

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

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.402/PUN/2013

निर्धारण वर्ष / Assessment Year : 2004-05

The Deputy Commissioner of Income Tax,
Circle-10, Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Thermax Ltd.
(formerly known as Thermax Babcock &
Wilcox Ltd. amalgamated with Thermax
Ltd.)
Mumbai Pune Road, Shivaji Nagar,
Pune-411 004.
PAN: AAAC3908K

.....प्रत्यर्थी / Respondent

प्रत्याक्षेप सं./CO.No.22/PUN/2014

निर्धारण वर्ष/Assessment Year: 2004-05

(Arising out of ITA No.402/PUN/2013)

Thermax Ltd.
(In respect of amalgamated company
Thermax Babcock & Wilcox Limited.)
14, Mumbai Pune Road, Wakdewadi,
Pune-411 003.
PAN: AAAC3908K

..... प्रत्याक्षेपक/ Cross objector

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-10, Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.508/PUN/2014

निर्धारण वर्ष / Assessment Year : 2005-06

Thermax Limited.
 (In respect of amalgamated Company
 Thermax Babcock & Wilcox Limited)
 Energy Building, Plot No.38 & 39,
 Block D-II, Chinchwad,
 Pune-411 019.
 PAN : AAAC3910D

.....अपीलार्थी / Appellant

बनाम / V/s.

The Additional Commissioner of Income Tax,
 Range-8, Akurdi, Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.713/PUN/2014

निर्धारण वर्ष / Assessment Year : 2005-06

The Assistant Commissioner of Income Tax,
 Circle-10, Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Thermax Ltd.
 (formerly known as Thermax Babcock &
 Wilcox Ltd. amalgamated with Thermax
 Ltd.)
 Thermax House,
 14, Mumbai Pune Road, Wakdewadi,
 Pune-411 003.
 PAN: AAAC3908K

.....प्रत्यर्थी / Respondent

Assessee by : Shri H.P. Mahajani
Revenue by : Shri Vishwash Mundhe

सुनवाई की तारीख / Date of Hearing : 11.07.2019
घोषणा की तारीख / Date of Pronouncement : 05.09.2019

आदेश / ORDER

PER VIKAS AWASTHY, JM

These appeals by the Department for assessment years 2004-05 & 2005-06 and Cross objection/appeal by the assessee for the aforesaid years are taken up together as the issues involved in both the years are more or less similar in facts.

ITA No.402/PUN/2013 (By Revenue)
CO No.22/PUN/2014
A.Y.2004-05

2. In ITA No.402/PUN/2013, the Department has assailed the findings of the Commissioner of Income Tax (Appeals)-V, Pune dated 09.11.2012 for the assessment year 2004-05. The assessee has filed cross objection in the aforesaid appeal filed by the Revenue in CO No.22/PUN/2014.

3. The Revenue has assailed the order of the Commissioner of Income Tax (Appeals) by raising following grounds:

“1. Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs.9,28,819/- on account of operational expenses on EDP, treating the same as revenue expenditure when in fact the said expenses are capital in nature.

2. Whether on the facts and circumstances of the case the Ld. CIT(A) was justified in holding that the method adopted by the Assessing Officer for recognition of contract revenue in respect of negative CIP is incorrect?

3. Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in holding on the basis of decision given in the case of Thermax Limited for A.Y.2004-05 that there is no fault in following AS-7.

4. The appellant craves leave to add, amend or alter any of the above grounds of appeal.”

4. In Cross Objections, the assessee has raised following grounds of appeal:

“1. The learned CIT(A) erred in sustaining disallowance of warranty provision to the extent of 50% of the gross amount rejecting the contention of the Respondent that 100% of such provision was allowable as a deduction in computing the income of the Respondent for the year under appeal.

Claim of the Respondent be allowed.

2. The learned CIT(A) erred in confirming treatment of EDP expenses of Rs.19,98,059/- as capital expenditure.

The claim of the Respondent that this expenditure was revenue in nature be allowed.

3. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of sales commission amounting to Rs.66,25,000/- rejecting the contention of the Respondent that the said expenditure was incurred wholly and exclusively for the purposes of the business of the Respondent.

The learned CIT(A) erred in not appreciating that the disallowance was made on the basis of mere conjectures and surmises and on grounds not germane to the issue and without giving the Respondent, among others, an opportunity of cross examining the recipients of such commission.

The claim of the Respondent be allowed.

The Respondent craves leave to add, to alter, or amend any of the above cross objections if necessary.”

Submissions on behalf of Assessee:

5. Shri H.P. Mahajani appearing on behalf of the assessee submitted at the outset that he is not pressing ground No.1 of cross objections.

6. In respect of ground No.2 of cross objections, the ld. AR of the assessee submitted that during the period relevant to the assessment year under appeal, the assessee paid EDP charges Rs.15,84,258/- and software charges Rs.4,13,801/- aggregating to Rs.19,98,059/-. The aforesaid expenditure was claimed as Revenue expenditure. In assessment proceedings, the Assessing Officer held the aforesaid expenditure as capital in nature and allowed depreciation u/s.32(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on the same.

