

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1534 OF 2016

Pr. Commissioner of Income Tax-14

.. Appellant

v/s.

M/s. Atos India P. Ltd.

.. Respondent

Mr. Suresh Kumar for the appellant

Mr. Atul Jasani for the respondent

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 23rd JANUARY, 2019

P.C.

1. This appeal is filed by the Revenue against the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short), raising following questions for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in law in holding that project risk expenses amounting to Rs.2,38,83,772 debited on the profit and loss account for the year under consideration is in the nature of liquidated damages and is allowable deduction in the A.Y. 2007-08?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in holding that while computing income under Section 10A of the Act the expenses incurred in foreign exchange towards technical services provided outside India if reduces from the export turnover should also be excluded from total turnover?

2. Question no.(i) arises in following background.

3. The respondent assessee is a company registered under the Companies Act. In the return filed for Assessment Year 2007-08, the assessee had claimed a sum of Rs.2.38 crores (rounded off) by way of expenses in the nature of liquidated damages. This liability arose out of execution of a contract by the assessee with HPCL. The contract between the assessee and the Hindustan Petroleum Ltd. ("HPCL" for short) contained a clause for payment in case the execution of the work gets delayed. This clause reads as under :-

"In case of delay in completing the job beyond the period of contract, the vendor shall be liable to pay a sum equivalent to 0.5% of the total contract value for every week or part thereof of the delay subject to a maximum of 5% of the total contract value."

4. The Assessing Officer, however, disallowed the claim on the ground that the liability was contingent. The issue eventually reached to the Tribunal. The Tribunal noted the terms of the contract between the assessee and HPCL, also noted that admittedly delay had occurred in execution of the work by the assessee and, therefore, the assessee's liability to make the payment had arisen. The Tribunal referred to and relied upon the decision of the Supreme Court in case of *Bharat Earth*

Movers, 245 ITR 425 and held that under said circumstances, the claim of expenditure should have been allowed.

5. Before us, learned Counsel for the Revenue argued that the liability was contingent in nature and further that in terms of Section 73 of the Contract Act, 1972, liquidated damages can be claimed only on the basis of the actual loss and this cannot be a matter of pre-decided agreement between the parties.

6. At the outset, we may notice that the Assessing Officer had raised only one objection to the claim being contingent in nature. The facts on record would show that the agreement contained a clause under which, the assessee would have to pay 0.5% of the total contract value for every week or part thereof for the delay in execution of the work subject to ceiling of maximum 5% of the total contract value. The fact that there had been delay in execution of the work of the assessee is not in dispute. Under the circumstances, the liability of the assessee to pay the sum to the HPCL as per the said clause had arisen. The liability thus, had crystallized and cannot be said to be a contingent liability.

7. The objection of the Counsel for the Revenue on the basis of

Sections 73 and 74 of the Contract Act also is not valid. To begin with, Section 74 of the Contract Act provides that in case of breach of contract if a sum is mentioned in the contract as the amount to be paid in case of such breach or there is any of the stipulation by way of penalty, the party complaining of such breach is entitled to the said sum whether or not actual damage or loss is proved to have been caused by the breach of contract. The case of the assessee would fall within Section 74 of the Contract Act itself since the contract envisaged payment of a sum pre-decided in case of breach of the agreement. Section 74 of the Act does not limit its applicability to a penalty stipulated in the contract but covers the case where any amount is agreed to be paid in case of breach of contract. In that view of the matter, reference to Section 73 of the Contract Act would not be necessary at all. In any case, what Section 73 provides is that when a contract has been broken, the party who suffers by such breach, is entitled to receive compensation for any loss or damages caused to him which naturally arose in the usual course of things from such contract. The question of applicability of Section 73 of the Act in the present case in view of the situation being covered by Section 74, would not apply. In any case, the provision of Section 73 would come into play if in case of breach of the contract, any party were to resile from the terms of the

Contract envisaging payment of liquidated damages as agreed in the contract. In the present case, the assessee who was liable to pay the said amount, had neither disputed nor refuted its liability. This question, therefore, does not require consideration.

8. Question no.(ii) is squarely covered by the judgment of this Court in case of *CIT Vs. Gems Plus Jewellery India Ltd. (2011) 330 ITR 175* in which the Court held that the amount of freight and insurance have to be excluded for the purposes of computation of export turnover, which would also be excluded while computing total turnover of the assessee. This question is also therefore not entertained.

9. In the result, the appeal is dismissed.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)