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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA No. 40 of 2005

Reserved on: August 23, 2017

Date of decision: August 31, 2017

COMMISSIONER OF INCOME TAX

..... Appellant

Through: Mr. Raghvendra Singh, Advocate.

versus

NEW DELHI TELEVISION LIMITED

..... Respondent

Through: Mr. M.S. Syali, Senior Advocate with
Mr. Mayank Nagi, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE PRATHIBA M. SINGH

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. This appeal, under Section 260A of the Income Tax Act, 1961 ('Act'), is directed against the impugned order dated 26th July 2004 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1757/Del/2003 for the Assessment Year ('AY') 1999-2000.

2. While admitting this appeal on 17th August 2005 the Court framed the following question of law for consideration:-

“Whether the ITAT was correct in law in holding that the television news software produced and exported by the Respondent/Assessee outside the country was customised

electronic data eligible for deduction under Section 80 HHE of the Income Tax Act, 1961?”

Background facts

3. The background facts are that the Assessee, New Delhi Television Limited (‘NDTV’), is engaged *inter alia* in the production of news software television programmes.

4. On 21st February 1997 an agreement was entered into between the Assessee and New Delhi Television (India) Private Limited (‘NTVI’) in terms of which it was agreed that the Assessee would be responsible for the production of the entire software (programming) for a 24-hour Indian news channel which would be supplied to NTVI which would in turn broadcast the said channel through STAR TV or enter into arrangements with other companies to provide for the broadcast of the channel. It was further agreed that NTVI would broadcast the channel *via* Satellite Cable or any other means deemed appropriate. *Inter alia*, it was agreed that the Assessee would export to STAR TV programme/footage tapes relating to the channel for the purpose of broadcasting overseas. The annual consideration payable by the Assessee for the purpose was set out in the agreement. NTVI would be solely responsible for the uplinking, transmission and distribution of the 24-hour news channel programming from Delhi, Hong Kong and/or other such programme uplinking sites, at its cost. A Memorandum of Understanding (‘MoU’) dated 21st March 1998 was entered into between the Assessee and STAR TV/NTVI.

Assessment order

5. For the AY in question, i.e. 1999-00, the Assessee filed its return declaring an income of Rs. 3,15,03,570 on 29th December 1999. The return was picked up for scrutiny and notice was served upon the Assessee by the Assessing Officer ('AO') under Section 143 (2) of the Act. Further, a notice under Section 142 (1) along with a questionnaire dated 12th December 2001 was issued.

6. In the return, the Assessee claimed deduction of Rs. 15,76,17,840 under Section 80HHE of the Act. The Assessee explained to the AO that the production process involved collection of news by receiving inputs by way of audio/video footage of various news stories, editing/processing the same and conversion of machine signals into images. The AO noted that under Section 80HHE deduction can be allowed only if "export of computer software is made."

7. The AO noted that, in terms of clause (b) of the Explanation to Section 80HHE, 'computer software' means any computer programme recorded in any disk/tape including any such programme of 'customized electronic data', which is transmitted from India to outside world by any means. The AO concluded that "the production of news software by no means can be described as computer software." It was noted that with effect from 1st April 2000, by virtue of Finance Act ('FA'), 1999, TV news software was covered under Section 80HHF.

8. The AO disallowed the deduction under Section 80HHE on the ground that "the Assessee company is not engaged in the production and export of

computer software.” Another ground on which the deduction was refused was that according to the AO, the agreement between NDTV and NTVI and the MoU dated 21st March 1998 between the Assessee and STAR TV/NTVI showed that the Assessee was not an exporter of computer software. It was only engaged in the production of news programmes which were being handed over to NTVI for uplinking and onward transmission. The Assessee had taken on lease satellite space from VSNL and had sub-leased it to NDTV. Accordingly, it was concluded by the AO that the Assessee was not involved in the export of television programmes.

Clause (b) of the Explanation to Section 80 HHE

9. At this stage it requires to be noticed that Section 80HHE provided for “deduction in respect of the profits from export of computer software etc.” Sub-section (1) of Section 80HHE states that an Indian company engaged in the business of export or transmission of computer software to a place outside India, or providing technical services outside India in connection with the development or production of computer software, would be entitled to a deduction “to the extent of the profits, referred to in sub-section (1B), derived by the Assessee from such business”. Explanation (b) to Section 80HHE, as it stood during the AY, in question reads as under:

“(b) ‘computer software’ means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data which is transmitted from India to a place outside India by any means.”

10. The above clause (b) was substituted with effect from 1st April 2001 by the FA 2000, as under:

“(b) ‘computer software’ means –

(i) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(ii) any customised electronic data or any product or service of similar nature as may be notified by the Board.

which is transmitted or exported from India to a place outside India by any means.”

11. It is important to note that the substituted clause became effective only from 1st April 2001 and therefore, did not apply to the AY in question. The other important aspect to be noted is that the words “or any customised electronic data” occurring in clause (b) of the Explanation was inserted with effect from 1st April 1999 and therefore, was applicable during the AY in question. The rationale behind the introduction of those words was set out in Circular No. 772 dated 23rd December 1998. Para 36.1 of which read as under:

“36.1 Under the existing provisions of Section 80HHE, 100% deduction is allowed on profits derived from export of computer software provided the sale consideration is received in or brought into India in convertible foreign exchange. Software exports have grown exponentially in recent years. *With a view to increasing India's market share in the international arena, the Explanation (b) below this section has been extended to include 'any customised electronic data' within the meaning of 'computer software'.* The benefits of deduction have also been extended to supporting software developers. With this in view, the proviso to sub-section (1); and sub-section (1A), (3A) and (4A) have been inserted by the Act so that the benefit of export can also be passed on to software developers by software exporting companies.” (emphasis supplied)

12. As already noticed, a change was brought about in Section 80HHF which was inserted by FA 1999 with effect from 1st April 2000. Sub-section (1) of Section 80HHF clearly envisages export or import by any means outside India *inter alia* of television news software. In fact from 1st April 2000 onwards the Assessee has been claiming deduction of profits from export of television news software only under Section 80HHF of the Act.

13. Therefore, it is only for one AY, i.e., AY 1999-2000 that the question arises viz., whether television news software exported by the Assessee falls within the definition ‘customized electronic data’ occurring in clause (b) of the Explanation to Section 80HHE of the Act.

Order of the CIT (A)

14. To revert to the sequence of events, aggrieved by the assessment order the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) [‘CIT (A)’] specific to the issue on hand. The Assessee pointed out that by its letters dated 28th December 2001, 5th March 2002 and 18th March 2002 it had made detailed submissions to the AO explaining what constituted computer software and how the activity undertaken by the Assessee is export of computer software. The Assessee urged that on a harmonious construction of the words ‘programme’ and ‘computer’ it became apparent that what was produced by the Assessee fitted within the definition of ‘computer programme’ under Explanation (b) to Section 80HHE of the Act.

15. Without prejudice to the above submissions, the Assessee contended that “the activity of the Assessee also falls within the meaning of the expression

‘customized electronic data’ which was inserted with effect from 1st April 1999". The assessee pointed out that the television programme produced was customized according to the specification and directions of its customers like STAR TV etc. The format, the editorial standard, the production standard, the technical standard, the quality standard, the graphic standard, the look and free, “are all customized.” Further, it was contended that considering the meaning of the word ‘customized’, ‘electronic’ and ‘data’, the programme produced by the Assessee also “falls within the said expression, i.e., customised electronic data.”

16. The CIT (A) disagreed with the Assessee. After analysing the definition of ‘computer programme’ under Section 80 HHE of the Act, the CIT (A) concluded that "it means basically the set of coded instruction which enable the computer to solve a problem." The CIT (A) held that the Assessee was “not engaged in the business of any such computer programme.” It was further held that data was not a final product in itself. It had to be operated upon by series of operations. It had to be interpreted to make a final product. The CIT (A) concluded that the Assessee was “making a final product, i.e., news software which is different from the data. Data is entirely different than the product produced by the Assessee." The CIT (A) held that the Assessee was not engaged in the business of customized electronic data. Consequently, the Assessee was held not entitled to the deduction under Section 80HHE during the AY in question.

Order of the ITAT

17. Aggrieved by the order of the CIT (A), the Assessee went before the

ITAT. In the impugned order, the ITAT discussed in detail the activities of the Assessee, which included the programme planning, data collection and input, graphics, editing and transmission of the final product. The Assessee was held entitled to the deduction under Section 80HHE of the Act. However, in coming to the said conclusion, the ITAT placed reliance on clause (b) of the Explanation to 80HHE which was effective from 1st April 2001. The ITAT also referred to its decision in *ACIT v. Amadeus India Pvt. Ltd.* (decision dated 17th January 2001 in ITA No. 4616 of 1998).

Submissions of counsel for the Revenue

18. Mr. Raghvendra Singh, learned Senior standing counsel for the Revenue, at the outset pointed out that there was an error on the face of the impugned order inasmuch the ITAT's conclusion was based on clause (b) of the Explanation to Section 80HHE which admittedly was not in operation during the AY in question viz., AY 1999-00. Mr. Singh accordingly submitted that the matter had to be remanded to the ITAT for a fresh adjudication on merits, leaving open the contentions of both parties to be urged before the ITAT.

19. Secondly, it was submitted by Mr. Singh that even otherwise the entire approach of the Assessee in the manner of proving its entitlement to deduction under Section 80HHE was faulty. Mr. Singh submitted that it was not enough for the Assessee to break up the composite expression 'customized electronic data' to show that each of the individual components of that expression stood satisfied. Mr. Singh had some reservation about the question framed by the Court as it placed an unfair burden on the Revenue to show that the television news software produced by the Assessee did not

fall within the expression ‘any customized electronic data. It was for the Assessee to lead positive evidence to that effect.

Submissions of learned Senior counsel for the Assessee

20. Mr. M.S. Syali, learned Senior counsel for the Appellant-Assessee, on the other hand opposed the request for remand of the proceedings. While Mr. Syali did not dispute that the ITAT had in the impugned order referred to a clause in the Explanation which was not applicable to the AY in question, he submitted that on merits there was sufficient material for the Court to conclude whether the Assessee was entitled to deduction under Section 80HHE. A remand to the ITAT would only further delay the matters considering that AY 1999-2000 was involved.

21. Mr. Syali pointed out that the facts were self-explanatory. There was no basis for the AO and the CIT (A) to hold that the Assessee was not exporting computer software as envisaged in clause (b) of the Explanation to Section 80HHE of the Act. A reference was made to the decision of this Court in ***Commissioner of Income Tax v. Kiran Kapoor (2015) 372 ITR 321 (Del)***. Mr. Syali submitted that on facts it had been demonstrated with sufficient clarity by the Assessee that it had exported television news software in the AY in question.

Analysis and reasons

22. At the outset it requires to be noticed that although two issues arose from the claim made by the Assessee for deduction under Section 80HHE of the Act, only one survives for consideration. The issue whether the benefit of deduction under Section 80 HHE of the Act would be available not to the

Assessee but to NTVI appears to have been finally decided in favour of the Assessee without any further challenge by the Revenue. In any event no question has been framed on this issue.

23. To recapitulate, the question that requires to be examined is whether the television news software produced and exported by the Assessee outside the country was 'customised electronic data' and thereby eligible for deduction under Section 80 HHE of the Act?

24. It requires to be noticed that one of the questions that arose in *Commissioner of Income Tax v. Kiran Kapoor* (supra) was whether the activity of collection, collation, formatting of data and information and its export) fulfils the conditions stipulated in Section 10B (2) of the Act? This Court answered the above question in the affirmative and held as under:

“The expression “computer software” is wide enough to embrace diverse activities. To eliminate any doubt, the reference to “customised electronic data” in the second Explanation to Section 10B (2), Parliament enabled the Board (BCDT) to include (by notification) diverse activities, which involve export of software, etc. The notification relied on in the present case uses the expressions (iii) content development or animation (iv) data processing (vii) human resources services and (ix) legal data bases. Here, the very first head “content development or animation” describes the process and is wide enough to cover compilation of material or data and its transformation into a ready to print/ready to publish book. It is also a “legal database.”

25. Turning to clause (b) of the Explanation to Section 80 HHE of the Act, the Court is unable to agree with the contentions of Mr. Singh, learned counsel for the Revenue that the words “or any customised electronic data” has to take colour from the main part of clause (b) of the Explanation and

cannot be construed independent of it.

26. There are two parts to the definition ‘computer software’. First is the exhaustive definition where the word “computer software” is used and this is followed by ‘any computer programme recorded on any disc, tape, perforated media’. Then there is the inclusive part of the definition where the word includes any such programme or any customized electronic data. The expression ‘any customized electronic data’ is preceded by the disjunctive ‘or’ which clearly indicates that any customized electronic data would also be considered to be ‘computer software’ under the inclusive part of the definition. The principle of *ejusdem generis* will not apply in the instant case particularly in the context under which this provision was introduced.

27. Circular No. 772 dated 23rd December 1998 explained the rationale behind introduction of these words. It acknowledged that “software exports have grown exponentially in recent years” and there was need to increase India’s market share in the international arena. Therefore, the expression ‘any customized electronic data’ requires a liberal interpretation. The amendment to clause (b) of the Explanation makes it more explicit. Section 80HHF (1) now envisages computer software including television news software. Therefore, the position for the AY 2000-01 onwards is not in doubt.

28. In ***Regional Director, Employees’ State Insurance Corporation v. Highland Coffee Works of P.F.X. Saldanha and Sons*** (1991) 3 SCC 617 the Supreme Court explained the word ‘include’ as under:

“The word ‘include’ in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word ‘include’ is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. [See (i) *Stroud’s Judicial Dictionary*, 5th Edn. Vol. 3, p. 1263 and (ii) *CIT v. Taj Mahal Hotel* AIR 1972 SC 168, (iii) *State of Bombay v. Hospital Mazdoor Sabha* AIR 1960 SC 610].”

29. On facts, the Court finds that the Assessee has been able to demonstrate that the television news software produced by it for the AY in question was indeed ‘customized electronic data’ which was exported from India to a place outside India. The entire process of making the programmes was to meet the requirement of STAR TV during the AY in question and the use of several software programmes for such production was sufficient to enable the ITAT to conclude in favour of the Assessee.

Conclusion

30. The factual findings of the ITAT, in any event, have not been shown to be perverse. While the ITAT did err in relying on clause (b) to the Explanation to Section 80 HHE of the Act, with considerable time having elapsed, remanding the matter to the ITAT for that purpose would only delay the matter further. Further, the Assessee has in the present case discharged its onus of showing that the television programmes produced by it answers the description of ‘computer software’ under clause (b) to the Explanation to Section 80HHE of the Act. Therefore, the ultimate

conclusion reached by the ITAT calls for no interference.

31. For all the aforementioned reasons, the question framed by the Court by the order dated 17th August 2005 is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue. The conclusion reached by the ITAT is affirmed but for the reasons different from that given by it.

32. The appeal is accordingly dismissed but, in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 31, 2017

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