6.1 In First Appellate Proceedings, the Commissioner of Income Tax (Appeals) relying on his predecessor's order in assessee's case for assessment year 2003-04 held the expenditure of Rs.9,28,819/- as revenue expenditure and the remaining amount of Rs.10,69,240/- was held as capital expenditure. The Commissioner of Income Tax (Appeals) directed the Assessing Officer to allow depreciation @60% on the expenditure held on capital account. Thus, the Commissioner of Income Tax (Appeals) granted part relief to the assessee.

6.2 Against the findings of the Commissioner of Income Tax(Appeals) both the assessee and the Revenue are in appeal before the Tribunal.

6.3. The ld. AR of the assessee submitted that the Revenue carried the issue in appeal in assessment year 2003-04 before the Tribunal in ITA No.83/PN/2007. The Tribunal vide order dated 21.02.2011 restored the issue back to the file of Assessing officer for re-examination in light of the decision of Special Bench of Tribunal in the case of Amway India Enterprises Vs. DCIT reported as 111 ITD 112. The ld. AR pointed that the Hon'ble Delhi High Court in the case of CIT Vs. Asahi India Safety Glass Ltd., 15 taxmann.com 382 (Delhi) and the Hon'ble Bombay High Court in the case of CIT Vs. Raychem RPG Ltd., 21 taxmann.com 507 (Bombay) has held that the expenditure incurred on software for carrying on business more efficiently is revenue in nature. Thus, in effect the decision rendered by the Special Bench in the case of Amway India Enterprises Vs. DCIT (supra.) has been reversed by the Hon'ble Delhi High Court in the case of CIT Vs. Asahi India Safety Glass Ltd.(supra.). The ld. AR further pointed that Mumbai Bench of the Tribunal in the case of Mahindra & Mahindra Ltd. Vs. DCIT in ITA Nos.3659, 3660 & 3661/Mum/2012 for the assessment years 1996-97, 1997-98 & 1998-99 decided on 31.07.2015 has held the expenditure on SAP implementation as revenue in nature. The ld. AR submitted that ground No.1 of the appeal by Revenue is corresponding to ground No.2 of the cross objection filed by the assessee.

7. In respect of ground No.3 of the cross objection, the ld. AR of the assessee submitted that the assessee has paid sales commission to the tune of Rs.66,25,000/- to M/s. Ayoki Fabricon Pvt. Ltd., Pune and M/s. New Bombay Ispat Udyog, Mumbai. The commission was paid to the aforesaid companies for securing contract for the assessee. The Assessing Officer disallowed payment of commission to the aforesaid companies on the

premise that the assessee has failed to prove services rendered by the aforesaid companies. The ld. AR for the assessee controverting the findings of Assessing Officer submitted as under:

- a. The facts and failures relied upon by the AO are not germane to deciding the issue about allowability of sales commission in the hands of the appellant*
- b. Payments were made in terms of agreements with the agents concerned*
- c. Commission was paid by account payee crossed cheques. Tax has been deducted at source as per law*
- d. Both the parties are existing and identified; they have not been found to be mere name-lenders or fronts for other parties.*
- e. They have not denied the receipt of such commission.*
- f. Recipients of commission are limited companies. Contracts were awarded to the assessee by two listed companies viz. Gujarat Ambuja and Deepak Fertilisers and Petrochemical Corporation*
- g. The parties have not denied receipt of commission or that they have not accounted for the same*
- h. Neither Ayoki Fabricon Pvt. Ltd nor New Bombay Ispat Udyog Ltd nor for that matter Gujarat Ambuja and Deepak Fertilisers and Petrochemical Corporation Ltd are in any way related to the promoters or Directors or the management of the appellant.*
- i. The transactions were completely at arm's length determined purely by commercial and business compulsions. Payments were made as per general commercial practices and for services rendered by the agents.*
- j. The corresponding Order values for the orders received by the appellant are Rs 814 lakhs (Gujarat Ambuja) and Rs. 674 lakhs-(Deepak). The corresponding agreed percentages of commission to the two parties being 4.45% and 4.45% respectively which was most reasonable.*
- k. The extent of services availed and rendered would depend on the extent of mutual understanding/requirements of the parties concerned.*
- l. It is presumptive that the agents would have incurred any noticeable direct expenditure in the context of these services.*
- m. Mere failure on the part of the agents to provide supporting documentary evidence cannot be made the ground for disallowing payments in the hands of the payer.*
- n. The parties have not denied having rendered any services or that they have denied having received the said commission from the appellant.*
- o. The parties have not denied having played any role in the award of contract to the Appellant.*

p. AO's observation that Ayoki Fabricon Pvt. Ltd was not aware about receipt by the Appellant of the first two advances from Gujarat Ambuja is irrelevant. The role of an agent would come into play only in the event of failure by the customer to pay the advances.

