

ORDER**PER CHANDRA MOHAN GARG, JUDICIAL MEMBER**

These are a bunch of five appeals filed by the assessee for A.Ys 2003-04 to 2005-06 and 2007-08 and cross appeal by the Revenue for A.Y 2007-08, directed against the orders of the Id. CIT(A), Panchkula dated 16.03.2011 in the case of the assessee and 26.3.2013 in Revenue's appeal. Since the issues involved in all these appeals are similar and the appeals were heard together, so these are being disposed off by this consolidated order for the sake of convenience. We shall dispose them of one by one. First we take up Revenue's appeal for A.Y 2007-08

ITA No. 3460/Del/2013 [A.Y 2007-08]

2. The following grounds have been raised by the Revenue in this appeal:

“1. The Id. CIT(A) erred in treating the assessee company eligible for claiming depreciation at a higher rate on moulds, higher rate of depreciation on moulds is applicable only to rubber and plastics manufacturers, whereas the present assessee is a two wheeler manufacturer.

2. The Id. CIT(A) erred in deleting the addition made on account of non deduction of TDS on payments made to non residents.

3. The ld. CIT(A) erred in deleting the addition made on account of sales tools expenses, which could not be established as being expenses incurred wholly and exclusively for the purpose of business, and which the assessee was under no obligation to incur, as per its agreement with vendors.”

3. The ld. counsel of the Revenue supporting the action of the A.O contended that the assessee company is not entitled to claim depreciation @ 30% as it is not manufacturer of rubber and plastic goods. The ld. counsel of the Revenue contended that CIT(A) erred in treating the assessee company eligible for claiming depreciation at a higher rate on moulds, higher rate of depreciation on moulds is applicable only to rubber and plastics manufacturers, whereas the present assessee is a two wheeler manufacturer. The ld. counsel of the Revenue further contended that the assessee had provided moulds to its suppliers for manufacture of plastic/rubber components, to be manufactured as per assessee's specifications in its factory premises and the moulds have not been used by the assessee in its own factory and for the purpose of claiming deduction @ 30%, moulds should be used in the assessee's factory. Therefore, the claim of deprecation @ 30% is not allowable. However, the ld. counsel of the Revenue fairly contended that the A.O allowed deprecation @

15% whereas the assessee claimed depreciation @ 30% as per entry vii of the schedule of depreciation. The ld. counsel of the Revenue finally submitted that the impugned order of ld. CIT(A) was without any basis and the same may be set aside by the restoring that of the A.O.

4. Per contra, the ld. counsel of the assessee first of all contended that the Revenue has not challenged this ground in any earlier or subsequent A.Y. except A.Y 2007-08 wherein the ld. CIT(A) accepted the stand of the assessee and directed the A.O to allow depreciation @ 30% on plastic moulds. The ld. AR placing reliance on the decision of the ITAT Pune Bench in the case of Kinetic Honda Motor Ltd Vs. JCIT reported at 72 TTJ 72 para 14 and submitted that in order to claim depreciation @ 30% it is necessary that the machines must be owned and used by the assessee. The ld. AR further submitted that in the present case the moulds were owned by the assessee and these were given to vendors for the purpose of manufacturing of various parts of two wheelers as specified by the assessee and the only question which remains to be considered is whether such moulds were used in plastic factories for the purpose of business of the assessee. To support this contention, the ld. AR also placed reliance on the decision of the Hon'ble High Court of Gujarat in the case of CIT Vs. Sanskrut Comfort Ltd dated 21.12.2005 in Tax

Appeal Nos. 852 & 853/2005, decision of the Madras High Court in the case of Areva T & D Vs. JCIT reported at [2013] 29 Taxman 255 and order of the ITAT Ahmadabad High Bench in the case of ITO Vs. Symphony Comfort Systems Ltd dated 20.5.2005 passed in ITA No. 777 and 4499[Ahd/2003].

5. We have heard the arguments of both the sides and carefully perused the relevant material placed on record before us. First of all we may point out that the A.O has not made any addition or disallowance in any of the earlier or subsequent A.Ys. Secondly, we observe that the A.O has allowed depreciation @ 15% whereas the assessee is claiming deprecation @ 30% by alleging that the assessee has made arrangement with vendors who, in turn, are engaged in manufacturing rubber and plastic goods as per specifications given by the assessee. The main contention of the A.O is that the assessee is not a manufacturer of plastic or rubber goods and the assessee is in the manufacture and sale of two wheelers and it cannot be deemed to be manufacturer of plastic/rubber parts. Accordingly, it is not entitled to depreciation at a higher rate. Thus, admittedly and undisputedly, the assessee is owner of plastic moulds, that is why the A.O allowed deprecation @ 15% and denied higher rate of depreciation as claimed by the assessee on the allegation that plastic moulds have not been used in its own factory premises and the same were given to vendors for use in their respective manufacturing units/factories. At

this juncture, we find it appropriate to consider the proposition laid down by the Ahmadabad Bench of the Tribunal in the case of Symphony Comfort Systems Ltd [supra] wherein it was held as below:

“4.3. I have considered carefully the observation of the AO and the submission of the counsel alongwith the appellate order passed for asst. yr. 1991-92. The CIT(A)-XIV while deciding the issue for asst. yr. 1991-92 has discussed the matter at length and observed that in the present "case, instead of having a separate division, the appellant is having plastic components manufactured using its own moulds and under its supervision at the factories of its vendors who are exclusive plastic goods factories, applying the same ratio that the moulds have in fact been used in plastic goods factories, the appellant would also be entitled to depreciation at the higher rate of 50 per cent on such moulds, the view taken by the Karnataka High Court has also been followed in the decision of the Tribunal Delhi Bench, wherein, though the end product, viz. vacuum glass was not a plastic product, it was held that the plastic moulds used for manufacturing plastic covers of the vacuum glasses in exactly the same manner as manufacturing is carried out by any other plastic factory, were entitled to depreciation at the higher rate under Appendix-I of the IT Rules. In view of the conclusion arrived at by the CIT(A) while passing the order for asst. yr. 1991-92, I hold that the appellant is entitled to depreciation @ 40 per cent' as claimed by the appellant on plastic moulds and, therefore, the AO is directed to delete the disallowance of Rs. 42,08,947/-.”

6. In view of the above, we are inclined to hold that the conclusion arrived by the Id. CIT(A) in para 5.2 of the impugned order is quite correct and justified and we are unable to see any valid reason to interfere with the impugned order on this issue as admittedly and undisputedly the assessee is owner of the plastic mould which were used in the premises of various vendors for manufacturing of plastic and rubber goods for use of assessee. In our considered opinion, it is immaterial whether the plastic /rubber moulds were used in the factory premises of the assessee or vendors. Prime requirement is that moulds should be owned by the assessee, the same should be part of block assets shown by the assessee and these were put to use for the purpose of business of the assessee and the three requisite conditions have been fulfilled by the assessee in the present case and thus it is entitled to claim depreciation @ 30% which was rightly allowed by the Id. CIT(A). Hence ground No. 1 of the Revenue being devoid of merits is dismissed.

Ground No. 1.1

7. Apropos this ground, we have heard the arguments of both the sides and carefully perused the relevant material on record inter alia the relevant paper book and ratio of decision as relied upon by the Id. DR.

8. The ld. DR took us through para 6.2 at page 14 of the impugned first appellate order and contended that since the payments were made by the assessee outside India in the form of reimbursement of expenses which attracts TDS provisions and the assessee has not deducted any TDS at the time of payments and the impugned payments made by the assessee are squarely covered under the provisions of section 40(a)(ia) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act']. Therefore, the same was rightly disallowed and added back to the income of the assessee. The ld. DR lastly submitted that the impugned order may be set aside by restoring that of the AO.

