

आयकर अपीलिय 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 Nos. 61 & 406/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Kirloskar Oil Engines Limited,
Laxmanrao Kirloskar Road,
Khadki, Pune – 411003

PAN : AADCK5714H

.....अपीलार्थी / Appellant

बनाम / V/s.

Jt. Commissioner of Income Tax,
Range – 9, Pune

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 79/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Assistant Commissioner of Income Tax,
Circle – 14, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Kirloskar Oil Engines Limited,
13, Laxmanrao Kirloskar Road,
Khadki, Pune – 411003

PAN : AADCK5714H

.....प्रत्यर्थी / Respondent

Assessee by : Shri C.H. Naniwadekar
Revenue by : Shri S.B. Prasad

सुनवाई की तारीख / Date of Hearing : 19-09-2019

घोषणा की तारीख / Date of Pronouncement : 21-11-2019

आदेश / ORDER**PER VIKAS AWASTHY, JM :**

The appeal by the assessee in ITA No. 61/PUN/2015 and cross appeal by the Revenue in ITA No. 79/PUN/2015 are directed against the order of Commissioner of Income Tax (Appeals)-V, Pune dated 27-10-2014 for the assessment year 2010-11. The assessee has filed another appeal in ITA No. 406/PUN/2015 for assessment year 2010-11 assailing the same order of Commissioner of Income Tax (Appeals) on the issue of disallowance u/s. 14A of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

Since, the issues raised in all these three appeals are emanating from same set of facts, these appeals are taken up together for adjudication and are being disposed of vide this common order.

ITA No. 61/PUN/2015, (Assessee's Appeal)

2. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds :

“1.0 Disallowance of Commission paid to Mr. Atul Kirloskar u/s. 40A(2) – Rs.1,80,00,000/-.

The learned CIT(A) erred on facts and law in upholding disallowance of Rs.1,80,00,000/- being commission paid to Mr. Atul Kirloskar u/s. 40A(2).

2.0 Disallowance out of Aircraft Expenses – Rs.1,11,22,180/-

The learned CIT(A) erred on facts and law in upholding the disallowance of Rs.1,11,22,180/- being Aircraft Expenses. The learned CIT(A) has made ad-hoc disallowance without considering the facts.

3.0 The assessee craves leave, to add, to alter, and to modify any of the above grounds of appeal.”

3. Shri C.H. Naniwadekar appearing on behalf of the assessee submitted that the ground No. 1 of the appeal is in respect of disallowance of commission paid to Shri Atul Kirloskar. The Tribunal in earlier assessment years i.e. assessment years 2007-08, 2008-09 and 2009-10 has allowed the payment of commission to the Directors. The only reason for disallowing commission to Shri Atul Kirloskar is that he was appointed Director on the last date of financial year i.e. 31-03-2010. The Commissioner of Income Tax (Appeals) has failed to consider the fact that the commission paid to Shri Atul Kirloskar was within the limits of Companies Act and the disclosure of the same was made in the annual report for the Financial Year 2009-10. Hence, the reason for disallowing commission paid to Shri Atul Kirloskar is unsustainable.

3.1 In respect of ground No. 2 of the appeal, the ld. AR submitted that the Commissioner of Income Tax (Appeals) has restricted the disallowance of expenditure on Aircraft to 25% of expenditure claimed on the premise that the Aircraft was used for non-business purposes. The ld. AR pointed that similar disallowance were made in the earlier assessment years. The Tribunal has restricted the disallowance to 15% of such expenses in assessment years 2001-02, 2002-03 and 2004-05. The facts in the assessment year under appeal are similar and disallowance of expenditure has been made by the Department for similar reasons.

4. Shri S.B. Prasad representing the Department submitted that the commission has been paid to Shri Atul Kirloskar to the tune of Rs.1.80 crores for single day in office. He was appointed Director of the company on last day of Financial Year 2009-10. In respect of ground No. 2 of the appeal, the ld. DR pointed that the assessee has failed to produce the