q. AO's observation that payment of commission to New Bombay Ispat Udyog Ltd was made before part of the obligations were fulfilled by the agent cannot be a ground for disallowing the claim. It is not as if the party denied fulfilling obligations at all.

r. The inquiries made by the AO have not revealed any facts that are prejudicial to the appellant and in fact support the case of the appellant as to factual payment of commission, existence of bona fide parties, commission being offered by them as their income, receipt of contracts and advances pursuant thereto etc; there is no finding of any collusiveness in these transactions. Inquiries did not reveal any sham or colorable devices. The disallowance has been made on the basis of mere suspicion.

s. There is no allegation that parties have withdrawn cash and paid it back to the assessee.”

7.1. In First Appellate Proceedings, the assessee furnished various documents to discharge its onus to prove services rendered by the said two companies. The Commissioner of Income Tax (Appeals) sought remand report from the Assessing Officer. The Assessing Officer in remand report dated 20.06.2012 observed that the records sought by the assessee are not traceable. The ld. AR further submitted that the Assessing Officer while disbelieving the documents furnished by the assessee made discreet enquiry. The Assessing Officer without seeking assessee's comments on enquiry report has made disallowance of the commission paid. It is a well settle law that an opportunity of cross examination should be given to the assessee before using the information against the assessee for making addition. In support of his contentions, the ld. AR placed reliance on the decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries Ltd. Vs. Commissioner of Central Excise, Civil Appeal No.4228/2006 and the decision of the Hon'ble Bombay High Court in the

case of M/s. R.W. Promotions P. Ltd. Vs. ACIT in Income Tax Appeal No.1489 of 2013 decided on 13th July, 2015.

8. In respect of appeal by the Department, the ld. AR of the assessee submitted that the issue raised in ground No.1 of the appeal is corresponding to ground No.2 raised by the assessee in cross objections. In respect of ground No.2 of the appeal by Department, the ld. AR submitted that the issue of revenue recognition method has already been adjudicated by the Tribunal in the case of assessee's group concern for assessment year 2004-05 in ITA No.1765 & 1803/PUN/2012 decided on 24.05.2019. The facts and method of revenue recognition in the case of assessee are identical.

Submissions of Revenue :

9. Shri Vishwas Mundhe representing the Department fairly admitted that the issue raised in ground No.1 in the appeal by the Revenue is corresponding to ground No.2 of the cross objection by the assessee. The ld. DR vehemently supported the findings of the Assessing Officer in treating EDP and software charges on capital account. The ld. DR submitted that the Special Bench of Tribunal in the case of Amway India Enterprises Vs. DCIT (supra.) has held such expenditure to be capital in nature. The ld. DR further submitted that the Assessing Officer has granted benefit of depreciation on the expenditure held under capital account.

9.1 In respect of ground No.2 of the Revenue's appeal, the ld. DR fairly admitted that the issue has already been adjudicated by the Tribunal in assessee's group concern in assessment year 2004-05.

9.2 In respect of ground No.3 of the cross objection by the assessee, the ld. DR submitted that the assessee has claimed expenditure in respect of commission paid to two parties i.e. M/s. Ayoki Fabricao Pvt. Ltd., Pune and M/s. New Bombay Ispat Udyog, Mumbai without furnishing supporting documents. The assessee has not been able to prove genuineness of the services rendered and the benefit, if any, arising from services rendered by aforesaid two parties. Even before the Commissioner of Income Tax (Appeals), the assessee has failed to furnish cogent evidences regarding rendering of services by the aforesaid two parties.

Findings of the Tribunal :

10. We have heard the submissions made by representatives of rival sides and have perused the orders of the Authorities below. The ground No.1 of appeal by Revenue is with regard to deleting of disallowance of Rs.9,28,819/- towards EDP and software charges. In cross objections ground No.2, the assessee has assailed the findings of Commissioner of Income Tax (Appeals) in partly confirming the addition on account of EDP and software expenses. The ld. AR has brought to our notice the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Asahi India Safety Glass Ltd. (supra.), wherein, the Hon'ble High Court has held the expenditure on acquiring software as revenue in nature. We further observe that the Hon'ble Bombay High Court in the case of CIT Vs. Raychem RPG

Ltd.(supra.) has held the expenditure on software, allowable as revenue expenditure. The judgments rendered by the Hon'ble Delhi High Court and also the Hon'ble Bombay High Court are subsequent to the order of Special Bench of Tribunal in the case of Amway India Enterprises Vs. DCIT (supra.). Thus, taking into consideration entire facts, we deem it appropriate to restore this issue back to the file of Assessing Officer for re-adjudication of the issue after considering the judgments rendered by the Hon'ble High Courts. Accordingly, **ground No.1 of appeal by Revenue and ground No.2 of cross objections by the assessee are allowed for statistical purposes in the terms aforesaid.**