9. Replying to the above, the ld. AR submitted that the payments made by the assessee are cost to cost reimbursement without any mark up to the non resident and since the payments made by it were outside India to non resident were in the form of reimbursement of expenses and were not chargeable to tax in India, therefore the CIT(A) was right in granting relief to the assessee by following the order of the DRP for A.Y 2006-07. The ld. AR also drew our attention towards the relevant operative para 6.2 at pages 14 and 15 of the impugned order and submitted that the CIT(A) has granted part relief to the assessee and the disallowance on the issue of payment to American Embassy School

towards school fees of daughter, reimbursement on account of travel expenses of Mr. Takeshi Miyashita and payment to M/s Honda Motor Company Ltd, Japan towards service fees of new models have been disallowed and the assessee has accepted this stand of the Revenue as there is no appeal by the assessee against these disallowances.

10. In rejoinder, the ld. DR submitted that if the assessee is paying through its principal at Japan, then TDS of this payment and have to be applied. However, the ld. DR candidly and fairly accepted that for invoking TDS provisions and making disallowance u/s 40(a)(ia) of the Act, income should be chargeable to tax in India, then only TDS provisions can be held as applicable.

11. On careful consideration of the above rival submissions, at the very outset, we may point out that the AO made disallowance on the allegation that the assessee has not made tax deduction at source on the payments made to non resident outside India whereas the CIT(A) granted part relief to the assessee by observing that since payments have been made outside India in the form of reimbursement of expenses, thus they are not chargeable to tax in India and the AO should not have made disallowance in this regard. The CIT(A) was quite justified and

passed a balanced order while upholding the addition under three heads and granting relief to the assessee by following the order of the DRP for A.Y 2006-07. It is well accepted proposition that the Rule of Consistency should be followed by the revenue authorities unless there is substantial change in the facts and circumstances. In the present case, the CIT(A) followed the order of DRP for earlier A.Y 2006-07 wherein claim of the assessee regarding payment in the nature of reimbursement of expenses was allowed. We are unable to see any valid reason to interfere with the conclusion of the CIT(A) especially when the AO could not establish that the impugned payments made by the assessee to non residents outside India were chargeable to tax in India and in this situation, TDS provisions are not applicable to the payments made by the assessee and hence we are unable to see any ambiguity or perversity in the order of the CIT(A) and thus we uphold the same. Accordingly, Ground No. 2 of the Revenue being devoid of merits stands dismissed.

Ground No. 3 of the Revenue

12. Apropos this ground, we have heard the arguments of both the sides and have perused the relevant material on record. The ld. DR drew out attention towards para 6 at page 3 of the assessment order and submitted that the assessee company has

claimed sales tools expenses on account of auto spare parts traded amounting to Rs. 77,85,401/-. The ld. DR further pointed out that AO noticed that there was an agreement between the assessee company and its dealers under the head 'General Obligations of the Company at para 11.2 under the sub-head 'Advertising Support. The ld. DR submitted that as per clause 11.2, the assessee has to provide necessary information, materials and such other assistance from time to time, at the dealer's cost and expenses, therefore, there was no obligation on the assessee to incur these expenses, hence the same were rightly disallowed. The ld. DR further pointed out that the CIT(A) granted relief to the assessee without any basis as there was no agreement between the assessee and the dealers that 50% of sales tools expenses would be subsidized to the dealers. Therefore, the impugned order may be set aside by restoring that of the AO.