details of persons who have utilized the Aircraft. In the absence of any information from assessee, the Assessing Officer was justified in making disallowance of 1/3rd of total expenditure claimed on use of Aircraft. The ld. DR further pointed that the Department in cross appeals has also raised grounds relating to payment of commission to the Directors and disallowance of depreciation on Aircraft as ground Nos. 4 and 6, respectively.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The first ground in appeal by the assessee is against disallowance of commission paid to Shri Atul Kirloskar u/s. 40A(2) of the Act. It is an undisputed fact that in earlier assessment years disallowance on account of remuneration to the Directors were made by the Assessing Officer. The issue travelled up to the Tribunal and the Tribunal in appeal by the Revenue in ITA No. 1919/PUN/2014 for assessment year 2009-10 vide order dated 17-07-2019 deleted the disallowances. In the assessment year under appeal, the Commissioner of Income Tax (Appeals) has disallowed commission Rs.1,80,00,000/- paid to Shri Atul Kirloskar on the ground that he was appointed Director on the last date of the financial year ending on 31-03-2010 and there is no plausible explanation for paying such huge commission to the Directors appointed on the last date of financial year. We observe that the authorities below have not examined the issue in proper perspective. For making disallowance u/s. 40A(2) the onus is on the Revenue to show that payments made by assessee to persons referred in clause (b) are excessive or unreasonable with regard to fair market value of the goods or services received by the assessee. In the present case the authorities below have failed to examine terms and conditions of

appointment of Shri Atul Kirloskar. If the terms of appointment allow payment of such commission at the time of appointment, the commission paid to Shri Atul Kirloskar is allowable, provided the commission paid is within the limits specified under Companies Act. We are of considered view that this issue needs revisit to the file of Assessing Officer for re-examination in the light of our above observations. The ground No. 1 of the appeal is thus allowed for statistical purpose.

6. The ground No. 2 of the appeal by the assessee is with respect to disallowance of Aircraft expenses. The assessee has claimed expenditure of Rs.2,99,33,417/- and depreciation of Rs.1,45,55,306/- on Aircraft. The Assessing Officer disallowed 1/3rd of expenditure and depreciation on the ground that the Aircraft has been used for non-business purposes. The Commissioner of Income Tax (Appeals) has restricted the expenditure to 25%. We observe that the issue of allowability of expenditure and depreciation on Aircraft was considered by the Tribunal in the past. The Tribunal in ITA No. 877/PN/2012 for assessment year 2004-05 has restricted the disallowance of expenditure on Aircraft to 15%. Since, the facts in assessment year under appeal and reason for disallowance is identical, respectfully following the order of Tribunal in assessee's own case, we deem it appropriate to modify the findings of Commissioner of Income Tax (Appeals) on this issue and restrict the disallowance to 15%. Accordingly, ground No. 2 of the appeal is partly allowed in the terms aforesaid.

7. In the result, the appeal of assessee in ITA No. 61/PUN/2015 is partly allowed.

ITA No. 406/PUN/2015, (Assessee's Appeal)

8. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) by raising following ground :

“1.0 Disallowance of Expenses u/s. 14A – Rs.4,36,58,306/-

The learned CIT(A) erred on facts and in law in disallowing Rs.4,36,58,306/- u/s. 14A of the Act. The learned CIT(A) also erred I stating in the order that Rule 8D is mandatorily applicable to the facts of the case. The assessee company did not incur any expenditure other than salary for earning dividend. The CIT(A) could not point out any other expenditure directly attributable for earning the tax free income and no nexus of the expenditure with the tax free income was established. The learned CIT(A) also failed to appreciate that the AO has not arrived at his satisfaction regarding the expenditure incurred in relation to such income having regard to the books of accounts before invoking Rule 8D.”

9. The ld. AR submitted that the assessee before making disallowance has failed to record satisfaction as envisaged u/s. 14A of the Act. The provisions of the Act or the Rules framed there under does not specify the manner of recording satisfaction u/s. 14A of the Act. The recording of satisfaction is subjective. The assessee has not made any suo-moto disallowance u/s. 14A for earning exempt income. After examining the assessment order we observe that the Assessing Officer has recorded satisfaction before applying the provisions of Rule 8D. Hence, we do not find any merit in the contention of the assessee. Accordingly, the solitary issue raised in the appeal by the assessee is without any merit and hence, dismissed.

