

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

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.510 & 511/PUN/2014
निर्धारण वर्ष / Assessment Years : 2007-08 and 2008-09

Thermax Limited, 14, Mumbai Pune Road, Wakdewadi, Pune – 411 003 PAN : AA ACT3910D	Vs.	DCIT, Circle-10, Pune, ACIT, Circle-10, Pune
Appellant		Respondent

आयकर अपील सं. / ITA Nos.715 & 716/PUN/2014
निर्धारण वर्ष / Assessment Years : 2007-08 and 2008-09

ACIT, Circle-10, Pune	Vs.	Thermax Limited, 14, Mumbai Pune Road, Wakdewadi, Pune – 411 003 PAN : AA ACT3910D
Appellant		Respondent

Assessee by
Revenue by

Shri H.P. Mahajani
Mrs. Nandita Kanchan

Date of hearing 11-09-2019
Date of pronouncement 13-09-2019

आदेश / ORDER

PER BENCH :

This batch of four cross appeals comprising of two appeals by the assessee and equal number of appeals by the Revenue relate to the assessment years 2007-08 and 2008-09. Since some of the

issues raised in these appeals are common, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

2. Before proceeding with these appeals, it is pertinent to mention that the cross appeals of the assessee for the A.Y. 2006-07 were simultaneously argued, for which we have passed a separate detailed order. Some of the issues raised in the instant appeals are similar to those of the earlier years including the immediately preceding year. Both the sides are in agreement that facts and circumstances of such similar grounds are *mutatis mutandis* similar to the earlier years, except where separately argued.

A.Y. 2007-08 :

3. Ground No.1 of the assessee's appeal and Ground No.1 of the Revenue's appeal are against the sustenance/deletion of addition on account of revenue recognition in respect of Freight and contract activity.

4. Ground No.3 of the assessee's appeal is against the addition on account of liquidated damages. Ground no. 2 of the Revenue's appeal is also on the same issue.

5. Ground No.4 of the assessee's appeal is against the addition on account of claim of depreciation at 80% on certain plant and machinery.

6. Ground No.6 of the assessee's appeal and Ground No.4 of the Revenue's appeal are against the confirmation/deletion of addition towards provision of warranty.

7. Both the sides agree that similar grounds have consistently been decided by the Tribunal in assessee's favour for the earlier assessment year. Following the precedents, we decide these grounds of the appeals in assessee's favour.

8. Ground No. 2 of the assessee's appeal is against the confirmation of addition in respect of Prior period expenses amounting to Rs.60,67,695/-. Such ground has been dismissed by the Tribunal in earlier years. Following the same, we dismiss this ground of appeal as well.

9. Ground No.5 of the assessee's appeal is against the confirmation of sales commission @10% amounting to Rs.1,18,13,080/-. This ground is similar to the Ground No.1 of the assessee's appeal for A.Y. 2006-07 which we have restored for fresh consideration. However, unlike the immediately preceding

year, the assessee did produce books of account before the AO for the year under consideration, who had full opportunity of examining the same and finding out anything adverse before making any addition out of the expenses. Despite that, the AO could not point out any specific defect *qua* the expense and chose to make an *ad hoc* addition. Following the view taken by the Tribunal in earlier years deleting such *ad hoc* additions, except the immediately preceding year for the special reasons as discussed in our order for the A.Y 2006-07, we order to delete the sustenance of *ad hoc* disallowance out of the Commission expense.

10. Ground No.7 of the assessee's appeal is against the confirmation of addition of Rs.4.21 crore towards legal and professional fees paid to Baker & Mckinsey LLP and others. The factual scenario of this ground is that the assessee paid a sum of Rs.8.42 crore towards legal fees paid for Purolite litigation in USA to Baker and Mckinsey and Silverman Berhheim & Vogel and Wilentz Goldman & Spitzer P.A. The assessee was called upon to explain the nature of such payment, in response to which it was submitted that Purolite filed a Civil action against the assessee company and its USA subsidiary in the Eastern District of Pennsylvania, USA on the ground that certain employees leaving

Purolite joined Thermax Ltd. and shared secret details of Purolite with the assessee and its USA subsidiary. The assessee submitted that this expenditure was incurred to defend the litigation. Not convinced, the AO held that such expenditure was covered by the Explanation to section 37(1) of the Act as it involved infringement of rights. He, therefore, disallowed the full amount of expenditure. The Id. CIT(A) did not approve the action of the AO in invoking the Explanation to section 37. He, however, observed that the parties to the litigation were not only the assessee but also its subsidiary in USA. It was, therefore, held that 50% of the expense should be allowed as deduction. This is how, the assessee is aggrieved by the confirmation of addition to the extent of Rs.4,21,00,000/-.