13. Replying to the above, the ld. AR submitted that the assessee was under obligation to support the dealers and impugned sales tools expenses represents 50% subsidy given to dealers on account of basic cost of standard sales tools, tools/features for standardization of Honda Exclusive Dealer Outlets. Therefore, the AO was incorrect in holding that the appellant was under no obligation to incur these expenses. The

ld. AR submitted that the acid test of section 37 of the Act is that the expenses should have been incurred for the purpose of business of the assessee and as per dealership agreement available at pages 382 to 391 of assessee's paper book, clause 12, the assessee was under obligation to support dealers and under this obligation sales tools expenses have been incurred. The ld. AR also pointed out that the AO has not doubted the genuineness of the expenses and it is not also the case of the AO that it was not for the purpose of business of the assessee. Therefore, the same should be allowed. The ld. AR counsel drew our attention towards page 403 onwards of the assessee's paper book and submitted that as per the decision of Hon'ble Jurisdictional High Court of Delhi in the case of Tupperware India [P] Ltd Vs. CIT reported at [2015] 60 Taxmann.com 350 [Delhi] where contract manufacturers were carrying out manufacturing activities for the assessee and it was in assessee's business necessity that all the tax liabilities of manufacturers were duly satisfied by the assessee then the payments in this regard has to be considered as business expenses of the assessee and thus the same are allowable u/s 37(1) of the Act.

14. The ld. DR also placed rejoinder to the above submissions of the assessee and submitted that the test of wholly and exclusively for the purpose of business of the assessee is a

matter of fact and issue of law. The ld. DR pointed out that in the case of Tupperware India [P] Ltd [supra], facts in para 10 are that since the assessee was not permitted to manufacture products in India and it had direct interest in the proper functioning/protection of business of contract manufacturers in as much as without them, the assessee could not run its business of trading in India. Therefore, law of additional excise duty levied upon the contract manufacturers was discharged by the assessee and in this situation it was held that it was for the purpose of business of the assessee. The ld. DR pointed out that the facts and circumstances of the present case are quite similar and distinct. Therefore, the ratio of the decision of Hon'ble Delhi High Court in the case of Tupperware India Ltd [supra] cannot be applied to the facts of the present case in favour of the assessee. The ld. DR also pointed out that it is trite law and for allowing claim of the assessee it has to be seen that the condition stipulated in section 37 has been complied or not. The ld. DR vehemently contended that the assessee is a company and it has to show that it has to show that expenses on sales tools expenses incurred by it was under an obligation as per agreement but there was no separate contract on this issue and the assessee was not under obligation to bear this liability to incur expenses on sales tools expenses. Therefore, it was rightly disallowed by the

AO. The ld. DR also contended that as per contract, liability to bear the expenses was on the dealer and the assessee and the assessee has not discharged its onus to support the claim as required u/s 37 of the Act.

15. On careful perusal of the above rival submissions, first of all we may point out that the ld. AR has not disputed this fact that there was a dealership agreement between the assessee and its dealers and as per clause 11.2 under the head “general obligations of the assessee company” it was agreed between the assessee and the dealers as under:

“11.2 The company shall provide necessary information, materials and such other assistance from time to time, at the dealer’s cost and expense wherever applicable, which support the dealers advertising and sales promotion efforts for the production in accordance with the provisions of policy, guidelines and operational standards with regards to advertising issue by the company from time to time.”

16. In view of the above, the assessee company was under obligation to provide necessary information, material and such other assistance from time to time at the dealers cost and the expenses and there was no obligation on the assessee company to subsidize 50% of the sales tools expenses or 50% in the form of subsidy to the dealers on account of basic cost of standard sales

tools, tools/features for standardization of Honda Exclusive Dealer outlets. On specific query from the Bench, the ld. AR could not show us any other addenda or amendment to this agreement between the assessee and the dealers and to establish that the expenses incurred on sales tools expenses was made by the assessee under an obligation of an agreement. It was the contention of the ld. AR that even if agreement is not on record, expenses could have been incurred by the assessee by amending the agreement and as per clause (c) of clause 3 at page 386 of the assessee's paper book, the assessee company was under obligation to compensate the dealers suitably in consideration for cooperation/services/assistance as and when rendered by dealers in respect of sales. The ld. AR also submitted that such compensation was to be decided as per policy of the company in such matters. First of all, we may point out that the said clause (c) of clause (3) of the agreement stipulates the liability of the assessee company to compensate dealers suitably in consideration for cooperation/services/assistance in respect of direct sales and thus the sales tools expenses were not related to direct sales but it was for the purpose of standard sales tools, tools/features for standardization of Honda Exclusive Dealer outlets as such. However, there is no further policy decision or any other document before us which could show us that there was