10. In the result, the appeal of assessee in ITA No. 406/PUN/2015 is dismissed.

ITA No. 79/PUN/2015, (Revenue's Appeal)

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

- “1. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition on account of late delivery fees of Rs.1,87,95,310/- by admitting the new evidences, without giving an opportunity to the A.O. to examine the same at his level and without appreciating that the provision has not been made on a scientific basis?
2. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that depreciation on printers, UPS and other allied items are allowable at higher rate of 60% i.e. rate applicable to computers, without appreciating that these items do not fall within the definition of computers?
3. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs.4,36,58,306/- made u/s. 14A which was confirmed in the AY 2005-06, AY 2006-07, AY 2007-08, AY 2008-09 and AY 2009-10 in the assessee own case?
4. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs.2,67,35,000/- made u/s. 40A(2) out of the commission paid to Directors without justifying the reasonableness of the payment to Directors?
5. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that subsidy received from Maharashtra Govt. under Package Scheme of incentive, 2001 is capital receipt while during the course of scrutiny, the AO observed that major amount of subsidy received by the assessee company is by way of reimbursement of taxes paid i.e. VAT to the State Govt. and hence a taxable revenue receipt?
6. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that the expenditure incurred by the assessee on Aircraft Running and depreciation would be restricted to 25% of the total Aircraft expenses when no details have been provided by the assessee even during the appellate proceedings?
7. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that the provision of warranty during it is a covered issue for the AY 2009-10 whereas there no addition on this issue in the AY 2009-10?
8. For the facts and such other reasons as may be urged at the time of hearing, the order of the Ld. Commissioner of Income-tax (Appeals) may be vacated and that of the Assessing Officer be restored.
9. The appellant craves leave to add, alter, amend, substitute or delete any of the grounds urged herein above as and when found necessary.”

12. The ld. AR submitted that the issues raised in ground Nos. 1 to 4 of the appeal by the Revenue are similar to the one adjudicated by the Tribunal in assessee's own case in assessment year 2009-10. To substantiate his contents the ld. AR furnished the order of Tribunal in ITA No. 1919/PUN/2014 for assessment year 2009-10 decided on 17-07-2019. The ld. AR further submitted that the ground No. 6 of the appeal is with respect to the disallowance of Aircraft expenditure and is corresponding to ground No. 2 of the appeal by the assessee.

13. The ld. DR fairly admitted that majority of the issues raised in the appeal by the Revenue are similar to the one adjudicated by the Tribunal in appeal by the Revenue in assessee's own case in assessment year 2009-10. However, the ld. DR strongly supported the findings of Assessing Officer and prayed for reversing the findings of CIT(A) in respect of the issues agitated by the Revenue in appeal.

14. Both sides heard. Orders of the authorities below perused. The ground No. 1 of the appeal by the Revenue is with respect to deleting the addition on account of 'late delivery fees' Rs.1,87,95,310/- (liquidated damages). We find that identical ground was raised by the Revenue in assessment year 2009-10. The Tribunal in assessment year 2009-10 vide order dated 17-07-2019, following the decision rendered in assessment year 2008-09 has restored this issue back to the file of Assessing Officer to decide the same on similar lines. Since, the issue is recurring in nature and the facts are identical, we deem it appropriate to restore this issue back to the file of Assessing Officer to decide in line with the directions of Tribunal in earlier assessment years. Accordingly, ground No. 1 of the appeal by the Revenue is allowed for statistical purpose.

15. The ground No. 2 of the appeal is with respect to allowability of depreciation @ 60% on UPS and other allied items. We observe that in assessment year 2009-10 the Co-ordinate Bench has upheld the findings of Commissioner of Income Tax (Appeals) in allowing depreciation @ 60% on UPS and other allied items. The Commissioner of Income Tax (Appeals) in assessment year under appeal has granted relief to the assessee by following its own order in assessment year 2009-10. We find no infirmity in the findings of Commissioner of Income Tax (Appeals) on this issue. Accordingly, the same is upheld and ground No. 2 of the appeal is dismissed.

16. In ground No. 3 of the appeal, the Revenue has assailed the order of Commissioner of Income Tax (Appeals) in deleting the addition of Rs.4,36,58,306/- made u/s. 14A of the Act. The assessee has received dividend income of Rs.7.76 crores and has claimed interest expenditure aggregating to Rs.13,64,32,000/-. The Assessing Officer made disallowance of Rs.4,36,58,306/- u/s. 14A r.w. Rule 8D. The ld. AR contended that the assessee was having own funds much more than the investments made. The ld. AR referred to Balance sheet of assessee as on 31-03-2010. An examination of the Balance sheet reveal that own interest free funds of assessee comprising of Share Capital and Reserve and Surplus are to the tune of Rs.680 crores as against investment of Rs.200 crores. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Reliance Utilities and Power Ltd. reported as 313 ITR 340 has held that where the assessee is having both interest bearing funds and interest free funds, it is presumed that the investment are made by utilizing interest free funds. In the light of the facts and decision of Hon'ble Jurisdictional High Court in the case of Commissioner of Income

Tax Vs. Reliance Utilities and Power Ltd. (supra), we restore this issue back to the file of Assessing Officer for recomputation of disallowance u/s. 14A of the Act. Accordingly, ground No. 3 of the appeal by Revenue is allowed for statistical purpose.

17. The ground No. 4 of the appeal is with respect to disallowance of commission u/s. 40A(2) of the Act, paid to the Directors. We find that this issue was considered by the Tribunal in appeal by Revenue in assessee's case in assessment year 2009-10. The commission paid to the Directors was allowed by the Tribunal. Hence, we do not find any reason to interfere with the findings of Commissioner of Income Tax (Appeals) on this issue. Accordingly, the same is upheld and ground No. 4 of the appeal is dismissed.

18. In ground No. 5 of the appeal the Revenue has assailed the findings of Commissioner of Income Tax (Appeals) in holding the subsidy received by the assessee from Maharashtra Government under Package Scheme of incentive, 2001 as capital receipt. The Tribunal in the case of Innoventive Industries Ltd. Vs. DCIT in ITA No. 601/PN/2013 for assessment year 2009-10 decided on 24-03-2017 has held that the incentive received under the Package Scheme of incentive is capital in nature. We further observe that the Co-ordinate Bench in appeal by the Revenue in ITA No. 1919/PUN/2014 (supra) has confirmed the findings of Commissioner of Income Tax (Appeals) in holding the sales tax benefit received by the assessee as capital receipt not liable to tax. Since, the facts in the assessment year under appeal are identical, we do not find any reason to interfere with the findings of Commissioner of Income Tax (Appeals) on this

issue. Accordingly, the same is upheld and ground No. 5 of the appeal is dismissed.

19. In ground No. 6 of the appeal, the Revenue has assailed the findings of Commissioner of Income Tax (Appeals) in restricting the expenditure and depreciation on Aircraft to 25%. This ground of appeal is corresponding to ground No. 2 of the appeal raised by the assessee. The Tribunal in past has restricted the disallowance to 15% of such expenditure, while adjudicating the appeal of assessee in ITA No. 61/PUN/2015 we have decided this issue by following the earlier order of Tribunal. Accordingly, the ground No. 6 of the appeal by the Revenue is dismissed.

20. The ground No. 7 of the appeal is against allowing provision for warranty. The ld. AR stated at the Bar that in assessment year 2009-10 provision was made on similar lines and the same was disallowed by the Assessing Officer. The assessee carried the issue in appeal. The Commissioner of Income Tax (Appeals) granted relief to the assessee holding that the provision was created on scientific basis. Further, reliance was placed on the decision of Hon'ble Supreme Court of India in the case of Rotork Contrals India Pvt. Ltd. reported as 314 ITR 62 and the decision of Tribunal in the case of ACIT Vs. Dana India Pvt. Ltd. in ITA No. 1805/PN/2012 for assessment year 2006-07 decided on 22-10-2013. The findings of Commissioner of Income Tax (Appeals) was accepted by the Department and were not agitated in appeal before the Tribunal. This factual position has not been controverted by the Department. The First Appellate Authority has granted relief to the assessee by following its order in assessment year 2009-10. The facts in assessment year under appeal are identical, we find no reason to interfere with the findings of

Commissioner of Income Tax (Appeals) on this issue. Accordingly, the same are upheld and ground No. 7 of the appeal is dismissed.

21. The ground Nos. 8 and 9 are general in nature, hence, require no adjudication.

22. In the result, the appeal of Revenue in ITA No. 79/PUN/2015 is partly allowed for statistical purpose in the terms aforesaid.

23. To sum up, the appeals of assessee in ITA No. 61/PUN/2015 is partly allowed, ITA No. 406/PUN/2015 is dismissed and appeal of Revenue in ITA No. 79/PUN/2015 is partly allowed for statistical purpose.

Order pronounced on Thursday, the 21st day of November, 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 : 21st November, 2019

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-V, Pune
4. आयकर आयुक्त / The CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.
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आदेशानुसार / BY ORDER,

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