



ITA Nos. 5465/Mum/2017 & 4741/Mum/2017
Kamani Oil Industries Private Limited
Assessment Year: 2013-14

आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“H” BENCH, MUMBAI

माननीय श्री पवन सिंह , न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE HON’BLE SHRI PAWAN SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.5465/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

Kamani Oil Industries Pvt. Ltd. (Now known as AAK Kamani Pvt. Ltd.) 317, Pooran Asha Building Narsi Natha Street Masjid, Mumbai-400 009.	बनाम/ Vs.	Dy. Commissioner of Income Tax-6(3)(2) R. No.524, Aayakar Bhavan Mumbai-400 020.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AACCK-4395-B		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./I.T.A. No.4741/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

Dy. Commissioner of Income Tax-6(3)(2) R. No.524, Aayakar Bhavan Mumbai-400 020.	बनाम/ Vs.	Kamani Oil Industries Pvt. Ltd. (Now known as AAK Kamani Pvt. Ltd.) 317, Pooran Asha Building Narsi Natha Street Masjid, Mumbai-400 009.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AACCK-4395-B		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Mahesh O. Rajora - Ld.AR
Revenue by	:	B. Srinivas-Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	13/11/2018
घोषणा की तारीख / Date of Pronouncement	:	02/01/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)



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1. These are cross appeals for Assessment Year [AY] 2013-14 which contest the order of Ld. Commissioner of Income Tax (Appeals)-12, Mumbai [CIT(A)], *Appeal No.CIT(A)-12/DCIT-6(3)(2)/94/15-16* dated 03/07/2016 on separate grounds of appeal. It is noted that the original order by Ld. first appellate authority was passed on 21/04/2017. However, the same has subsequently been rectified on 03/07/2017 [wrongly written as 03/07/2016]. The assessee has contested the order dated 03/07/2017 whereas the revenue has contested the order dated 21/04/2017. The grounds urged by assessee read as under:

1. (a) *The Commissioner of Income Tax(Appeals) - 12, Mumbai [CIT(A)] erred in rejecting the contention of the Appellant that software purchased from Techent Solution of Rs.7,43,689/- are capitalized in block of asset and on the facts and circumstances of the case of the Appellant and in law, no disallowance is attracted u/s 40(a)(ia) of the Act.*
- (b) *Without prejudice to above, the CIT(A) erred in not appreciating that on the facts and circumstance of the case and in law, no TDS u/s 194J of the Act was deductible on payment made to Technet Solution towards purchase of software; hence no disallowance is attracted u/s 40(a)(ia) of the Act.*

The grounds urged by revenue reads as under:-

1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition on account of estimation of Gross Profit @ 9 % and rejection of books u/s. 145."*
2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) failed to appreciate the fact that the assessee had failed to provide the details of consumption of raw material (seeds) vis-a-vis yields, separately in respect of different types of oils (cotton, mustard and ground nut, etc.) extracted from different seeds, when there is huge variation in the market price of these oils, and this being one of the main reasons for rejection of book result u/s. 145."*
3. *The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside to the file of the AO or confirm the order of the AO "*

2.1 Facts germane to the issues are that the assessee being *resident corporate entity* engaged in the business of *manufacturing, refining and trading of edible oil & vanaspati* was assessed for impugned AY in scrutiny assessment u/s 143(3) on 28/03/2016 wherein the income of the



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assessee was assessed at Rs.52.89 Crores after certain additions / adjustments as against returned loss of Rs.3.46 Crores *e-filed* by the assessee on 30/09/2013.

2.2 During assessment proceedings, it was noted that the turnover of the assessee increased from Rs.898 Crore in immediately preceding AY to Rs.942.30 crores during impugned AY whereas *Gross Profit Rate* fell from 3.55% to 3.03% despite there being no material change in the activities being carried out by the assessee. The assessee attributed the same to increase in cost of packing material, employee cost and change in grouping of expenses. It transpired that the manufacturing process involved procuring of various edible oils from the market-both national as well as international market and then mixing up different edible oils to manufacture different brands of products or simply refining the oil without mixing. The various manufacturing inputs included coconut oil, palm oil, ground nut oil and sesame oil etc. Although the quantitative data in respect of individual oil was available, however, manufacturing output data against the same was not available. The assessee submitted that since the manufactured products varied in mix, constitution and weight etc. such a correlation of the consumption and output for each such input was not possible. A tally of quantitative data was submitted wherein the total quantity consumed under different heads of raw material and final output as a whole was furnished. It was also submitted that very nature of the manufacturing process makes it difficult to have any reasonable and determinable correlation of the output vis-à-vis the input. However, not convinced, Ld. AO proceeded to reject the books of accounts u/s 145(3) and estimated the *Gross Profit Rate [GP Rate]* of 9% against



