

Gurbax Singh  
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**ITA No. 173 of 2015 (O&M)  
Date of decision: 19.07.2017**

**The Pr. Commissioner of Income Tax-2, Chandigarh**

**.....Appellant**

**Vs.**

**M/s Vertex Infosoft Solutions Pvt.Ltd, SCO-273, 2<sup>nd</sup> Floor, Sector-35-D,  
Chandigarh.**

**.....Respondent**

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL  
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Ms. Urvashi Dhugga, Senior Standing Counsel for the appellant.

Mr. Pankaj Jain, Senior Advocate with Mr. Divya Suri, Advocate  
for the respondent.

**Ajay Kumar Mittal,J.**

1. The appellant-revenue has filed the instant appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 18.11.2014, Annexure A.5, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh (in short, "the Tribunal") in ITA No. 1123/Chd/2013, for the assessment year 2010-11, claiming following substantial questions of law:-

- (i) “Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT is justified in treating the transfer of license to use software as a ‘sale’, instead of ‘royalty’ by relying on decision of Hon’ble Supreme Court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh (2004) 141 Taxman 132(SC) given under Andhra Pradesh General Sales Tax Act, 1957?
- (ii) Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT is justified in not treating the “Usher charges” on transfer of licenses as “royalty” in view of explanations (2) & (5) to Section 9 of the Act?

2. A few facts necessary for adjudication of the controversy involved, as narrated in the appeal, may be noticed. The assessee company e-filed the return of income for the assessment year 2010-11 on 27.09.2010 declaring income of ₹ 12,83,680/-. As per the computation submitted, the profit as per profit and loss account was ₹ 1,09,86,979/-. After adjusting depreciation and interest on FDRs, the profit on business was determined at ₹ 1,00,14,313/-. The assessee company claimed exemption under Section 10B of the Act at ₹ 97,60,732/-. During the course of assessment proceedings, the counsel for the assessee sought a number of adjournments, praying that the assessment be kept pending till the disposal of appeal in earlier assessment years by the Tribunal. As the assessee requested for adjournments on one pretext or the other, the Assessing Officer was compelled to finalize the case and assessment was made under Section 144 of the Act. In the order under Section 144 dated 27.12.2012 income before deduction under Section 10B of the Act was determined at ₹ 1,10,44,407/-. Additions of ₹ 6,98,603/- on account of foreign exchange fluctuation, ₹ 6,90,000/- on account of capital loss being shares written off, ₹ 6,12,380/-

on account of disallowance of travelling and local conveyance expenses considering the same to be for non-business purposes and of personal nature, ₹ 20,26,197/- on account of Singapore living expenses, ₹ 33,867/- on account of short declaration of interest received from Axis Bank and ICICI Bank, ₹ 8,676/- on account of short receipt of professional and technical services fee and ₹ 6,96,000/- under Section 40A(2)(b) of the Act on account of excess salary were made in the case. Income was assessed at ₹ 1,58,10,130/-. The Assessing Officer passed order under Section 154 dated 16.01.2013 reducing the income of the company to ₹ 1,36,80,537/-. Certain additions were made by the Assessing Officer while finalising the case of the assessee under Section 144 of the Act. The assessment framed was subsequently rectified under Section 154 of the Act vide order dated 16.01.2013 and addition of ₹ 20,26,197/- on account of Singapore living expenses was reduced to ₹ 2,02,620/- and income was finally assessed at ₹ 1,36,80,540/-. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 18.09.2013, the CIT(A) allowed the appeal of the assessee on all the issues. It was recorded by the CIT(A) that he had called the comments of the Assessing Officer on the additional information furnished by the assessee during the course of appellate proceedings, but no reply was furnished by the Assessing Officer. However, as per records detailed reply was submitted to the office of CIT(A) by the Assessing Officer. Against the order passed by the CIT(A), the department filed an appeal before the Tribunal. Vide order dated 18.11.2014, Annexure A.5, the Tribunal dismissed the appeal of the revenue and confirmed the order passed by the CIT(A). Hence the instant appeal by the appellant-revenue.

3. We have heard learned counsel for the parties.

4. Admittedly, the assessment in the present case for the assessment year 2010-11, was made ex-parte under Section 144 of the Act as the assessee did not submit the requisite information despite being given various opportunities to do so. During the assessment proceedings, the Assessing Officer had disallowed the exemption claimed by the assessee under Section 10B of the Act and some other disallowances were also made by the Assessing Officer. Aggrieved by the order, the assessee filed an appeal before the CIT(A). The assessee had also filed some additional evidences before the CIT(A) in support of its claim of exemption under Section 10B of the Act. These submissions of the assessee were never filed before the Assessing Officer during the assessment proceedings and thus remained unexamined by the Assessing Officer. Accordingly, the CIT(A) called for the comments of the Assessing Officer. The CIT(A) passed order dated 18.09.2013 to the effect that no such remand report was received till the date of passing of order and allowed the appeal of the assessee on this issue. According to the revenue, the Assessing Officer vide letter No.6735 dated 27.9.2013 i.e. after the decision of the appeal submitted his remand report to the CIT(A). Therefore, the remand report of the Assessing Officer could not have been taken into consideration by CIT(A). Aggrieved against the order of CIT(A), the Department filed an appeal before the Tribunal which was dismissed and the order passed by the CIT(A) was upheld.

5. After perusing the narration of facts and the orders passed by the authorities below, we find that in the circumstances of the case, the matter requires to be remanded to the Assessing Officer for deciding it afresh after considering the additional evidence produced by the assessee. Consequently, the order dated 18.9.2013 passed by the CIT(A) and order dated 18.11.2014, passed by the Tribunal, Annexures A.4 and A.5

respectively are set aside and the matter is remanded to the Assessing Officer for deciding it afresh in accordance with law after hearing the parties. Accordingly, the appeal stands allowed.

**(Ajay Kumar Mittal)**  
**Judge**

**July 19, 2017**  
**‘gs’**  
Whether speaking/reasoned  
Whether reportable

**(Amit Rawal)**  
**Judge**  
**Yes**  
**Yes**