground no.3 of the Revenue's appeal are in respect of deduction towards provision for warranty.

15. Both the sides fairly agreed that the facts and circumstances of these grounds are similar to those of preceding year. The Tribunal

has discussed this aspect in para no.8 to 11 of its order in which it has been held that provision for warranty should be allowed at 0.4% of net sales in the Atlas Copco Division. As regards the Chicago Pneumatic Division, since the actual expenditure was more than the amount of provision, the Tribunal directed to allow deduction for the entire amount of provision. Relevant discussion for the year under consideration has been made at page no.29 of the impugned order, on which a table has been drawn depicting the position of provision. As per this table, the actual expenses incurred by the assessee stand at Rs.2.85 crore. There is a recovery of claim to the tune of Rs.24.37 lakh. If claims recovered are reduced from the actual expenses incurred, we get net amount of Rs.2.61 crore and odd towards expenses incurred for the year, as against that the amount of provision created by the assessee at Rs.1,59,17,000/-. As the amount of provision is less than the amount of actual expenses, following the view taken by the Tribunal in its order for the A.Y. 2002-03 in the CP division, we direct to allow the deduction for the entire amount of provision for Rs.1,59,17,000/-. However, it is made clear that no deduction for incurring of actual expenses should be separately allowed. The contrary view of the Revenue in its appeal is accordingly dismissed.

16. Ground no.5 of the assessee's appeal is against the disallowance of certain expenses. The AO discussed this issue at page 30 onwards of his order. He observed that the assessee claimed deduction of Rs.8,91,41,639/- under the head "Miscellaneous Expenses". Since necessary details were not available, he disallowed 50% of such expenses and made addition of Rs.4,45,70,820/-. The assessee furnished certain details before the ld. CIT(A), who held that a separate amount of warranty provision amounting to Rs.33,77,762/- was not deductible; an item amounting to Rs.14,99,816/- towards expenditure on Gifts was not substantiated and hence was not deductible; donations of Rs.6,26,628/- were liable to be added; and fees for handling shares record at Rs.13,53,956/- was also to be disallowed. For the remaining expenses, he restricted the disallowance at 25% as against 50% made by the AO.

17. Having heard both the sides and gone through the relevant material on record, we find that the first sum of Rs.33,76,762/- is in the nature of actual expenses incurred during warranty period. Since a deduction has been separately allowed to the assessee on creation of provision for warranty, there can be no question of allowing any separate deduction for actual expenses incurred in

accepting the claims under warranty. We, therefore, uphold the impugned order to the extent of disallowance of Rs.33,76,762/-.

18. Second item is expenditure on Gifts at Rs.14,99,816/-. The assessee could not produce any evidence to show whether the Gifts were given for the business purpose or were hit by Explanation 1 to section 37(1) of the Act. In the absence of furnishing any such details, we uphold the view taken by the ld.CIT(A) in sustaining this disallowance.

19. Similar is the position regarding donations of Rs.6,26,628/-, for which the assessee could not adduce any evidence. The impugned order is, therefore, upheld to this extent.

20. As regards the fee of Rs.13,53,956/- for handling share records is concerned, we find that the same is in respect of shares issued by the assessee company and not for handling any investments of the assessee. Such expenses incurred by the assessee are deductible in full.

21. As regards the remaining expenses, the ld. CIT(A) restricted the addition to 25%. Considering the peculiar circumstances prevailing in the extant case, we are of the considered opinion that it

would be just and fair if the disallowance is restricted to 15% of such expenses. We order accordingly.

22. Ground no.6 of the assessee's appeal is against the confirmation of inclusion of commission income of Rs.7,87,32,730/- as part of total turnover in the computation of deduction u/s.80HHC. The later part of the ground is towards confirmation of exclusion of 90% of Service charges and Miscellaneous income from profits of business for deduction u/s.80HHC.

23. It is seen that similar issue came up for consideration before the Tribunal in assessee's own case for the immediately preceding assessment year. Following the view taken by the Tribunal in assessee's own case for still another year, the matter has been remitted to the AO for a fresh decision. Both the sides are in agreement that the facts and circumstances of the extant ground are similar to those for the A.Y. 2002-03. Following the view taken for the immediately preceding assessment year, we set aside the impugned order and remit the matter to the file of AO for deciding this issue in conformity with the directions given by the Tribunal in its earlier orders.

24. Last ground of the assessee's appeal is against the confirmation of set-off of long term capital loss on sale of mutual funds amounting to Rs.31,62,005/- against the long term capital gain on sale of shares of REL instead of long term capital gain on sale of property as claimed by the assessee.

25. The factual matrix of this issue is that the assessee suffered long term capital loss amounting to Rs.31,62,005/- on sale of mutual fund investments. The assessee sought to reduce such amount from long term capital gain on Mulund property amounting to Rs.4,20,69,031/-. The AO opined that such loss was liable to be set off against long term capital gain amounting to Rs.7,09,64,882/- arising on transfer of Revathi CP Shares. The ld. CIT(A) affirmed the view taken by the AO against which the assessee has approached the Tribunal.

26. We have heard the rival submissions and gone through the relevant material on record. There is no dispute on the assessee actually suffering long term capital loss on sale of mutual fund investments amounting to Rs.31,62,005/-. The dispute is only against the set off from the long term capital gain. Whereas the case of the assessee is that such loss should be set off against long term capital gain arising from Mulund property, the authorities below

have opined that such loss should be set-off against long term capital gain on Revathi CP shares. The *raison détre* for the assessee's stand is that if the loss is allowed against the long term capital gain from Mulund property, the amount of long term capital gain on Revathi CP shares would stand at a higher level, which would result in lower tax liability and *vice-versa*.

27. Section 112 of the Act deals with determination of tax on long term capital gains. Clause (d) of section 112(1) provides for the determination of tax arising from long term capital gain in the hands of a recipient, who is not an individual or HUF or a domestic company. The assessee is covered under this clause. Under the main provision of clause (d), income-tax should be calculated on long term capital gain @20%. First proviso to section 112 (1) states that where the tax is payable in respect of income arising from the transfer of long term capital asset, being the listed securities (other than a unit), then such amount should be charged to tax at the rate of 10%. Obviously, the mutual fund investments are listed securities. Now the question arises as to whether loss from listed securities, being, on mutual fund investments should be reduced from gains from other listed securities, being, shares of Revathi? It is pertinent to note that section 112 falls under Chapter XII of the Act with the

heading "Determination of Tax in certain Special cases". Thus, it is vivid that section 112 has application only at the time of determination of tax. However, in so far as the computation of income in this regard is concerned, section 70(3) of the Act assumes significance. This provision states that where the result of computation in respect of any capital asset (other than a short-term capital asset) is loss, assessee *shall be entitled to have the amount of such loss set off* against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short term capital asset. The term `similar computation' in this provision refers to computation of income from long term capital assets, in contrast to short term capital assets. It does not restrict itself to the computation from same or similar nature of long-term capital assets. Once there is a loss from the transfer of any long term capital asset and some long term capital gain is also available, the assessee is entitled to set off such loss against gain arising from any long term capital asset of his choice. The choice is that of the assessee, which is further substantiated from the words used in the provision, namely, "*the assessee shall be entitled to have……*". It, therefore, implies that it is the entitlement of the assessee to compute income from long term capital gains in terms of section 70(3) and as such he can adopt a

course of action, which is more beneficial to him. The Department cannot tinker with the same so long as it is otherwise in accordance with the provision. That is how, the computation of income from long term capital gain gets concluded u/s.70(3) of the Act. Such computation is then sent for determination of tax payable in terms of section 112 of the Act. As section 112 has application only for the purpose of determination of tax, it cannot apply to determine the amount of income or prioritize the computation in any manner. Once the assessee has determined its long term capital gain income in a particular manner which has sanction of section 70, the AO cannot disturb such calculation merely because it is less remunerative from the angle of determination of tax.

28. Adverting to the facts of the instant case, we find that the assessee set off its long term capital loss from the sale of mutual funds against the long term capital gain from transfer of Mulund property. This is absolutely permissible under section 70(3) of the Act. We, therefore, hold that no exception can be taken to the action of the assessee and accordingly the amount of long term capital gain on Revathi CP shares at Rs.7.09 crore should be taxed under proviso to section 112 of the Act. *Ex consequenti,* this ground of appeal is allowed.

29. Ground no.1 of the Revenue's appeal is against the amalgamation expenditure of Rs.49,60,536/- incurred by the assessee on stamp duty for transfer of immovable assets, which was held by the CIT(A) to be an allowable expenditure u/s.35DD of the Act.

30. Both the sides are *consensus ad idem* that similar issue came up for consideration before the Tribunal in the case of the assessee for the A.Y. 2002-03. We find that relevant discussion has been made on page 13 para 22 of the order by which the issue has been determined in favour of the assessee. Following the view taken for the immediately preceding year, we dismiss this ground of appeal by the Revenue.

31. Second ground by the Revenue is against allowing claim of Dealer Commission. Here again, we find that similar issue has been determined by the Tribunal at page 37 of its order for the immediately preceding year. The relevant discussion has been made from para 64 onwards and eventually the view taken by the ld. CIT(A) has been approved. Following the same, we countenance the impugned order on this score. This ground is not allowed.

32. Ground no. 4 of the Revenue's appeal is against the deletion of addition on account of Transfer Pricing adjustment on Royalty payment.

33. Succinctly, the facts of the ground are that the assessee reported certain international transactions. The AO made a reference to the TPO (Transfer Pricing Officer) for determination of the Arm's Length Price (ALP) of such international transactions. One of the transactions reported by the assessee was "Payment of Royalty" with transacted value of Rs.2,07,87,581/-. The assessee paid royalty to its three Associated Enterprises (AEs) @ 5% on local sales and 6% on export sales. The TPO, in his order dated 03-03-2006, noticed that the assessee was paying royalty to some AEs to whom it was making sales. Such amount was worked out at Rs.1,59,56,359/-. However, he determined NIL ALP of the entire transaction of payment of royalty at Rs.2.07 crore on the ground that the assessee could not file any documentary evidence relating to the discontinuation of production of products by the AEs on which royalty was paid. The AO made the transfer pricing addition, which came to be deleted in the impugned order.

34. We have heard both the sides and gone through the relevant material on record. It is found as an admitted position that the

assessee paid Royalty to its AEs as per the rates approved by the RBI. The TPO determined NIL ALP simply on the ground that the AEs to whom the assessee paid Royalty had discontinued production of such products. In our considered opinion, this is no ground to determine NIL ALP of an international transaction. The TPO is required to determine the ALP of an international transaction under one of the methods mandated under rule 10B of the Income-tax Rules, 1962. Nothing of the sort has been done in the instant case. The TPO got influenced with extraneous reasons, which have no bearing on the determination of the ALP of an international transaction. It is further observed that similar issue came up for consideration before the Tribunal in assessee's own case for the immediately preceding assessment year. The transfer pricing addition made in similar circumstances has been deleted. Relevant discussion has been made on page 39 onwards of the order. Considering the entire conspectus of the case, including the fact that the payment of Royalty to AEs was as per RBI norms, we are satisfied that the view taken by the ld. CIT(A) is unassailable. This ground, therefore, fails.

35. Last ground taken by the Revenue in its appeal is against the direction of the ld. CIT(A) for not charging interest u/s.234D.

36. The ld. AR fairly conceded that in view of the retrospective amendment carried out to section 234D by insertion of Explanation 2 by the Finance Act, 2012 with retrospective effect from 01-04-2003, the ground by the Revenue needs to be allowed. We, therefore, overturn the impugned order on this issue and uphold the charging of interest u/s.234D of the Act.

37. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 18th July, 2019.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 18th July, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-V, Pune
4. The CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
   "**सी**" / DR 'C', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	17-07-2019	Sr.PS
2.	Draft placed before author	17-07-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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