11. In ground No.2 of appeal, the Revenue has assailed the action of Commissioner of Income Tax (Appeals) in accepting revenue recognition method adopted by the assessee. We observe that this issue has already been considered by the Co-ordinate Bench of the Tribunal in the case of assessee's group concern for assessment year 2004-05 in ITA No.1765 & 1803/PUN/2012 (supra.). The Tribunal on this issue has held as follows:

*"21. On hearing both the sides, we find in the appeal of the assessee and in the appeal of the Revenue, the issue for adjudication relates to the correctness of the adjustments made to the estimated cost qua the **"freight outward"** to the tune of Rs.26.55 lakhs. The details and the facts are already narrated in the preceding paragraphs of this order. Perusing the order of the Tribunal for the assessment year 2003-04 (supra), we find, in principle, the income recognition method stands approved by the order of the Tribunal in favour of the assessee. The discussion at para 11 to 13 of the order of the Tribunal is relevant in this regard and the same are extracted as under :-*

"11. Ground No.2 is with respect to addition made to the contract income.

AO noticed that assessee is a manufacturer of industrial boilers and heat transfer equipments and undertakes the projects on contract basis and the contract normally runs over a period of more than one year. The assessee was accounting for income on such projects by following the "Projection Completion method"

and was raising invoices as per the scheduled payments agreed with the clients but at the same time had created provision towards "Contribution Equalization Provision" to adjust excess billing. During the year, the provision of contribution equalization debited to the Profit and Loss account was Rs.4,53,93,679/-. AO noticed that the excess amount realized as per the invoices was not offered as revenue receipts and to that extent profit was not offered as income. AO was of the view that since the invoices was raised as per the agreed schedule; the invoice value should be treated as revenue receipts. He further noticed that identical issue arose in A.Y. 1997-98 wherein it was held that the value reflected in invoices raised as per agreed schedule with the clients was to be treated as revenue receipts. AO therefore held that the provision of Rs.4,53,93,679/- cannot be allowed. He accordingly disallowed the same and made its addition. Aggrieved by the order of AO, assessee carried the matter before CIT(A), who granted partial relief to the Assessee by holding as under :

"7.2. I find that the issue has elaborately been dealt with by my predecessor in appellant's case in appeal for A.Y. 2002-03, wherein it was held by him that although, in principle, the appellant cannot be found fault with for having followed Accounting Standard-7 in the matter of revenue recognition and accordingly, making provisions for equalization, its actual working is not above scrutiny. He held that the appellant was not justified in omitting to recognize revenue wherever completion was less than 33% of the total project or where the contracts were less than Rs.25 lacs. The Ld.CIT(A) also disapproved the appellant's act of further scaling down towards contingencies/unforeseeable losses. The facts of the case during this year are identical to those in A.Y. 2002-03 and I find no reason to form a view other than that of my predecessor. Accordingly, the Assessing Officer is directed to work out the excess provision in the light of the observation made by Ld.CIT(A) in A.Y.2002-03 and restrict the disallowance to that extent. Decided accordingly."

Aggrieved by the order of Ld.CIT(A) assessee is now in appeal before us. Revenue is also aggrieved by order of CIT(A) to the extent of relief granted by him and has therefore raised ground No.2 in its appeal. Since the grounds raised by assessee and Revenue are inter-connected, both are considered together.

12. Before us, Ld. AR submitted that identical issue arose before Tribunal in assessee's appeal for A.Y. 2002-03 and the issue was decided by the Co-ordinate Bench of the Tribunal in assessee's favour by following the Tribunal order in A.Ys.1997-98 to 2002-03. He placed on record the order of Tribunal for A.Ys. 2000-01 to 2002-03 and pointed to the relevant findings of the Tribunal. He submitted that since there are no change in the facts of the case for the year under consideration, therefore following the order of the Tribunal in Assessee's own case for earlier years, the issue be decided in favour of the assessee. Ld. DR did not controvert the submissions made by the Ld. AR but however supported the order of AO.

13. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to increasing the

income to the extent of provision for profit equalization. We find that identical issue of increase in the contract income arose in assessee's own case in A.Ys.2000-01 to 2002-03 and the coordinate Bench of the Tribunal decided the issue in assessee's favour by following the Tribunal order for A.Ys. 1997-98 to 2000-01, by holding as under:

"18. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to increasing the income to the extent of provision for profit equalization. We find that identical issue of increase in the contract income arose in assessee's own case in A.Y. 2000-01 and 2001-02 and the coordinate Bench of the Tribunal decided the issue in assessee's favour by following the Tribunal order for A.Yrs. 1997-98, 1998-99 and 1999-2000, by holding as under:

9. The third ground raised by the assessee in appeal relates to income recognition from contract in accordance with Accounting Standard 7 of the Institute of Chartered Accountants of India (ICAI). The Revenue in cross appeal for assessment year 2000-01 has also raised this issue as ground No.1. The assessee is manufacturing boilers and heat transfer equipments on contract basis. These contracts are spread over a period of more than one year. The assessee is recognizing income of the projects, on project completion method. The assessee raises invoice on the client as per schedule of payments. The bills raised are always more than the revenue that should be recognized on the basis of project completion method. The adjustment is required to be made to adjust excess billing. The adjustment is made in accordance with AS 7 by creating a provision 'Contribution Equalization Provision'. The Assessing Officer rejected this method of making adjustment by the assessee. In the first appeal, the Commissioner of Income Tax (Appeals) partly accepted the claim of the assessee. Against the finding of the Commissioner of Income Tax (Appeals), both, the assessee and the Revenue have come in appeal.

9.1 We observe that similar issue had come up in the appeal of the assessee and the Revenue for assessment years 1998-99 and 1999-2000. The Co-ordinate Bench decided the issue in favour of the assessee. The relevant extract of the order of the Tribunal reads as under:-

22. On this aspect, it was a common ground between the parties that in assessment year 1997-98, the Tribunal vide its order dated 03.09.2014 (supra.) in the assessee's own case has upheld the stand of the assessee by following the decision of the Pune Bench of the Tribunal on a similar issue in the case of Thermax Babcock & Wilcox Ltd. vs. DCIT vide ITA Nos.157 & 158/PN/1995 dated 11.05.2001 for assessment years 1990-91& 1991-92. The Tribunal in its order dated 03.09.2014 (supra) noted that in the case of Thermax Babcock & Wilcox Ltd. (supra) which was a group company of the assessee, the Tribunal upheld the allowability of provision for profit equalization while recognizing incomes on application of percentage of completion method in the case of long term contracts in the light of the AS-7 issued by the ICAI. In view of

the decision of the Tribunal in the assessee's own case in the preceding assessment year, we do not deal with the issue any further except directing the Assessing Officer to implement the order of the Tribunal dated 03.09.2014 (supra) on this Ground too. As a consequence, whereas Ground of Appeal of the assessee is allowed that of the Revenue is dismissed."

There has been no change in the facts and circumstances in the present year, nor there is any change in the accounting treatment given by the assessee. We do not find any reason to deviate from the view taken by the Co-ordinate Bench in assessment years 1998-99 and 1999-2000. Accordingly, this ground in the appeal of the assessee is accepted and the ground raised by the Revenue in its appeal is dismissed.

19. Before us, since both the parties have admitted that the facts of the case in the present ground are identical to that of earlier years and since in earlier years, the issue has been decided by Co-ordinate Bench of the Tribunal in assessee's favour, we therefore following the decision of the coordinate Bench of the Tribunal in assessee's own case for earlier years and for similar reasons, allow the ground of assessee and thus, the assessee's ground No.4 is allowed and Revenue's ground No.2 is dismissed.

14. Before us, since both the parties have admitted that the facts of the case in the present grounds are identical to that of earlier years and since in earlier years, the issue has been decided by Co-ordinate Bench of the Tribunal in assessee's favour, we therefore following the reasoning of the decision of the Co-ordinate Bench of the Tribunal in assessee's own case for earlier years and for similar reasons, allow the ground of assessee and thus the assessee's ground No.2 is allowed and Revenue's ground No.2 is dismissed."

22. From the above discussion and the arguments made out by the ld. Counsel for the assessee, we find the AS-7 which existed prior to letter dated 01st April, 2003 continues to remain the same; but for minor changes. There are minor changes in relation to the computational issues. However, there is no change so far as "cost based" percentage completion method in concerned. Therefore, the computation of "recognition income" is concerned, the order of the CIT(A) is fair and reasonable and the same does not call for any interference. Accordingly, relevant grounds stand allowed in favour of the assessee.

*23. Further, so far as adjustments made by the Assessing Officer to the estimated cost is concerned, the CIT(A) already granted part relief to the assessee. **With reference to the freight outward to be included** in the estimated total cost, we find it is a case of reimbursement of the actual cost incurred by the assessee. The inclusion in the total estimated cost when the same is returned has no effect on the income aspect. Therefore, being the case of reimbursement, there is no profit element. Consequently, recognition income of such reimbursement is not appropriate. Therefore, the order of the CIT(A) on this issue requires to be reversed. Accordingly, assessee is entitled to get relief on this issue also. Thus, **ground no.2***

of the assessee is allowed and the ground no.1(a) and 1(b) of the Revenue is dismissed.”

The ld. DR has not been able to controvert the findings of the Co-ordinate Bench of the Tribunal. Thus, following the decision rendered in the case of assessee's group concern, **ground No.2 of the Revenue's appeal is dismissed.**

12. Ground No.3 is general in nature and hence, requires no adjudication.

13. In the result, **appeal of the Revenue is partly allowed for statistical purposes.**

14. The ld. AR of the assessee has stated at the Bar that he is not pressing ground No.1 of the cross objections. In view of the statement made by the ld. AR, **ground No.1 of the cross objections by the assessee is dismissed as not pressed.**

15. Ground No.2 of cross objection is corresponding to ground No.1 of the Revenue's appeal. While adjudicating ground No.1 of the Revenue's appeal, we have decided the ground No.2 of cross objection by the assessee giving detailed reasons. **The ground No.2 of cross objection by the assessee are allowed for statistical purposes.**

16. Ground No.3 of the cross objection is with respect to disallowance on sales commission amounting to Rs.66,25,000/- paid by assessee to M/s. Ayoki Fabrication Pvt. Ltd. (Rs.36,25,000/-) and to M/s. New Bombay Ispat Udyog Ltd. (Rs.30,00,000/-).

16.1 The Assessing Officer before disallowing the commission paid to the aforesaid parties made discreet enquires from the aforesaid parties. In the enquiry, the Assessing Officer found that the aforesaid parties were not aware of the advances given to assessee by M/s. Gujarat Ambuja Cement Limited, a company from which the assessee had allegedly received contract through M/s. Ayoki Fabrication Pvt. Ltd. Similarly, in respect of contract received from M/s. Deepak Fertilizers & Petrochemicals Corporation Limited allegedly through M/s. New Bombay Ispat Udyog Ltd., the Assessing Officer observed some missing links. The disjoint links in the transaction between the assessee and conduit parties who were purportedly instrumental in getting the contracts to the assessee raised cloud of suspicion in the mind of Assessing Officer resulting in disallowance of commission paid to these parties.

16.2 During First Appellate proceeding, the Commissioner of Income Tax (Appeals) sought remand report from the Assessing Officer. In remand proceeding, the Assessing Officer could not retrieve the entire records as the same were not traceable. Thus, the Assessing Officer failed to confront assessee with the information gathered during enquiry. Despite this shortcoming, the Commissioner of Income Tax (Appeals) upheld the finding of Assessing Officer and confirmed the addition.

16.3 A perusal of the documents on records indicate that principles of natural justice were violated during assessment proceeding, as well as during remand proceeding. The Assessing Officer made enquiry at the back of the assessee. The assessee was never confronted with the

information/documents gathered during enquiry by the Assessing Officer. Thus, the assessee was not given any opportunity to rebut the material/information came to the knowledge of Assessing Officer during assessment proceeding. The material/information gathered by the Assessing Officer in discreet enquiry was used to make disallowance of commission allegedly paid by assessee for procuring contracts. It is a well settled principle of natural justice that no one should be condemned unheard. Opportunity of hearing is one of the fundamental principles of jurisprudence. Even during remand proceeding, the Assessing Officer failed to confront the assessee with the material gathered during enquiry. The Assessing Officer in remand proceeding categorically observed that records are not available as the same were not traceable. In the absence of vital documents used as evidence by the Assessing Officer for making addition, the Commissioner of Income Tax (Appeals) has erred in confirming addition. We find merit in the contentions of the assessee. The reasons for disallowing commission is purely on surmises and conjectures. The findings of the Commissioner of Income Tax (Appeals) on this issue are erroneous and hence, liable to be rejected. We hold and direct accordingly. The payment of commission to M/s. Ayoki Fabrication Pvt. Ltd. and M/s. New Bombay Ispat Udyog Ltd. is allowed. Thus, **ground No.3 of the cross objections filed by the assessee is allowed.**

17. In the result, **cross objections of the assessee are partly allowed.**

18. To sum up, appeal of the Revenue and cross objection of the assessee are partly allowed for statistical purposes.

ITA No.508/PUN/2014 (By Assessee)
A.Y.2005-06

19. ITA No.508/PUN/2014 by the assessee and ITA No.713/PUN/2014 by the Department are directed against the order of the Commissioner of Income Tax (Appeals)-2, Nashik dated 13.01.2014 for the assessment year 2005-06.

20. The assessee has raised following grounds assailing the findings of Commissioner of Income Tax (Appeals) :

“1. The learned CIT(A)-2 Nashik erred in sustaining disallowance of warranty provision to the extent of 50% of the gross amount rejecting the contention of the Respondent that 100% of such provision was allowable as a deduction in computing the income of the Respondent for the year under appeal

Claim of the Appellant be allowed.

2. On the facts and in the circumstances of the case and in law the learned CIT(A)-2 Nashik erred in disallowing sales commission amounting to Rs 47,25,000/-.

On the facts and in the circumstances of the case and in law and, largely for the reasons adduced by the CIT(A) in his order for A Y 2004-05, the learned CIT(A)-2 Nashik erred in coming to the conclusion that the parties in question had not rendered services to the appellant necessitating disallowance of the said commission.

Without prejudice to the above the learned CIT(A)-2 Nashik erred in not giving the appellant an opportunity to cross examine the parties concerned, which, in any event, the Assessing Officer ought to have suo motu allowed in compliance with the rules of natural justice.

The disallowance by annulled.

Your appellant craves leave to add to, alter, or amend any of the above grounds of appeal if necessary.”

21. Shri H.P. Mahajani appearing on behalf of the assessee submitted at the outset that the assessee is not pressing ground No.1 of the appeal.

22. In respect of ground No.2, the ld. AR of the assessee submitted that this issue relates to disallowance of sales commission amounting to Rs.47,25,000/-. The ld. AR submitted that the assessee paid commission to the same parties i.e. M/s. Ayoki Fabricon Pvt. Ltd., Pune and M/s. New Bombay Ispat Udyog, Mumbai as was paid in assessment year 2004-05. The ld. AR further submitted that the submissions made in the assessment year 2004-05 would equally apply to this assessment year i.e.2005-06, as the reasons for payment of commission and disallowance of commission are identical in both the assessment years.

23. On the other hand, Shri Vishwas Mundhe representing the Department vehemently defended the impugned order in disallowing sales commission in the absence of any cogent evidences indicating rendering of services by two parties i.e. M/s. Ayoki Fabricon Pvt. Ltd., Pune and M/s. New Bombay Ispat Udyog, Mumbai.

24. We have heard the submissions made by representative of rival sides and have perused the orders of Authorities below. The ld.AR of the assessee has stated at Bar that he is not pressing ground No.1. Accordingly, **ground No.1 of the appeal by assessee is dismissed as not pressed.**

25. In ground No.2, the assessee has assailed disallowance of sales commission paid to two parties i.e. M/s. Ayoki Fabricon Pvt. Ltd., Pune and M/s. New Bombay Ispat Udyog, Mumbai. Both the sides are unanimous in

stating that the facts relates to the assessment year under appeal i.e.2005-06 with respect to the aforesaid ground are similar to the facts in assessment year 2004-05. Thus, our findings given in assessment year 2004-05 while adjudicating the ground No.3 of the cross objection would *mutatis-mutandis* apply to ground No.2 of this appeal. Thus, **ground No.2 raised in appeal by the assessee is allowed.**

26. In the result, **appeal of the assessee for assessment year 2005-06 is partly allowed.**

ITA No.713/PUN/2014 (By Revenue)
A.Y.2005-06

27. The Revenue has raised following grounds impugning the order of Commissioner of Income Tax (Appeals):

“1. Whether on the facts and circumstances of the case, the Ld.CIT(A) was justified in deleting the disallowance of Rs.2,40,030/- on account of operational expenses on EDP, treating the same as revenue expenditure, when in fact the said expenses are capital in nature.

2. Whether on the facts and circumstances of the case, the Ld.CIT(A) was justified in deleting the disallowance of Rs.23,18,442/- on account of provision for medical expenses and LTA when the same was held to be contingent in nature by the A.O.

3(a). Whether on the facts and circumstances of the case, the Ld.CIT(A) was justified in deleting the addition of Rs.62,82,890/- made on account of negative Contract In Progress (CIP)?

3(b). Whether on the facts and circumstances of the case, the Ld.CIT(A) was justified in holding that the method adopted by the Assessing Officer for recognition of contract revenue in respect of negative CIP is incorrect?

3(c). Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in holding on the basis of decision given in A.Y.2004-05 that there is no fault in following AS-7.

4. The appellant craves leave to add, amend or alter any of the above grounds of appeal.”

28. The ld. AR submitted that the issue raised in grounds No.1 and 3(a), 3(b) & 3(c) in the present appeal are similar to ground No.1 and 2, respectively raised by Revenue in assessment year 2004-05. In respect of ground No.2 of the appeal, the ld. AR submitted that this issue has already been considered by the Tribunal in assessee's group company for assessment year 2004-05 in ITA No.1765 & 1803/PUN/2012 (supra.).

29. The ld. DR fairly admitted that the grounds No.1 and 3(a), 3(b) & 3(c) in the present appeal by Revenue are similar to the ground No.1 and 2, respectively in the appeal by Revenue for assessment year 2004-05. As regards ground No.2 is concerned, the issue relating to Provision for Medical expenses & LTA has already been considered by the Tribunal in assessee's group company in ITA No.1765 & 1803/PUN/2012 (supra.).

30. Both sides heard. In grounds No.1 of the present appeal, the Revenue has assailed the deletion of disallowance of Rs.2,40,030/- on account of operational expenses on EDP. Similar ground was raised by the Revenue in assessment year 2004-05. We have restored this issue back to the file of Assessing Officer for deciding the issue afresh in the light of the decisions rendered by the Hon'ble Delhi High Court in the case of CIT Vs. Asahi India Safety Glass Ltd.(supra.) and the Hon'ble Bombay High Court in the case of CIT Vs. Raychem RPG Ltd.(supra.). Thus, **ground No.1 raised in appeal by the Revenue is allowed for statistical purposes.**

31. In respect of ground No.2 of the appeal, the Revenue has assailed disallowance of Rs.23,18,442/- on account of provision for medical

expenses and LTA. We observe that this issue has already been adjudicated in assessee's group concern in ITA No.1765 & 1803/PUN/2012 (supra.).

The Tribunal on this issue has held as follows:

“58. Ground No.6 relates to the provision for Medical Expenses of Rs.48,22,069/-. The Assessing Officer discussed this issue vide Para 39 of the assessment order and the Ld. CIT(Appeals) dealt with this issue vide Para 39 of the appellate order.

59. The Ld. Counsel for the assessee submitted that this issue is decided in favour of the assessee vide Para 69 to 71 of the Tribunal's order in assessee's own case ITA No.1055 & 1056/PUN/2009 (supra.).

60. We have heard both the sides and perused the Para 69 to 71 of the Tribunal's order wherein this issue has been decided in favour of the assessee. For the sake of completeness, the relevant paragraphs are extracted as under:

“69. Ground No 5 is with respect to deletion of addition on account of medical expenses.

During the course of assessment proceedings AO noticed that Assessee has made additional provision of Rs 7,54,000 for the medical expenses. The AO was of the view that the provision was without quantification and the amount did not crystallised. He accordingly disallowed Rs 7,54,000 and made its addition. Aggrieved by the order of AO, Assessee carried the matter before CIT(A) who deleted the addition by observing as under :

“17.3 I find that the issue is covered in favour of the appellant by the order of CIT(A) in appellant's own case in A.Y. 2002-03. After careful consideration, I do not find any reason to form a view other than that formed by my predecessor. Accordingly, this ground of appeal succeeds.

Aggrieved by the order of CIT(A), Revenue is now before us.

70. Before us Ld DR supported the order of CIT(A). Ld AR on the other hand reiterated the submissions made before lower authorities and further submitted that in AY 2001-02 the identical issue was decided by tribunal in assessee's favour. He further submitted that the issue was not challenged by the Department in AY 2002-03. He thus supported the order of CIT(A).

71. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance of additional medical expenses. We find that CIT(A) while deciding the issue in assessee's favour had relied upon the order of his predecessor for AY 2002-03. Before us, Ld AR submitted that in AY 2002-03 CIT(A) on identical facts had decided the issue in assessee's favour and the issue was not agitated by the Revenue. The aforesaid contention of the Ld AR has not been controverted by the Revenue. We

*further find that identical issue in AY 2002-03 was decided in Assessee's favour. In view of the aforesaid fact, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.***"

*From the above, it is evident that the Tribunal has decided the issue in favour of the assessee. Respectfully, following our decision, **ground No.6 raised in appeal by the Revenue is dismissed.***"

31.1. Both the sides are unanimous in stating that the facts in assessment year under appeal are similar to one which has already been adjudicated by the Tribunal for assessment year 2004-05 in assessee's group concern cases. Thus, following the decision of Co-ordinate Bench, **ground No.2 of the appeal by Revenue is dismissed.**

32. In ground No.3(a), 3(b) & 3(c), the Revenue has assailed the action of the Commissioner of Income Tax (Appeals) in not accepting the method adopted by the Assessing Officer for recognition of contract revenue in respect of negative CIP. The issue raised in ground No.3(a), 3(b) and 3(c) in the present appeal is identical to ground No.2 of Revenue's appeal for assessment year 2004-05. The ground No.2 of the Revenue's appeal for assessment year 2004-05 has been dismissed by us by following the order of the Co-ordinate Bench in assessee's group concern. Therefore, detailed findings given by us while adjudicating ground No.2 of the Revenue's appeal for assessment year 2004-05 would *mutatis-mutandis* apply to grounds No.3(a), 3(b) and 3(c) of the present appeal. Thus, **ground No.3(a), 3(b) and 3(c) raised in appeal by the Revenue are dismissed.**

33. In the result, **appeal of the Revenue is partly allowed for statistical purpose.**

34. To sum up :

ITA No.402/PUN/2013	Partly allowed for statistical purposes.
CO No.22/PUN/2014	Partly allowed.
ITA No.508/PUN/2014	Partly allowed.
ITA No.713/PUN/2014	Partly allowed for statistical purposes.

Order pronounced on Thursday, the 05th day of September, 2019.

Sd/- Sd/-
 (डी. करुणाकरा राव/D. KARUNAKARA RAO) (विकास अवस्थी /VIKAS AWASTHY)
 लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 05th September, 2019
 SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-V, Pune.
4. The CIT-V, Pune.
5. The CIT(Appeals)-2, Nashik.
6. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
7. 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	27.08.2019	Sr.PS/PS
2	Draft placed before author	29.08.2019	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		