आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND Shri Duvvuru RL Reddy, JUDICIAL MEMBER

आयकर अपील सं./**I.T.A.Nos.2403,1480/Mds./2014 & 807/Mds./2013**
निर्धारण वर्ष /Assessment years : 2008-09,2006-07 & 2009-10

M/s.Thermodyne Technologies Private Limited, 18, Ayodhya Colony, Velachery, Chennai 600 042. **[PAN AAACT 3393 E]** **(अपीलार्थी/Appellant)**	**Vs.**	The Assistant Commissioner of Income Tax, Company Circle III(2), Chennai 600 034. **(प्रत्यर्थी/Respondent)**

आयकर अपील सं./**I.T.A.No.2385/Mds./2014**
निर्धारण वर्ष /Assessment year :2008-09

The Assistant Commissioner of Income Tax, Company Circle III(2), Chennai 600 034. **(अपीलार्थी/Appellant)**	**Vs.**	**M/s.Thermodyne Technologies Private Limited,** 18, Ayodhya Colony, Velachery, Chennai 600 042. **[PAN AAACT 3393 E]** **(प्रत्यर्थी/Respondent)**

Assessee by : Shri S.Sridhar, Advocate
Revenue by : Shri A.V.Sreekanth, JCIT, D.R

सुनवाई की तारीख/Date of Hearing	:	01-05-2017
घोषणा की तारीख /Date of Pronouncement	:	02.06-2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This cross appeal is filed by the Assessee in ITA No.2403/Mds./14 & the Revenue in ITA No.2385/Mds/14 are directed against the order of the Learned Commissioner of Income Tax(A)-III, Chennai dated 27.06.2014 pertaining to the assessment year 2008-09. The other appeal of the assessee in ITA No.1480/Mds./2014 is directed against the order of Learned Commissioner of Income Tax(A)-III, Chennai dated 12.03.14 pertaining for assessment year 2006-07 and another appeal of the assessee in ITA No.807/Mds./2013 is directed against the order of Learned Commissioner of Income Tax(A)-III, Chennai dated 05.12.12 pertaining for assessment year 2009-10.

Since issues involved in all these Cross appeals as well as assessee's appeals are common in nature, these appeals are clubbed together, heard together, disposed off by this common order for the sake of convenience.

First we take up ITA No.1480/Mds./14(Assessee's Appeal: 2004-05)

2. In this appeal, only one ground for our consideration is with regard to sustenance of disallowance of the claim for deduction of

₹27,62,934/- being the provision for warranty quantified at 2% of the total sales in the computation of taxable total income without assigning proper reasons and justification.

3. The facts of the issue are that the AO disallowed the provision for warranty amounting to ₹27,62,934/- as it is not an allowable expenditure, relying on the decision of the Hon'ble jurisdictional High Court in the case CIT Vs. Rotark Controls India Ltd., reported in 293 ITR 311. Aggrieved with the order of AO, the assessee carried the appeal before the Ld.CIT(A). On appeal, the Ld.CIT(A) observed that the assessee provides specific percentage 2% on total sales and the same is written back in two years, in equal installments. Further, Ld.CIT(A) observed that the decision of the jurisdictional High Court cited supra relying by the ld. Assessing Officer was reversed by the Hon'ble Supreme Court in the case of M/s.Bharat Earth Movers Vs. CIT in (2000) 245 ITR 428(SC) wherein the Apex Court laid down certain important guidelines with regard to provisions for warranty to be allowed as a business expenditure. The gist of the guidelines is as follows:-

> *"a provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past even; (b) it is probable that an outflow*

of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized."

According to Ld.CIT(A), it is seen from the written submissions filed by the assessee that the assessee provides at a specific percentage "say 2%" which clearly indicates it is not based on any specific historical trend or data systematically maintained. Hence, the Ld.CIT(A), following the guideline of the Apex Court cited supra, confirmed the action of the ld. Assessing Officer. Against this, the assessee is in appeal before us.

4. Before us, ld.A.R submitted that on the basis of past experience, the assessee provided 2% of total sales as a provision for warranty and the same was written back in two equal installments, while the expenditure incurred for such warranty related items are written off as expenses in the years of incidence and he placed reliance in the judgement of Supreme Court in the case of M/s.Rotork Controls India Ltd. in 314 ITR 62(SC).

4.1. On the other hand, ld.D.R relief on the order of lower authorities.

5. We have heard both the parties and perused the material on record. In our opinion, the warranty based on the actionable basis or scientific basis, it is to be allowed. This fact was not demonstrated by the assessee before the Ld.CIT(A). If the methodology followed to make such warranty provisions in the books of accounts is on notional basis, then notional provisions cannot be allowed. The assessee is duty bound to explain the basis on which it was provided in the books of accounts of the assessee. Accordingly, the issue in dispute is remitted to the file of ld. Assessing Officer for fresh consideration.

5.1. In the result, the appeal No.1480/Mds/2014 is partly allowed for statistical purposes.

ITA No.2403/Mds./14(Assessee's appeal) & 2385/Mds./2014(Revenue's appeal) for A.Y 2008-09

These are cross appeals. First we take Assessee's appeal.

6. In assessee's appeal, Ground Nos.2 to 4 is with regard to disallowance made u/s.14A of the Act r.w.Rule 8D. At the time of hearing, the ld.A.R has not pressed these grounds. Accordingly, these grounds No.2, 3 & 4 stand dismissed as not pressed.

7. The next ground in this appeal is with regard to disallowance of foreign exchange fluctuation loss.

8. The facts of the issue are that the exchange loss on amount lying in EEFC account was Rs.5,09,335/-. The AO disallowed the foreign exchange fluctuation loss as notional since the assessee company has chosen to keep a portion of the receipt of export in EEFC account based on RBI guidelines. Aggrieved, the assessee carried the appeal before the Ld.CIT(A). Before Ld.CIT(A), the assessee submitted that the assessee company maintained accounts regularly on mercantile system and following accounting standards prescribed by ICAI, on account of fluctuation in the rate of foreign exchange as on the date of balance sheet was an item of expenditure u/s.37(1) of the Act, notwithstanding that the liability had not been discharged in the year in which the fluctuation in the rate of foreign exchange occurred and placed reliance in the case of Oil and Natural Gas Corporation Ltd. In [2010] 189 Taxman 292(SC). On appeal, the Ld.CIT(A) observed that while deciding the appeal in above cited supreme court judgemnet relied by the assessee, the Hon'ble Supreme Court followed the decision rendered in Woodward Governor India (P) Ltd.,. The Hon'ble Supreme Court while deciding the case summarized certain important factors to be taken into account on account of fluctuation in foreign exchange currency rates. The Ld.CIT(A) observed that the facts of the present case are completely different from the facts in the case referred to above. According to Ld.CIT(A), in this case the assessee

has not been able to prove that the factors mentioned by the Apex court in the case of Woodward Governor India (P) Ltd., had been adhered to by the assessee in its case. The facts of the assessee's case is that the money was lying in its EEFC A/c. Hence, Ld.CIT(A) upheld the action of the AO. Against this, the assessee is in appeal before us.

9. We have heard both the parties and perused the material on record. In our opinion, the loss incurred by the assessee on account of foreign exchange fluctuation is arisen on depositing of export proceeds in EEFC account based on RBI guidelines. Being so, the loss on this count to be allowed as a revenue loss in view of the judgment of Supreme Court in the case of Woodward Governor India (P) Ltd. in [2009] 312 ITR 254(SC). Accordingly, this ground of assessee is allowed

9.1. In the result, the appeal in 2403/Mds.2014 is partly allowed.

Revenue's Appeal"

10. The first issue in Revenue's appeal is with regard to deletion of disallowance of Rs.13,65,327/- u/s.40(a)(i) of the Act in respect of commission paid to M/s.Tricel Ltd, without deducting TDS.

10.1. The facts of the issue are that the AO found that the assessee made payments to a foreign agent and the assessee did not deduct

the TDS on the belief that the commission paid is not chargeable to tax and also the said company i.e. M/s.Tricel Ltd., does not have a permanent establishment in India. The ld. Assessing Officer did not accept the assessee's contention and placing reliance in the case of Van Oord ACZ India (P) Ltd. vs. CIT reported in 323 ITR 130(Del.), disallowed at Rs.13,65,327/- u/s.40(a)(i) of the Act. Aggrieved with the order of ld. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A). On appeal, the Ld.CIT(A) observed that the same issue was decided in favour of assessee in assessee's own case for assessment year 2009-10 by CIT(A)-1, Madurai and Ld.CIT(A) following the decision taken on this issue in the above CIT(A)'s order, Ld.CIT(A) directed the AO to delete the addition made u/s.40(a)(i) of the Act. Against this, the Revenue is in appeal before us.

10.2. We have heard both the parties and perused the material on record. A similar issue came for consideration before this Tribunal in assessee's own case in ITA Nos.1707 & 1782/Mds./2012 for assessment year 2008-09 vide order dated 27.04.2016 wherein held as follows:-

> *"27. We have considered rival submissions and perused the materials on record. With regard to the issue as to whether the TDS has to be deducted or not when the commission payment made to the overseas agents, the issue is squarely covered in favour of the assessee by the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. Faizan Shoes Pvt*

Ltd. [2014} 367 ITR 155, wherein by dismissing the appeal of the Revenue, the Hon'ble High Court has held as under:--

Held, dismissing the appeal, that on a reading of section 9(1)(vii) , commission paid by the assessee to the non-resident agents would not come under the term "fees for technical services". For procuring orders for leather business from overseas buyers, wholesalers or retailers, as the case may be, the non-resident agent was paid 2.5 per cent. commission on free on board basis. This was a commission simpliciter. What was the nature of technical service that the non-resident agents had provided abroad to the assessee was not clear from the order of the Assessing Officer. The opening of letters of credit for the purpose of completing the export obligation was an incident of export and, therefore, the non-resident agent was under an obligation to render such services to the assessee, for which commission was paid. The non-resident agent did not provide technical services for the purposes of running of the business of the assessee in India. Therefore, the commission paid to the non-resident agents would not fall within the definition of "fees for technical services" and the assessee was not liable to deduct tax at source on payment of commission.

28. Respectfully following the above judgement of the Hon'ble Jurisdictional High court cited supar, the ground raised by the Revenue is dismissed."

In view of the order of the Tribunal cited supra, this ground of Revenue is dismissed.

11. The second issue in Revenue's appeal is with regard to deletion of addition on account of retention money amounting to Rs.53,62,227/-.

11.1 The facts of the issue are that the AO found that retention money was not included in total income. Hence, the AO had added retention money on the basis of concept of accrual i.e. there cannot be postponement of income and enunciated the scope of total income u/s.5(1) of the Act. Aggrieved by the order of ld. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A). On appeal, the Ld.CIT(A) observed that the same issue was decided in favour of assessee in assessee's own case for assessment year 2009-10 by CIT(A)-1, Madurai and Ld.CIT(A) following the decision taken on this issue in the above CIT(A)'s order, Ld.CIT(A) directed the AO to delete the addition of Rs.53,62,227/-. Against this, the Revenue is in appeal before us.

11.2 After hearing both the parties, this issue came for consideration before the judgment of Madras High Court in the case of CIT vs East Coast Constructions and Ind. Ltd, 283 ITR 297(Mad.) wherein held that:-

> "the assessee was entitled to receive the retention money after completion of the contract. On the date of the bills, no enforceable liability had accrued or arisen. When the assessee had no right to receive the money by virtue of the contract between the parties and the assessee also had no right to enforce payment, it could not be said that the right to

receive payment of the remaining 10 per cent of the value of job had accrued."

Accordingly, this ground of Revenue stands dismissed.