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turnover of Rs.942.30 Crores as reflected by the assessee. After adjusting the already declared *Gross Profit*, the net addition thus worked out to be Rs.56.27 Crores which was added to the income of the assessee.

2.3 The second addition u/s 40(a)(ia) stem from the fact that the assessee failed to deduct tax at source u/s 194J against software payment of Rs.7.43 Lacs stated to be made to an entity namely *Technet Software Solutions*. The assessee pointed out that the said expenditure was capitalized in the books and therefore, disallowance u/s 40(a)(ia) was not justified. However, disregarding the same, Ld. AO disallowed the same u/s 40(a)(ia).

3. Aggrieved, the assessee agitated the same with partial success before Ld. CIT(A) vide impugned order dated 21/04/2017 wherein Ld. CIT(A) relying upon Tribunal's order in assessee's own case for AY 2011-12 over-ruled the stand of Ld.AO in rejecting the books of accounts u/s 145(3). The assessee had raised an alternative ground number-3 to submit that the comparable *GP Rate* of the impugned AY was 5.31% and not 3.03% as adopted by Ld. AO. It was explained that the variation in *GP Rate* arose on account of the fact that there was a change in grouping of expenses and certain selling & distribution expenses during impugned AY were treated as part of manufacturing cost unlike AY 2011-12 where these expenses were treated as part of *Commission & brokerage expenses*. The comparable *GP Rate* for earlier AYs was also placed on record to fortify the submissions. Finding strength in the same, Ld. CIT(A) remitted the matter back to the file of Ld. AO to verify this aspect of comparison of *GP Rate*. The addition u/s 40(a)(ia) was deleted



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by observing that nothing was payable on the last day of the financial year and therefore the additions were not warranted in terms of the decision of *Vishakhapatnam Tribunal* rendered in *Merilyn Shipping & Transports Vs. ACIT*.

4. Subsequently, the assessee filed a rectification application u/s 154 before Ld. CIT(A) to seek rectification of certain errors. It was pointed out that when the books of accounts were accepted then the addition on the basis of *GP Rate* was not justified and ground number-3 raised by the assessee, being only an alternative ground, was not required to be adjudicated. Finding strength in the plea, ground number-3 was left open and was not adjudicated upon by first appellate authority. Regarding disallowance u/s 40(a)(ia), it was submitted that since the software expenses were capitalized in the books, the addition thereof u/s 40(a)(ia) was not justified in terms of decision of this Tribunal rendered in *Sonic Extraction Private Limited [23 ITR 447]* & *Skol Breweries Ltd. [142 ITD 49]*. However, Ld. CIT(A) relying upon the decision rendered in *Spaco Carburettors (I) Ltd. [3 SOT 798]* rejected these submissions. Therefore, the rectification in this respect was rejected. In other words, the stand of Ld. CIT(A) in providing relief to the assessee by placing reliance on the decision rendered in *Merilyn Shipping & Transports Vs. ACIT* remained intact. Aggrieved, the assessee as well as revenue is in further appeal before us. The revenue is aggrieved by deletion of estimated additions as made by Ld. AO by applying *GP rate* whereas the assessee is aggrieved by dismissal of the submission in rectification application that addition u/s 40(a)(ia) was not warranted since the expenditure was capitalized in the books of accounts.



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5. The Ld. Authorized Representative for Assessee [AR], *Shri Mahesh Rajora* taking us through the documents placed in the *paper-book* submitted that similar *GP* additions made in earlier two AYs has been deleted by the Tribunal and facts were similar in the impugned AY. Our attention was also drawn to the fact that the comparable *GP Rate* for the impugned AY works out to 5.31% and therefore, there was only a minor variation in the same which do not justify rejection of books of accounts. Regarding disallowance u/s 40(a)(ia), it was submitted that the assessee has claimed only depreciation against the software expenditure which was only statutory allowance and therefore, could not be disallowed by applying the provisions of Section 40(a)(ia). Per *Contra*, Ld. Departmental Representative, *Shri B.Srinivas CIT-DR*, submitted that fall in *GP Rate* was not satisfactory and mere grouping of expenditure would not alter the net profit offered by the assessee to tax. Regarding disallowance u/s 40(a)(ia), it was submitted that the same was to apply in all cases since the statutory provisions override all the other provisions of the act.

6.1 We have carefully heard the rival contentions and perused relevant material on record including documents placed in the *paper-book* and judicial pronouncements as cited before us. Upon due consideration, we find that the assessee is a *corporate entity* who was mandatorily required to maintain books of accounts as per *The Companies Act* as well as under *The Income Tax Act*. The accounts were subjected to Audits under both the Act. The assessee's turnover stood at Rs.942.30 Crores during the impugned AY and the extensive stock details were being maintained by the assessee. The only basis of rejection of books of



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accounts was the fact that there was fall in *GP Rate* in comparison to earlier years and the assessee failed to submit quantitative details of consumption of input material vis-à-vis each individual output products. Per *contra*, it is noted the aforesaid details could not be provided by the assessee since the manufactured products varied in mix, constitution and weight etc. such a correlation of the consumption and output for each such input was not possible. Nevertheless, quantitative details of input material vis-à-vis final output as a whole were furnished. Nothing on record suggests any discrepancies / infirmity in the same. The explanation that the very nature of the manufacturing process made it difficult to have any reasonable and determinable correlation of individual output vis-à-vis the input appears to be plausible one. Further, consistent accounting policies were being followed by the assessee and similar records were being maintained in earlier years. The Ld. AO has failed to adduce any cogent evidence to suggest any serious defect or discrepancy in the books of accounts or bring on record any material to establish that the assessee made any sales outside the books of accounts or inflated any expenditure. A mere fall in the *GP Rate* could only be a ground for making further in-depth inquiries but could not be by themselves a ground for rejection of books of account since in terms of statutory provisions of Section 145(3), the books could be rejected only in situation where Ld. AO was not satisfied about the correctness or completeness of the accounts of the assessee. This condition, in the present case, in our opinion, has remained unfulfilled.

6.2 Proceeding further, we find that similar additions were made in the quantum assessment for AYs 2011-12 & 2012-13. The matter for AY



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2011-12 reached up-to the level of this Tribunal wherein the Tribunal rejected the stand of revenue in rejecting assessee's books of accounts. During impugned AY, the Ld. first appellate authority, relying upon the stand of Tribunal in AY 2011-12, has over-ruled the stand of Ld. AO in rejecting the books and estimating the income on the basis of *GP rate*. Nothing on record suggest that the aforesaid order of the Tribunal for AY 2011-12 has ever been overruled by any competent judicial authority. There is no change in the material facts or circumstances during impugned AY. The matter for AY 2012-13 has also reached up-to the level of this Tribunal vide *ITA No. 5010/Mum/2016 & 4964/Mum/2016 order dated 10/10/2018* wherein, following the order for AY 2011-12, similar stand has been taken.

6.3 Therefore, viewed from any angle, the stand of Ld. AO in rejecting the books of accounts u/s 145(3) and making addition on the basis of *GP rate* could not be upheld and therefore, we see no reason to interfere with the impugned order. The revenue's appeal stand dismissed.

7.1 The only ground in assessee's appeal is related with disallowance u/s 40(a)(ia). We find that Ld. first appellate authority, in the original appellate order, has already deleted the impugned addition by following the decision of *Vishakhapatnam Tribunal* rendered in *Merilyn Shipping & Transports Vs. ACIT* and the revenue is not under appeal against the same. Therefore, the adjudication of this ground is merely academic in nature. Nevertheless, the Ld. AR has urged that the decision of *Spaco Carburettors (I) Ltd. [3 SOT 798]* as relied upon by Ld. CIT(A) in rectification proceedings, does not apply to the fact of the case since that decision was rendered in the context of expenditure incurred u/s 35AB



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and not in the contest of depreciation u/s 32 which is the case here. Our attention is drawn to the decision of this Tribunal rendered in *Skol Breweries Ltd.* [142 ITD 49] to submit that the issue under appeal stood squarely covered in assessee's favor.

7.2 Upon perusal of both the judicial pronouncements, we agree with the contention of Ld. AR that the issue stood squarely covered by the following observations of this Tribunal rendered in *Skol Breweries Ltd.* [supra]:-

16.2 *It is manifest from the plain reading of provisions of sec. 40(a)(i) that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, section 40 refers to the outgoing amount chargeable under this Act and subject to TDS under Chapter XVII-B. There is a difference between the expenditure and other kind of deduction. The other kind of deduction which includes any loss incidental to carrying on the business, bad debts etc., which are deductible items itself not because an expenditure was laid out and consequentially any sum has gone out; on the contrary the expenditure results a certain sums payable and goes out of the business of the assessee. The sum, as contemplated under sec. 40(a)(i) is the outgoing amount and therefore, necessarily refers to the outgoing expenditure. Depreciation is a statutory deduction and after the insertion of Explanation 5 to sec. 32, it is obligatory on the part of the Assessing Officer to allow the deduction of depreciation on the eligible asset irrespective of any claim made by the assessee. Therefore, depreciation is a mandatory deduction on the asset which is wholly or partly owned by the assessee and used for the purpose of business or profession which means the depreciation is a deduction for an asset owned by the assessee and used for the purpose of business and not for incurring of any expenditure.*

16.3 *The deduction u/s 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Depreciation is not an outgoing expenditure and therefore, the provisions of sec. 40(a)(i) of the Act are not attracted on such deduction. This view has been fortified by the decision of the Hon'ble Punjab & Haryana High Court in the case of Mark Auto Industries Ltd. (supra) in pars 5 & 6 as under:*

"5. Adverting to questions (ii) and (iii), the issue which arises for consideration is whether the assessee could be disallowed claim for depreciation under Section 40(a)(i) of the Act on the ground that the payments made for technical know-how which had been capitalized, no tax deduction at source has been made thereon. The Tribunal while accepting the plea of the assessee, in para 3, had noticed as under:



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"3. Ground no. 4 is against deletion of an addition of Rs. 6,88,1751- made by the AO on account of deduction of depreciation on technical know-how as the assessee failed to deduct tax in accordance with the provision contained in section 40(a)(i). The finding of the learned CIT(A) was that the assessee had incurred, expenditure by way of technical know-how, which was capitalized amount as made in the return of income. Since the assessee had not claimed deduction for the amount paid, the provisions contained in section 40(a) (i) were not attracted. The learned DR could not find any fault with this direction of the CIT(A) also although she referred to page 4 of the assessment order, where it was mentioned that the tax deducted in respect of the payment was made over to the Government in the subsequent year and, therefore, depreciation could not be deducted on the capital expenditure incurred by the assessee. In reply, the learned counsel pointed out that the expenditure by way of technical know-how was capitalized and it was not claimed as revenue expenditure. Therefore, there was also no reason to disallow depreciation on such capitalized amount as the aforesaid provision does not deal with deduction of depreciation. Having considered arguments from both the sides, we are of the view that there is no error in the order of the learned CIT(A) which requires correction from us. Thus, this ground is also dismissed."

6. Learned counsel for the revenue was unable to substantiate that in the absence of any requirement of law for making deduction of tax out of the expenditure on technical know how which was capitalized and no amount was claimed as revenue expenditure, the deduction could be disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity could be found in the order passed by the Tribunal which may warrant interference by this Court. Thus, both the questions are answered against the revenue and in favour of the assessee."

16.4 In view of the above discussion as well as following the decision of the Hon'ble Punjab & Haryana High Court, we decide this issue in favour of the assessee and against the revenue.

The other decision has been rendered in the context of expenditure u/s 35AB. Respectfully following the cited decision, we find substantial force in the argument that depreciation being statutory allowance in nature and not an actual outgoing for the assessee and therefore, could not be disallowed by applying the provisions of Section 40(a)(ia). The assessee's appeal stands allowed.

Conclusion

8. The revenue's appeal ITA No.4741/Mum/2017 stands dismissed whereas the assessee's appeal ITA No.5465/Mum/2017 stands allowed in terms of our above order.



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Order pronounced in the open court on 02nd January, 2019

Sd/-

(Pawan Singh)

Sd/-

(Manoj Kumar Aggarwal)

न्यायिक सदस्य / **Judicial Member** लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 02/01/2019

Sr.PS:- Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
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