liability on the assessee to incur 50% subsidy on sales tools expenses to the dealers and in the absence of any such amendment or document, we decline to accept the contention of the assessee when it was under no obligation of agreement between dealers and thus the impugned claim of expenses could not be held as allowable to the assessee. At this juncture, we may point out that ratio of the decision in the case of Tupperware India Ltd [supra] is not available to the appellant in the present case as it was a case pertaining to liability of payment of additional excise duty in pursuance of CESC's order and the appellant of that case discharged liability for proper functioning/protection of business of contract manufacturers in as much as without them, the assessee could not run its business of trading in India. Obviously, when a company is out outsourcing manufacturing activity to the various vendors, contract manufacturers, then any liability regarding Excise duty and additional Excise duty has to be borne by the contractee as per excise laws and the same has to be held for the purpose of business of the assessee, because excise duty or additional excise duty was paid as per mandatory taxation legislation which cannot be avoided. In the present case, payment of sales tools expenses was not under legal obligation or liability and same has been incurred without any agreement. At the risk of repetition, we

may point out that as per clause 11.2 of agreement between the assessee and the dealer, all expenses have to be borne by the dealers in regard to advertisement support services, which includes sales tools expenses also. Thus we are unable to accept the reasons recorded by the CIT(A) for granting relief to the assessee on this count and we set aside the same and order of the AO is restored. Consequently Ground No. 3 succeeds.

17. In the result the appeal of the Revenue is partly dismissed on Ground No. 1 and 2 and partly allowed on Ground No. 3.

ITA No. 3074/Del /2011 [A.Y 2004-05]

ITA No. 3075/Del /2011[A.Y 2005-06]

18. Both the parties concurred that Ground No 1 in A.Y 2004-05 and 2005-06 are similar to the facts of A.Y 2007-08. Since by the earlier part of this order we have dismissed ground No. 2 of the Revenue wherein the assessee got relief from the first appellate order on the issue of payments to non residents and our said conclusion would apply mutatis mutandis to Ground No. 1 in A.Y 2004-05 and 2005-06. Consequently, Ground No 1 of the assessee in both the years are allowed and the AO is directed to delete the addition made u/s 40(a)(ia) of the Act.

Ground No. 2 in A.Y 2004-05]

19. Apropos Ground No. 2, the ld. AR submitted that the CIT(A) has erred in facts and in law in disallowing a sum of Rs. 19,05,993/- being trial run expenses holding the same to be capital expenditure. The ld. AR further submitted that the CIT(A) and the AO erred in not appreciating that the trial run expenses incurred for introducing the new models of motorcycle as part of the existing business were allowable a revenue deduction. The ld. AR drew our attention towards para 7 at page 3 of the assessment order and contended that the AO by passing a cryptic order made disallowance without looking into the facts of the case. The ld. AR further contended that the CIT(A) in para 8.3 dismissed the ground of the assessee by incorrectly observing that the general ledger details reveals that the expenses have been booked as trial run cost and trial parts purchased etc. Therefore, the AO rightly treated the same as capital expenditure and disallowed the same. The ld. AR placed reliance on the decision of the Hon'ble High Court of Bombay in the case of CIT Vs. Sonata Software Ltd reported at [2012] 21 Taxmann.com 23 [Bom] and submitted that the expenditure incurred on indigenisation of software has been rightly held to be allowable as revenue expenditure. The ld. AR also drew our attention towards the assessee's paper book page 131 and

submitted that the trial run expenses neither related to setting up of a new plant and were not incurred on purchase of any capital asset, such expenses were not incurred in capital and were allowable revenue expenses as per the test laid down by the Hon'ble Supreme Court in the case of Empire Jute Company Limited VS. CIT reported at 124 ITR 1.

20. The ld. AR lastly contended that the assessee incurred trial run expenses on the activity of indigenisation of software and consequently this activity boosted Indian economy. Therefore, the same has to be allowed as Revenue expenditure instead of capital expenditure as wrongly and incorrectly observed by the authorities below.

21. Per contra, the ld. DR strongly supported the action of the AO and the impugned order and submitted that as per the auditor's report submitted by the assessee itself, it was seen that the auditors have mentioned that these expenses were of capital in nature. Therefore, the same could not be treated as Revenue expenditure and the AO was quite justified and correct in disallowing the same.

22. After careful consideration of the above rival submissions and perusing the relevant material on record as well as the cited decisions, we find that it is an admitted fact that the assessee

incurred trial run expenses for introducing the new models of motorcycle as part of the existing business which the assessee claimed allowable as revenue deduction whereas the CIT(A) and the AO came to the conclusion that these expenses were capital expenditure. We find that as per the assessee, trial run expenses neither related to setting up of a new plant and were not incurred on purchase of any capital asset, such expenses were not incurred in capital and were allowable revenue expenses as per the test laid down by the Hon'ble Supreme Court in the case of Empire Jute Company Limited [supra]. The Hon'ble Apex Court in this case has held as under:

“There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none-the-less, be on revenue account and the test one during benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense that it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched. The expenditure would be on revenue account, even though the advantage may endure for an indefinite future.”

23. In the present case, we find that the expenses were essential expenses incurred on purchase of spare parts for their trial and indigenisation in India. The assessee has neither set up a new plant nor purchased any capital asset. Accordingly, in view of the above decision of the Hon'ble Supreme Court, we find no merit in the order of the AO nor in the impugned order of the CIT(A) holding the above expenses to be capital in nature. Consequently, ground No. 2 of the assessee is allowed.

24. In the result, the appeal stands allowed.

Revenue Appeal ITA No. 3237/DEL/2011 [A.Y 2003-04]

25. Both the parties concurred that Ground Nos 1 and 2 in A.Y 2003-04 are similar to the facts and circumstances of Ground No. 3 of A.Y 2007-08. Since by the earlier part of this order we have allowed ground No. 3 of the Revenue wherein the assessee got relief from the first appellate order on the issue of payments regarding sales tools expenses has been decided in favour of the Revenue and the order of AO has been restored. Thus our conclusion on Ground No. 3 in A.Y 2007-08 favouring the Revenue would apply mutatis mutandis to Ground No. 1 and 2 of the Revenue and thus Ground No. 1 and 2 in A.Y 2003-04. Consequently, Ground No 1 & 2 of the Revenue stand allowed.

26. In the result, the appeal of the Revenue stands allowed.

Assessee's Appeal ITA No. 3073/DEL/2011 [A.Y 2003-04]

27. Ground No. 1 and 1.1 raised in this appeal of the Revenue stand covered by Ground No. 2 of A.Y 2007-08, the decision of which has been given by us in the earlier part of this order wherein we have dismissed Ground No. 2 on similar issue in A.Y 2007-08. Following the same, we dismiss ground N. 1 and 1.1 in this A.Y also.

28. In the result, the appeal of the assessee stands dismissed.

The order is pronounced in the open court on 31.08.2016.

29. To sum up, in the result,

ITA No. 3073/Del/2011 [A.Y 2003-04] is allowed.
ITA No. 3074/Del/2011 [A.Y 2004-05] is allowed.
ITA No. 3075/Del/2011 [A.Y 2005-06] is allowed.
ITA No. 3460/Del/2013 [A.Y 2007-08] is partly allowed.
ITA No. 3237/Del/2011 [A.Y 2003-04] is allowed.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Sd/-
(C.M. GARG)
JUDICIAL MEMBER

Dated: 31st August, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR