IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A. No.6163/Mum/2014 - Assessment Year 2010-11
I.T.A. No.7991/Mum/2019 - Assessment Year 2015-16

Thyssenkrup Industrial Solutions (India) Private Limited Uhde House, L.B.S Marg Vikhroli (West), Mumbai-400 083 PAN : AAACU1416H	vs	The Deputy Commissioner of income-tax, Range-15(3)(1), Mumbai
APPELLANT		**RESPONDENT**

I.T.A. No.6232/Mum/2016
(Assessment year 2010-11)

The Deputy Commissioner of Income-tax, Circle-15(3)(2), Mumbai	vs	Thyssenkrup Industrial Solutions (India) Private Limited Uhde House, L.B.S Marg Vikhroli (West), Mumbai-400 083 PAN : AAACU1416H
APPELLANT		**RESPONDENT**

Assessee by	Shri M.M. Golwala, AR
Revenue by	Shri Narendra Singh Janpangi, DR

Date of hearing	09-03-2021
Date of pronouncement	25-05-2021

O R D E R

Per Saktijit Dey, JM:

Captioned are cross appeals for assessment year 2010-11 and appeal by the assessee for assessment year 2015-16. While cross appeals for assessment year 2010-11 arise out of order dated 29-07-2016 passed by learned Commissioner of Income Tax (Appeals)-24, Mumbai, the appeal for assessment year 2015-16 is against the final assessment order passed in pursuance to directions of the Dispute Resolution Panel (DRP).

ITA 6232/Mum/2016 – Revenue's appeal (Assessment Year 2010-11)

2. At the outset, learned Counsel for the assessee submitted, the tax effect in this appeal of the revenue is below the monetary limit of Rs.50 lakhs as per circular No.17/2019 dated 08th August, 2019 issued by the Central Board of Direct Taxes (CBDT) for filing appeal before the Tribunal. Therefore, appeal is not maintainable. To substantiate his contention that the tax effect of the amount disputed by the revenue is below Rs.50 lakhs, learned Counsel drew our attention to the grounds raised by the revenue and the order of learned Commissioner of Income Tax (Appeals) as well as the order passed by the assessing officer while giving effect to the order of the learned first appellate authority.

3. The learned Departmental Representative has not opposed the aforesaid contention of the assessee.

4. Having heard rival submissions and perused materials on record and more particularly, the order dated 05-02-2018 passed by the assessing officer giving effect to the order of learned Commissioner of Income Tax (Appeals), we find that the amount disputed by the revenue in this appeal is Rs.1,08,24,657/-.

Undisputedly, the tax effect on the aforesaid amount disputed by the revenue is much below the monetary limit of Rs.50 lakhs prescribed by the CBDT in circularNo.17/2019 dated 08th August, 2019 for filing appeal before the Tribunal. In view of the aforesaid, we dismiss the appeal due to low tax effect.

5. In the result, appeal is dismissed.

ITA No.6163/Mum/2016 – Assessee's Appeal for Assessment Year 2010-11

6. In grounds 1, 2 &3, assessee has challenged the addition made on account of alleged understatement of receipts in respect of the project by following percentage of completion method of accounting.

7. Briefly the facts are, the assessee, a resident company, is stated to be engaged in the business of supply of process, designing, supply, construction and commissioning of building plant for the chemical, fertilizer, petrochemical and related industries. The assessee recognizes its revenue in respect of various projects following percentage of completion method of accounting. The assessing officer, however, did not accept the method of accounting followed by the assessee and proceeded to compute income on the basis of bills/invoices raised by the assessee during the year. Accordingly, he made addition of Rs.43,56,12,194/- to the income of the assessee. Learned Commissioner of Income Tax (Appeals) also sustained the addition made by the assessing officer.

8. Before us, learned Counsel for the assessee submitted that the assessee is consistently following the aforesaid method of accounting for revenue recognition from assessment year 2004-05 onwards and while deciding identical dispute in assessee's own case for assessment year 2006-07, the Tribunal has

deleted similar disallowance made by the assessing officer. In this context, he drew our attention to the order passed by the Tribunal in ITA No.1691/Mum/2012 dated 09-04-2019.Further, he submitted, similar disallowance/addition made in assessment years 2007-08 and 2009-10 were also deleted by the Tribunal while deciding assessee's appeals on the disputed issue.

9. The learned Departmental Representative, though, agreed that the issue in dispute is covered by the decision of the Tribunal, however, he relied upon the observations of the assessing officer and learned Commissioner of Income Tax (Appeals).

10. We have considered rival submissions and perused materials on record. It is evident, identical issue came up for consideration before the Tribunal in assessee's own case for assessment year 2006-07. While deciding the issue in the order referred to above, the Tribunal deleted the addition holding as under:-

> *"2.5.5 Upon careful consideration, the undisputed position that emerges is that the assessee is following consistent method of accounting to recognize the revenue under these contracts. percentage of completion of the project has been worked out as per total cost incurred on the project to date vis-à-vis total budgeted cost and that fraction is applied to the contract value for the purpose of revenue recognition. Similar formulae have been adopted by the assessee in preceding two years which has been accepted by the revenue. No case of revenue leakage has been established before us. Nothing on record suggest that remaining income under the project has not been offered by the assessee in subsequent years, following the same method of accounting. Simply because progress billing was more than the stage of percentage of completion, the same, in itself, could not be the basis to usurp the consistent method of accounting being followed by the assessee. Therefore, the additions made by the revenue, under the circumstances, could not be sustained. We order so. Accordingly, ground Nos. 7 to 11 of assessee's appeal stands allowed."*

11. Following the aforesaid decision, the Tribunal has decided the issue in favour of the assessee in assessment year 2007-08 vide ITA No.1904/Mum/2012 dated 08-06-2020 and in assessment year 2009-10 vide ITA No.1245.Mum/2014 dated 07-08-2020. Facts being identical, respectfully following the consistent view of the Tribunal expressed in assessee's own case in preceding assessment years referred to above, we delete the addition made by the assessing officer and sustained by learned Commissioner of Income Tax (Appeals). These grounds are allowed.

12. Ground 4 is not pressed; hence, dismissed.

13. In grounds 5 & 6 assessee has challenged addition of Rs.1,72,26,690/- (wrongly mentioned as Rs.9,02,57,424/- in the ground) towards addition on account of excess of progress billing over inventories.

14. At the outset, learned Counsel for the assessee submitted, the issue is squarely covered by the decision of the Tribunal in assessee's own case for assessment years 2006-07 and 2009-10.

15. The learned Departmental Representative, though, agreed that the issue is covered by the decisions of the Tribunal, however, he relied upon the observations of the assessing officer and learned Commissioner of Income Tax (Appeals).

16. Having considered rival submissions, we find that identical issue relating to similar addition made in assessment year 2006-07 came up for consideration

before the Tribunal. While deciding the issue, in the order referred to above, the Tribunal has held as under:-

> "2.6.3 Upon careful consideration, we find that the assessee has accumulated cost as well as revenue under these projects in the Balance Sheet by following completed contract method. The revenue has accepted such accumulation during AYs 2004-05 & 2005-06 and this is the third year of accumulation under the projects. It is not the case of the revenue that the income under these projects have not been offered to tax in subsequent years. No case of revenue leakage has been established before us. Therefore, the action of revenue in disturbing the consistent method of accounting being followed by the assessee could not be held to be justified. Hence, we delete the impugned additions and allow these grounds of appeal."

17. Identical view was expressed by the co-ordinate bench while deciding assessee's appeal in assessment year 2009-10 (supra). Facts being identical, respectfully following the decisions of the Tribunal in assessee's own case, as referred to above, we delete the addition. These grounds are allowed.

18. Grounds 7 to 12 being not pressed, are dismissed.

19. In ground 13, the assessee has raised the issue of non grant of TDS credit of Rs.19,16,963/-.

20. Having considered rival submissions, we direct the assessing officer to verify form 26AS and other materials on record and grant credit for TDS in accordance with law. This ground is allowed for statistical purpose.

21. Ground 14 being consequential in nature, does not require adjudication.

22. In addition to the main grounds, assessee has raised three additional grounds. The additional grounds raised by the assessee, since, do not require investigation into fresh facts, we are inclined to admit them for adjudication.

23. In grounds 1 & 2 of additional grounds, the assessee has raised the issue of deduction of education cess and higher and secondary education cess on income-tax amounting to Rs.47,49,963/-.

24. Having considered rival submissions, we find that this issue is squarely covered by the decision of Hon'ble jurisdictional High Court in case of Sesa Goa Ltd vs JCIT (2020) 423 ITR 426 (Bom), wherein, the Hon'ble Court has held that amount paid towards education cess and higher and secondary education cess on income-tax is an allowable deduction. The same view has been expressed by the co-ordinate bench in case of M/s Baroda Industries Pvt Ltd vs DCIT in IT No.2547/Mum/2019 dated 27-11-2020.Respectfully following the aforesaid decisions, we allow assessee's claim. These grounds are allowed.

25. In ground 3 of additional ground, the assessee has claimed depreciation on certain expenditure incurred in the assessment year 2008-09.

26. Briefly the facts are, in assessment year 2008-09 the assessee had incurred expenses of Rs.3,60,80,058/- towards repair and claimed it as revenue expenditure. However, assessee's claim was rejected by the assessing officer by treating the expenditure as capital in nature. The decision of the assessing officer was also upheld by learned Commissioner of Income Tax (Appeals).

27. Before us, learned Counsel for the assessee submitted, against the order of learned Commissioner of Income-tax (Appeals) in assessment year 2008-09, the assessee had filed an appeal before the Tribunal, which, though has been heard, but order is still awaited. He submitted, while deciding assessee's appeal in assessment year 2008-09, though, learned Commissioner of Income Tax

(Appeals) upheld the nature of expenditure as capital; however, he allowed depreciation on the expenditure incurred. Thus, the learned Counsel submitted, in case assessee's claim of revenue expenditure is not accepted in assessment year 2008-09, consequential relief relating to claim of depreciation should be allowed.

28. The learned Departmental Representative submitted, the issue can be decided on the basis of order to be passed by the Tribunal in assessment year 2008-09.

29. We have considered rival submissions and perused materials on record. As submitted by learned Counsel for assessee, the expenditure on which the assessee has claimed depreciation in the current year was debited as revenue expenditure in the assessment year 2008-09. Admittedly, the assessee is contesting the issue before the Tribunal in assessment year 2008-09 and as submitted, the appeal has been heard. Therefore, assessee's claim of depreciation would depend on the outcome of the decision of the Tribunal regarding assessee's claim of revenue expenditure in assessment year 2008-09. In case, assessee's claim is accepted in assessment year 2008-09, this ground would become infructuous. Otherwise, if the Tribunal agrees with the departmental authorities that the expenditure is capital in nature, the assessee would be entitled to claim depreciation. Accordingly, this ground is restored back to the assessing officer for deciding afresh keeping in view the order of the Tribunal for assessment year 2008-09. This ground is allowed for statistical purposes.

30. In the result, appeal is partly allowed.

ITA 7991/Mum/2019 – Assessee's appeal – Assessment Year 2015-16

31. Grounds 1, 2 & 3 are identical to grounds 1, 2 & 3 of ITA No.6163/Mum/2016 decided by us in the earlier part of the order. Facts being identical, our decision therein will apply mutatis mutandis to these grounds as well. Accordingly, grounds are allowed.

32. Grounds 4 to 7 are not pressed; hence, dismissed.

33. Ground 8 is identical to additional ground 3 of ITA No.6163/Mum/2016 decided by us earlier in this order. Following our decision therein, we restore the issue to the assessing officer for allowing assessee's claim of depreciation in case the expenditure incurred by the assessee is held to be of capital nature by the Tribunal while deciding the appeal for assessment year 2008-09. This ground is allowed for statistical purposes.

34. In ground 9, the assessee has raised the issue of short grant of TDS.

35. Having heard the parties, we direct the assessing officer to verify form 26AS and other materials on record and allow credit for TDS as may be admissible and in accordance with law. This ground is allowed for statistical purpose.

36. In ground 10, assessee has raised the issue of non grant of foreign tax credit of Rs.43,24,819/-.

37. We have considered the submissions of the parties and perused materials on record. It is the contention of the assessee that the entire income earned by the assessee, whether in India or from contracts executed in foreign countries have been offered to tax in India and the assessee has shown positive income.

Hence, credit for tax paid in foreign countries should be given. Undisputedly, the aforesaid issue was not a subject matter of dispute before learned DRP. This issue has been raised for the first time before us. All relevant facts relating to assessee's claim have to be examined, as, they were never examined at any stage. Therefore, we restore the issue to the assessing officer for examining assessee's claim and deciding it in accordance with law. We make it clear, we have not expressed any opinion on the merits of assessee's claim which the assessing officer has to decide keeping in view the allowability of assessee's claim vis-à-vis the legal position. Of course, the assessing officer has to provide a reasonable opportunity of being heard to the assessee before deciding the issue.

38. In ground 11, the assessee has challenged the levy of interest under section 234A of the Act.

39. It is the claim of the assessee that the return of income having been filed within the time limit prescribed under section 139(1) of the Act, no interest under section 234A can be charged. Keeping in view the aforesaid submission of the learned Counsel, we direct the assessing officer to verify the date of filing of return and in case it is found that the return of income was filed within the due date as per section 139(1) of the Act, no interest under section 234A can be charged.

40. Ground 12 being consequential in nature, does not require adjudication.

41. Besides the above grounds, the assessee has raised additional grounds 1 & 2 claiming deduction of education cess and higher and secondary education cess amounting to Rs.47,49,963/-. The issue raised in these additional grounds are

identical to the issue raised in ground 1 & 2 of additional grounds raised in ITA No.6163/Mum/2016. Following our decision therein, we admit the additional grounds and allow assessee's claim of deduction. These grounds are allowed.

42. In the result, appeal is partly allowed.

43. To sum up, Revenue's appeal is dismissed and assessee's appeals are partly allowed.

Order pronounced on 25/05/2021.

Sd/- sd/-

RAJESH KUMAR	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dt : 25/05/2021
Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

By Order

Asstt. Registrar, ITAT, Mumbai