11.3 In the result, the appeal of Revenue in ITA No.2385/Mds./2014 is dismissed.

ITA No.807/Mds./2013 (Revenue's appeal) (A.Y 2009-10)

12. The first issue in Revenue's appeal is with regard to deletion of disallowance u/s.40(a)(i) of the Act in respect of commission paid to M/s.Tricel Ltd., and M/s.English Boiler, without deducting TDS.

12.1 As discussed earlier the same issue in para -10 of this order in ITA No.2385/Mds./2014, this issue is squarely covered in favour of the assessee by the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. Faizan Shoes Pvt Ltd. [2014} 367 ITR 155(Mad.).Accordingly, this ground of Revenue stands dismissed.

13. The second issue in Revenue's appeal is with regard to deletion of addition on account of retention money amounting to Rs.49,35,891/-.

13.1 As discussed earlier the same issue in para -11 of this order in ITA No.2385/Mds./2014, this issue is squarely covered in favour of the assessee by the decision of the Madras High Court in the case of CIT vs East Coast Constructions and Ind. Ltd, 283 ITR 297(Mad.). Accordingly, this ground of Revenue stands dismissed.

14. The last issue is with regard to deletion of addition of Rs.50 lakhs made towards forfeited trade advances.

14.1 The facts of the issue are that the AO found that unsecured loans also included trade advances received from parties on account of contracts. The AO in his order called for details on advances from three parties, namely , Mata Energy Ltd., The Indure Pvt Ltd and Nirani Sugars Ltd. According to AO, no sales had been booked in respect of trade advances received during the previous year. The AO did not accept the explanation given by the assessee a regarding Nirani Sugars Ltd. as the assessee did not produce any proof for the defrayment of expenses. The AO made an addition of Rs.50lakhs towards forfeited trade advances. Aggrieved, the assessee carried the appeal before the Ld.CIT(A).

14.2 During the appellate proceedings before Ld.CIT(A), ld.A.R explained that the said advance (credit balance of Rs.50 lakh) was already brought to taxation by means of write back by way of credit to

administrative expenses, defraying the amount of Rs.30 lakhs from 'office maintenance –General' and Rs.20 lakhs from 'Draughtsman Service Charges'.The ld.A.R submitted that this was also brought to the notice of ld. Assessing Officer along with ledger extract in support of the entry. The main contention of ld.A.R was that the trade advance of Rs.50 lakh was added back to the total income as the liability was no longer payable. So, while the assessee itself had reckoned it as income and offered for taxation, the AO had without appreciating the entries passed defraying the expenses, has added the amount as income of assessee. The Ld.CIT(A) observed that the AO is not justified in making the addition of Rs.50 lakhs since the assessee itself had considered it no longer as a liability and taken credit of the expenditure to an equal amount in two heads. It is seen that to this extent, the taxable income of assessee had increased by defrayment of expenses of a like amount. The journal entry passed to this effect is sufficient evidence of the assessee having brought this amount for taxation. Though these details were before the AO even during the course of assessment proceedings, the AO has failed to appreciate the accounting entry passed by the assessee in this regard. Hence, Ld.CIT(A) deleted the addition made by the AO on this count. Against this, the Revenue is in appeal before us.

14.3 We have heard both the parties and perused the material on record. The Ld.CIT(A) deleted the addition without calling for a remand report from the AO and the submissions of the assessee is not at all verified by the AO. Hence, this issue in dispute is remitted to the file of AO for fresh consideration.

14.1. In the Result, this appeal No.807/Mds./2013 is partly allowed for statistical purposes.

15. To sum up, the appeal of assessee in 2403/Mds.2014 is partly allowed and appeals of Revenue in ITA No.2385/Mds./2014 and ITA No.2385/Mds./2014 are dismissed & in ITA No.807/Mds./2013 is partly allowed for statistical purposes.

Order pronounced on 02nd June, 2017, at Chennai.

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	**(चंद्र पूजारी)**
(**DUVVURU RL REDDY**))	**(CHANDRA POOJARI)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 02nd June, 2017.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF