आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1470/PUN/2010

निर्धारण वर्ष / Assessment Year : 2006-07

Atlas Copco (India) Limited.
Sveanagar, Dapodi,
Pune-411 012.
PAN : AAACA4074D

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-8, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri R. Murlidhar &
Shri Prashant Gandhi

Revenue by : Shri Neeraj Bansal, CIT

सुनवाई की तारीख / Date of Hearing : 19.08.2019
घोषणा की तारीख / Date of Pronouncement : 21.08.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the directions of the Ld. Dispute Resolution Panel (DRP) dated 13.09.2010 for the assessment year 2006-07 as per the grounds of appeal on record.

2. The assessee has preferred additional grounds of appeal apart from the grounds in the appeal memo. We would first adjudicate the additional grounds of appeal filed before us.

Adjudication of Additional grounds

3. In **additional ground No.1,** the assessee has challenged the validity of the order passed u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') stating that the Assessing Officer had passed draft assessment order without following the mandate as laid down u/s.144C of the Act. It is the contention of the assessee that the Assessing Officer along with draft assessment order had issued notice u/s.274 r.w.s.271(1)(c) of the Act and thereby not following the mandate of section 144C of the Act and hence, assessment is void ab-initio.

4. For this proposition, the Ld. AR of the assessee has placed reliance on the decision of the Co-ordinate Bench of the Tribunal, Pune in ITA No.163/PUN/2013 for assessment year 2008-09 in the case of Yazaki India Private Limited Vs. ACIT decided on 12.07.2019.

5. Per contra, the Ld. DR has placed strong reliance on the assessment order passed by the Assessing Officer and contended that it is a draft assessment order only. There is no notice of demand u/s.156 of the Act send with the draft assessment order. Therefore, there is no violation of Section 144C of the Act.

6. We have perused the case records and heard the rival contentions. We find that in the present case, the draft assessment order is accompanied by

the notice u/s.274 r.w.s.271(1)(c) of the Act. However, there is no notice of demand u/s.156 of the Act sent to the assessee along with draft assessment order. In the aforesaid case laws relied upon by the assessee, the assessment was completed u/s.143(3) r.w.s.144C(3) of the Act. In this case it is not so. Firstly, assessment order in the present case was passed u/s.143(3) r.w.s. 144C of the Act. Secondly, in the case referred by the assessee, demand notice was sent along with penalty notice. But in the instant case, there is no such demand notice that is being sent and therefore, the character of the assessment order is that of the draft assessment order. Therefore, there is no violation of Section 144C of the Act. We, therefore, uphold the validity of assessment order passed u/s. 143(3) r.w.s.144C of the Act. **Thus, additional ground No.1 is dismissed.**

7. **Second additional ground** raised by the assessee is with regard to the issue of non- disallowance of Educational Cess.

8. This issue had come up for consideration before the Co-ordinate Bench of the Tribunal in assessee's own case in ITA No.736/PUN/2011 and ITA No.732/PUN/2011 for assessment year 2005-06 wherein it was observed and held by the Bench as follows :

> *"33. In respect of additional ground No.1, the ld. AR contended that Education cess on income-tax paid for the year should be allowed as deduction. In support of his contention, he relied on the judgment of Hon'ble Rajasthan High Court in Chembal Fertilizers Ltd. and Another and Vs. JCIT and Another (2018) 102 CCH 0202 Raj-HC in which it has been held that Education cess is not disallowable u/s.40(a)(ii) of the Act. This ground was not seriously resisted on behalf of the Revenue.*
>
> *34. We have heard the submissions. It is seen that relying on Circular F. No. 91/58/66-ITJ(19) dt. 18th May, 1967, the Hon'ble Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd. (supra) has held that Education cess is not disallowable u/s 40(a)(ii) of the Act. The said judgment has also been followed by the Pune bench of the Tribunal in DCIT vs. Bajaj Allianz General Insurance Company Ltd. (ITA No.*

1111/Pun/2017) vide its order dated 25.7.2019, a copy of which has been placed on record by the ld. AR. No contrary precedent has been brought to our notice by the ld. DR. Following the precedent, we allow this additional ground of appeal."

Respectfully following the aforesaid decision, **additional ground No.2 raised in appeal by the assessee is allowed.**

9. The **third additional ground** is with regard to the issue of consequential claim of depreciation on the amount of capital expenditure incurred by the assessee on certain premises.

10. In assessee's own case for assessment year 2005-06 (supra.), the Tribunal has held as follows:

"36. We have gone through the relevant discussion made in para 16 of the Tribunal order dated 22-07-2019 in ITA No.1302/PUN/2010 for the A.Y. 2004-05 in which the Tribunal noticed that the assessee purchased a property during the year and carried out suitable repairs/renovation to make it fit for use. The decision of the ld. CIT(A) capitalizing 40% of the expenditure as against 80% done by the AO, was approved by the Tribunal. Once a particular amount has been held to be capital expenditure on a building purchased by the assessee, the same has to be subjected to depreciation. As the Tribunal has approved the capitalizing of certain amount to Building account, we, therefore, direct the AO to allow depreciation on such amount as per law."

That on the similar facts and circumstances, for this year also and maintaining the rule of consistency, **we allow the additional ground No.3 raised in appeal by the assessee.**

Adjudication of grounds in the appeal memo

Now we would proceed to adjudicate the grounds raised by the assessee in the appeal memo.

11. The **first ground** is with regard to the "**sales to Associated Enterprises (AEs)**".

12. It was contended by the Ld. AR of the assessee that during the year total sales to AEs was at Rs.61.38 Crores, out of which Rs.54.10 Crores is not disputed. It is Rs.7.28 Crores which is the disputed amount. The Ld. AR invited our attention to the TPO's order at Page 15 for assessment year 2006-07 read with TPO's order at Page 8 for assessment year 2005-06 and demonstrated that the subject matter and facts for both these assessment years are similar. It is seen that sales to AEs is always more. At Page 661 onwards Volume-I of the Paper book, the entire details of sales have been placed before us. The Ld. AR further contended that for assessment year 2005-06, the Tribunal in assessee's own case (supra.) in detailed has determined this issue restoring the matter to the file of the AO/TPO for deciding it afresh giving certain directions.

That on similarity of facts and circumstances, first ground is remitted back to the file of Assessing Officer/TPO with similar directions as referred hereinabove. Thus, **first ground of appeal by the assessee is allowed for statistical purposes.**

13. Next ground of appeal is with regard to "**royalty payment made by the assessee to its AEs**".

14. Both the parties agreed that on similar facts and circumstances for assessment year 2005-06 in assessee's own case (supra.), the issue was decided in favour of the assessee. The Tribunal in its order has held as follows:

> "*4. 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 and the assessee was making exports to them also. In our considered opinion, such reasons are not germane in the determination of the ALP.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 of payment of royalty came up for consideration before the Tribunal in assessee's own case for the earlier assessment years in which deletion of transfer pricing addition on payment of royalty by the ld. first appellate authority has been upheld. Considering the entire conspectus of the case, including the fact that the payment of Royalty to the AEs was as per RBI norms, we are satisfied that the view taken by the ld. CIT(A) is unassailable. This ground, therefore, fails."*

Respectfully following our findings in the preceding assessment year i.e. assessment year 2005-06, **we allow this ground of appeal of the assessee.**

15. Next ground is with regard to the "**international transaction of receipt of indenting commission**".

16. The Tribunal in its order for assessment year 2005-06 in assessee's own case (supra.) on the issue as per detailed reasoning contained therein had upheld the order of the Ld. CIT(A) where ALP of commission income at Rs.13.79 Crore as against the transacted value of commission income at Rs.13.38 Crore was found within +/- 5% range, therefore, not calling for any transfer pricing addition. This ground of appeal of the Revenue was therefore not allowed.

However, in the present facts and circumstances, we have analyzed that no such calculation has been taken into account by the Sub-ordinate Authorities in any of their respective orders either by the Assessing Officer/TPO or DRP. Hence, in the present facts and circumstances, this

issue is remitted back to the file of Assessing Officer/TPO for fresh adjudication and the assessee is directed to submit calculation before the Assessing Officer on the issue and thereafter, the Assessing Officer shall adjudicate the same after considering our decision as rendered in assessee's own case for assessment year 2005-06(supra.). Needless to say, AO/TPO shall grant reasonable opportunity of hearing to the assessee in accordance with law. **Thus, this ground of appeal is allowed for statistical purposes.**

17. The next ground is with regard to "**benefit of variation/reduction of 5% from the Arithmetic Mean not granted".** The Ld. AR of the assessee submitted that he is not pressing this ground. In view of the submission of the Ld. AR, **this ground is dismissed as 'not pressed'**.

18. The next ground is with regard to "**Software development expenses-treated as capital".**

19. The Ld. AR of the assessee submitted that this issue has been dealt by the Tribunal in assessee's own case for assessment year 2004-05 in ITA No.1302/PUN/2010 and ITA No.1303/PUN/2010 decided on 22.07.2019 wherein the Tribunal on this issue has held as follows:

> *"10. We have perused the case records and heard the rival contentions. We have also considered the judicial pronouncements placed before us. The records demonstrates that there is sharp difference in up-gradation of software and expenses incurred by the assessee as compared to the assessment year 2001-02 with that of the relevant assessment year. In this year, various software have been installed such as Computer Software-ICEM- CFD- Hexa Mesh Software by the assessee. However, none of the parties could submit through evidence regarding endurability of these software, whether it is in the category of general purpose of software or specialized software which can be utilized directly for manufacturing or production. Therefore, this issue needs detailed verification. Further, we observe the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Geoffrey Manners & Co. Ltd. (supra.) wherein the decision of the Tribunal has been upheld by observing that in the changing trend development of technology for research is essential and there is small degree of endurability attached to it. Thus, the*

expenditures in that case was held to be revenue in nature. Similar position the assessee had witnessed for assessment year 2001-02 wherein the Ld. CIT(Appeals) himself has given relief to the assessee. But in the relevant assessment given, the specialized software used by the assessee, the degree of endurability of these software are to be ascertained. If they are of such expenditure that they can be used directly for manufacturing and production and for longer degree of endurability then there cannot be any iota of doubt that they are capital in nature. However, if the degree of endurability is small then following the decision of the Hon'ble Bombay High Court (supra.) this expenditure should be treated as revenue expenditure and hence, allowable.

In view of the matter, we set aside the order of the Ld. CIT(Appeals) on this issue and restore it to the file of Assessing Officer for detailed verification as herein above mentioned after complying with the principles of natural justice. Thus, ***ground No.2 raised in appeal by the assessee is allowed for statistical purposes."***

19.1 The Ld. AR of the assessee however contended that they have produced sufficient documentation in the paper book at pages No.1582 to 1635 stating expenditure are revenue in nature. We are of considered view that the nature and character of the software development and its endurability has to be determined and ascertained. The Tribunal is not a Forum for placing technical documents for factual verification and investigation. This can be done only by the Investigating Agency and the Officers of the Department.

In view of the matter, we set aside the order of the Ld. CIT(A) on this issue and remit the issue back to the file of Assessing Officer for adjudication after considering the voluminous documentation placed on record by the assessee as well as taking into account our decision rendered in assessee's own case for assessment year 2004-05. **Thus, this ground of appeal is allowed for statistical purposes**.

20. The next issue is with regard to "**expenditure on premises-Treated as Capital".**

21. We observe that in assessee's own case for assessment year 2005-06, the assessee had come up with this issue before the Tribunal regarding 40% of expenses on premises being capitalized. The Tribunal on this issue has held as follows:

> *"18. Here again, both the sides agree that similar issue has been decided by the Tribunal against the assessee in its order for the A.Y. 2004-05. In the absence of the ld. AR pointing out any difference in the facts or law on this issue for the instant and the preceding year, following the view taken for the A.Y. 2004-05, we uphold the capitalization of expenses in relation to the premises @ 40%. At the same time, it is directed that the assessee be allowed depreciation on such capitalized amount."*

22. Both the parties agreed that facts and circumstances are similar. Considering the similarity of facts and circumstances, we uphold the capitalization of expenses in relation to the premises @40% in this year also. It is directed that the assessee be allowed depreciation on such capitalized amount. **Thus, this ground of appeal of the assessee is partly allowed.**

23. The next issue is with regard to "**ad-hoc disallowance of miscellaneous expenses @ 10%".**

24. This issue has been dealt by the Tribunal in assessee's own case for the assessment year 2005-06 at Para 19 and 20 of the Tribunal's order. It was observed by the Tribunal that after allowing full deduction towards software expenses and fees for handling share record and making full disallowance for warranty expenses, Gifts and Donations, the Tribunal restricted the addition to 15% of the balance expenses. The Tribunal further held following the same view, the impugned order on this issue was set aside and the matter was remitted to the file of Assessing Officer to the amount disallowable out of

miscellaneous expenses in accordance with the directions given in the immediately two preceding years on this score.

That for this year also, the impugned order is set aside and the matter is remitted back to the file of Assessing Officer with similar directions and the Assessing Officer shall decide the issue accordingly after providing reasonable opportunity of hearing to the assessee. As the AO has himself disallowed 10% of the remaining expenses, we direct that the disallowance for this year should be restricted to 10% instead of 15%. The Assessing Officer is also directed to verify the gifts. **Thus, this ground of appeal is allowed for statistical purposes.**

25. The next issue is "**whether the commission expenses are allowable".**

26. We observe that in assessment year 2005-06 in assessee's own case, in Revenue's cross appeal, this issue had come up for adjudication before the Tribunal. The Tribunal found that it is an admitted position that similar issue has been determined by the Tribunal in favour of the assessee in its orders for the assessment years 2002-03 to 2004-05. Following the same, the issue was decided in favour of the assessee and against the Revenue.

That on similar facts and circumstances in this year also and maintaining the rule of consistency, **we allow this ground of appeal of the assessee.**

27. The next issue is with regard to "**whether payment of VRS expenditure is allowable or not for deduction u/s.35DDA of the Act."**

28. We observe that in assessee's own case for assessment year 2005-06, the Tribunal at Para 25 of its order has observed and held as follows:

> *"25. Similar issue came up for consideration before the Tribunal in assessee's own case for earlier years as well. 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 does not get deduction on actual payment basis. The impugned order is set aside to this extent and the matter is remitted to the AO for allowing deduction only towards incurring of liability, i.e. on accrual of liability towards VRS u/s.35DDA and that no amount should be allowed as deduction on payment basis."*

That for this year also under similar facts and circumstances as agreed by both the parties herein, we allow this ground for statistical purposes with similar directions as given in assessment year 2005-06. **Thus, this ground of appeal is allowed for statistical purposes.**

29. The next issue is with regard to the **"allowance of the deduction u/s.35DD of the Act of amalgamation expenses incurred by the assessee on stamp duty for transfer of immovable assets".**

30. We observe that the Revenue in its cross appeal for assessment year 2005-06 had preferred this ground before the Tribunal. The Tribunal on this issue has held as follows:

> *"27. Both the sides are consensus ad idem that similar issue has been determined by the Tribunal in favour of the assessee in earlier years. Following the precedents, we dismiss this ground of appeal by the Revenue."*

Respectfully following the aforesaid decision of the Tribunal and on similar facts and circumstances, **we allow this ground of appeal of the assessee.**

31. The next ground of appeal is with regard to "**allowing deduction towards provision for warranty".** Similar issue has been considered by the Tribunal in its order for the assessment year 2005-06.

Respectfully following the aforesaid decision, this issue is restored back to the file of Assessing Officer to be decided as per our directions given in the decision mentioned aforesaid. Thus, this ground of appeal is allowed for statistical purposes.

32. In the result, **appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 21st day of August, 2019.

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

पुणे / Pune; दिनांक / Dated : 21st August, 2019.
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "**सी**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	19.08.2019	Sr.PS/PS
2	Draft placed before author	20.08.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		