11. We have heard both the sides and gone through the relevant material on record. It is an admitted position that the assessee incurred Rs.8.42 crore to defend the litigation created by Purolite. Such litigation was initiated not only against the assessee but also its USA subsidiary. The benefit of such expenditure in the shape of fee paid to Baker and Mckinsey LLP and others, has obviously gone to the assessee inasmuch as it had defended itself. The mere fact that the subsidiary in the USA also got benefitted by the expenditure, cannot come in the way of allowing deduction in the

hands of the assessee. Even in the absence of its USA entity being a party to the litigation, the assessee was bound to incur such expenditure to defend itself. The Hon'ble Supreme Court in *Sassoon J. David & Company Private Limited Vs. CIT (1979) 118 ITR 261 (SC)* has held that deduction has to be allowed for the expenditure incurred wholly and exclusively for the purpose of business even if benefit of such expenditure percolates to someone else also. Respectfully following the precedent, we decide this ground in the assessee's favour and order to delete the addition of Rs.4.21 crore.

12. Ground No.3 of the Revenue's appeal is against the deletion of disallowances made on account of Public Relation expenses, Membership & subscription, Garden expenses, Misc. Expense, House Magazine expenses, Vehicle expenses, Misc Foreign Travel Expenses and Telephone expenses.

13. Both the sides agree that this ground is similar to the grounds taken by the Revenue in earlier years in which the ad hoc additions made by the AO have been finally deleted by the Tribunal. Following the orders of the Tribunal in the assessee's own case for earlier years, this ground of Revenue is not allowed.

14. Ground No.5 of the Revenue's appeal is against the deletion of addition of Rs.40,00,930/- on account of Provision for Medical and LTA expenses. Both the sides agree that the facts and circumstances of this ground are similar to the Ground No.6 of the Revenue's appeal for the A.Y. 2004-05. Relevant discussion has been made in paras 58 to 60 on pages 39 & 40 of the Tribunal order dated 25-05-2009 in which such an issue has been determined in assessee's favour. Following the same, we uphold the impugned order on this score.

15. In the result, the appeal of the assessee is partly allowed and that of the Department is dismissed.

A.Y. 2008-09 :

16. Ground No.1 of the assessee's appeal and Ground No. 1 of the Revenue's appeal are against the confirmation of addition on account of income recognition from contract activity.

17. Both the sides agree that similar issue has been decided by the Tribunal in assessee's own case for the A.Y. 2005-06 in the assessee's favour. Relevant discussion has been made in para 8.1 pages 9 to 12 of the order. Following the precedent, we decide this

issue in favour of the assessee. The ground of the assessee is allowed and that of the Revenue is dismissed.

18. Ground No.2 of the assessee's appeal is against the denial of deduction on account of Prior period expenses. Here again, both the sides are in agreement that the facts and circumstances of this ground are *mutatis mutandis* similar to the Ground No.2 for the A.Y. 2005-06 in which such issue has been decided against the assessee. Following the same view, we decide this ground against the assessee.

19. Ground No.3 of the assessee's appeal and Ground No.2 of the Revenue's appeal are against the liquidated damages. The assessee's ground is in two parts viz., a sum of Rs.6,98,07,700/- paid to Arsmeta Captive Power Company and the remaining amount of Rs.1,40,46,812/-. In sofaras the second part of the assessee's ground and the ground of the Revenue are concerned, the issue has been consistently decided by the Tribunal in favour of the assessee. Following the view taken by the Tribunal in the preceding years, we allow this part of the assessee's ground and dismiss that of the Revenue.

20. The second component of this ground is against the liquidated damages of Rs.6.98 crore towards invocation of Bank Guarantee by the Arsmeta Captive Power Company. The Id. CIT(A) confirmed the addition.

21. We have heard both the sides and gone through the relevant material on record. It is noticed that the assessee claimed deduction on a mere invocation of performance bank guarantee on 28-04-2007. Thereafter, the assessee sought legal remedy and the injunction granted by the City Civil Court was vacated. The matter was finally settled in a later year on the assessee paying a sum of Rs.6.00 crore to Arsmeta Captive Power Company. Till that time, the assessee could not have claimed deduction of contractual liquidated damages to Arsmeta Captive Power Company. No deduction of Rs.6.98 crore is permissible for the year under consideration as no liability on account of liquidated damages was finally incurred. The Id. AR contended that the assessee voluntarily credited Rs.6.98 crore to its Profit and loss account in succeeding year when it claimed deduction of payment of Rs.6.00 crore. If the assessee had erroneously credited its income in the succeeding year, the same can be reversed subject to the relevant provision. We, therefore, uphold the impugned order on this score.

22. Ground No.4 of the assessee's appeal is against the confirmation of disallowance of depreciation at 80% in respect of certain items of plant and machinery instead of allowing depreciation @25%.

23. Here again, it is found as an admitted position that similar issue has been decided by the Tribunal in the assessee's favour for the immediately preceding assessment year and earlier years. Respectfully following the precedent, we decide this issue in assessee's favour.

24. Ground No.5 of the assessee's appeal is against the disallowance u/s.14A. The assessee earned exempt dividend income of Rs.34.25 crore. The AO invoked the provisions of section 14A r.w. Rule 8D and accordingly computed the net disallowance at Rs.244.14 lakh, after allowing the benefit of Rs.85.63 lakhs as disallowed by the assessee. The Id. CIT(A) restored the matter to the file of AO with direction to recompute the disallowance by holding that in computing the average value of investments, the investments which yield taxable income, should be excluded. He jettisoned the contention of the assessee that the fixed assets should be considered at their gross value without excluding depreciation. He further directed the AO to exclude interest of

Rs.19.99 lakh incurred in Post Shipment packing credit. All the above three directions given by the ld. CIT(A) are perfectly in order. Since the issue has been restored to the AO, we uphold the impugned order to this extent thereby affirming the specific directions given in the impugned order.

25. Ground No. 6 of the assessee's appeal is against the confirmation of addition of Rs.1,15,00,653/- on account of payment of commission to Nischal Corporate Services.

26. Having heard both the sides and gone through the relevant material on record, we find that facts and circumstance of this ground are similar to Ground No.1 of the assessee's appeal for A.Y. 2006-07. In our order for the said earlier year, we have restored the matter to the file of AO with certain directions for deciding the issue afresh. Following the same view, we set-aside the impugned order and remit the matter to the file of AO for deciding this issue afresh in accordance with our directions rendered therein.

27. Ground No.7 of the assessee's appeal is against the confirmation of disallowance on account of legal expenses and fees paid to Baker & Mckinsery LLP amounting to Rs.9.74 crore in respect of USA litigation. Both the sides agree that the facts and

circumstances of this ground are similar to Ground No.7 taken for the A.Y. 2007-08. Following the view taken hereinabove, we allow this ground of appeal.

28. Ground No.8 of the assessee's appeal and Ground No.4 of the Revenue's appeal are against the confirmation/deletion of addition towards provision of warranty.

29. Both the sides agree that similar grounds have consistently been decided by the Tribunal in assessee's favour in the earlier assessment years. Following the precedents, we allow this ground of appeal in assessee's favour and dismiss the Revenue's ground.

30. Ground No.3 of the Revenue's appeal is against the *ad hoc* disallowance of Public Relation Expenses, Miscellaneous Vehicle expenses, Foreign Travel expenses and Telephone expenses.

31. Here again, both the sides agree that the facts and circumstances of this ground are similar to Ground No.3 for the A.Y. 2005-06 in which the issue has been decided in assessee's favour. Following the same, we dismiss this ground of appeal.

32. Ground No.5 of the Revenue's appeal is against the relief allowed by the Id. CIT(A) in the Provision for medical and LTA expenses amounting to Rs.90,36,835/-.

33. Both the sides agree that the facts and circumstances of this ground are similar to Ground No. 6 of the Revenue's appeal for the A.Y. 2004-05 wherein this ground was decided in favour of the assessee. Following the same, we uphold the impugned order and dismiss this ground as well.

34. In the result, the appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 13th September, 2019.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 13th September, 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)-2, Nashik
4. The CCIT, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" /
DR 'B', 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	11-09-2019	Sr.PS
2.	Draft placed before author	13-09-2019	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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