IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2019

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.596 of 2008

M/s.Diebold Systems P. Ltd.,
28/3, Montieth Road,
Egmore, Chennai-600 008. .. Appellant/Appellant

-vs-

The Assistant Commissioner of Income Tax,
Company Circle-I (4),
121, Nungambakkam High Road,
Chennai-600 034. .. Respondent/Respondent

Tax Case Appeal filed under Section 260A of the Income-tax Act, 1961 against the order dated 21.04.2006 on the file of the Income-tax Appellate Tribunal Chennai Bench-A, in I.T.A.No.1314/Mds/2005, for the assessment year 2001-02.

For Appellant : Mr.M.P.Senthil Kumar

For Respondent : Mr.T.Ravi Kumar,
Senior Standing Counsel

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JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal by the appellant/assessee filed under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 21.04.2006, passed by the Income-tax Appellate Tribunal Chennai Bench-A (for brevity, "the Tribunal"), in in I.T.A.No.1314/Mds/2005, for the assessment year 2001-02.

2.The above appeal has been admitted on the following substantial questions of law, vide order dated 14.07.2008:-

> "*(i) Whether on the facts and in the circumstances of the case the Tribunal is right in law in holding that the appellant is not entitled to relief under Section 80IA in respect of the income arising from installation, AMC charges, technical charges, consultation charges and licence fee?*
>
> *(ii) Whether on the facts and in the circumstances of the case the Tribunal is right in law in not considering the alternative claim that the expenses incurred in carrying on the Annual Maintenance work is an allowable deduction?*
>
> *(iii) Whether on the facts and in the circumstances of the case the Tribunal is right in law*

in confirming the disallowance of Rs.53,21,968/- out of the expenses of purchase of software?

(iv) Whether on the facts and in the circumstances of the case the Tribunal is right in law in disallowing Rs.3,36,46,054/- in respect of purchase of software from M/s.Diebold Inc., U.S.A. and M/s.Chiptrans Private Limited?

(v) Whether on the facts and in the circumstances of the case the Tribunal is right in law in confirming the disallowance of brokerage/commission amounting to Rs.41,64,000/- paid by the appellant?"

3.We have heard Mr.M.P.Senthil Kumar, learned counsel for the appellant/assessee; and Mr.T.Ravi Kumar, learned Senior Standing Counsel for the respondent/Revenue.

4.Mr.T.Ravi Kumar, learned Senior Standing Counsel raised a preliminary objection by contending that the three fact finding authorities, viz., the Assessing Officer, the Commissioner of Income-tax (Appeals)-VIII, Chennai (for brevity, "the CIT(A)"), and the Tribunal have concurrently held against the assessee, on facts, and before this Court, the assessee cannot re-argue the factual position, as the present appeal is under Section 260A of the Act.

5.Thus, the first hurdle which Mr.M.P.Senthil Kumar, learned counsel has to cross is to convince this Court that there arises for consideration substantial question of law as framed by the assessee.

6.The issues which arise for consideration are categorised as four, viz.,

(i) Deduction claimed under Section 80IA of the Act on AMC (Annual Maintenance Charges of ATM) in respect of ATM machines sold by the assessee;

(ii) Disallowance under Sections 40A(2)(a) and 40A(2)(b) in respect of purchase of software from Diebold Inc., USA;

(iiii) Disallowance under Sections 40A(2)(a) and 40A(2)(b) in respect of purchase of software from M/s.Chip Trans, USA; and

(iv) Disallowance of brokerage/commission.

7.We propose to deal with the fourth issue first. The Tribunal while considering the said issue, took note of the findings rendered by the Assessing Officer and the CIT(A). The discussion starts from paragraph 31 of the impugned order. After referring to the statement recorded from the Vice President (Sales & Operations) of the assessee company, the Tribunal noted that even the person in-charge of sales was not aware of the marketing activity done by the sales agents and he was not aware of the details of orders procured by the sales agents and even the Vice President of the Bank of Punjab Limited, to whom the assessee sold ATM machines, was not aware of the sales agents. The assessee was dealing with the Bank of Punjab Limited and the business was continuous one. Therefore, the Tribunal opined that the assessee failed to establish that there was necessity to identify once again the Bank of Punjab Ltd., as its customer. Further, the Tribunal noted that there is nothing on record to show that the assessee has derived business advantage by paying sales commission. Every factual findings recorded by the Tribunal will clearly show that the assessee miserably failed to establish their claim regarding the disallowance of brokerage/commission.

8.Thus, we find there is no substantial question of law arising for consideration on this aspect.

9.Next, we move on to the second and third issues, which are disallowance under Sections 40A(2)(a) and 40A(2)(b) in respect of software purchased from M/s.Diebold Inc., and M/s.Chip Trans.

10.The assessee sought to justify the gross difference in the amount paid in respect of software purchased from both the companies on the ground that M/s.Diebold Inc., was their associate concern, whereas, M/s.Chip Trans was a third party. This aspect of the matter was considered by the Assessing Officer, the CIT(A) as well as the Tribunal and factually, it was found that the stand taken by the assessee does not merit consideration. The following finding would be sufficient to sustain the order passed by the Tribunal:-

> *"19.Further, when we analyze the purchase price and the sale price, it is interesting to note that the sale price of software sold by the Assessee company to various banks was usually same, i.e., Rs.2,25,000/-. However, the purchase price of software purchased from Chip Trans varies from Rs.3,17,646/- to Rs.3,34,004/-. In the case of Diebold, the purchase price of software was usually Rs.50,568/-. The Assessee was selling the software set at loss when the purchase was made from Chip Trans and made exorbitant profit when the purchase was made from Diebold Inc..........*
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> *20...............There is no plea by the Assessee that Chip Trans, USA, is not a specified person and Sec.40A(2)(a) is not applicable. Admittedly, as enumerated in the facts of the case, Mr.Harish*

Murthy, MD., of the Assessee company was interested in HMA Data Systems P. Ltd., and also in Chip Trans, USA. The Assessee is a specified person as per Sec.40A(2)(a) of the Act. In our opinion, the conditions laid down in Sec.40A(2)(a) are squarely applicable to the facts of this case. The purchase price paid by the Assessee towards purchase cost of software has directly resulted in deriving benefit to the specified person who has substantial interest in other companies. The payment for purchase of software sets was very excessive and unreasonable having regard to the market value of the goods, legitimate needs of the Assessee's business and benefit derived by the Assessee. These facts are evident from the comparison of purchase price paid to software purchased from Diebold Inc., USA and Chip Trans, USA. The affidavit filed by the Assessee regarding the purchase of 709 software and also the statement and the letter dated 6.3.2006 at Annexure (supra) are only self serving in nature as the Assessee has failed to furnish item-wise cost of each software embedded to each software set sold by the Assessee and the Assessee has not also co-related the cost of software purchased with the software sold at it has made in the letter dated 11.4.2003, wherein the Assessee has furnished the purchase cost of each software set ad sale value and the Assessee itself has given that the Assessee has purchased 312 sets at a *cost of Rs.6.46,39,832/- and the sale value was Rs.5,48,94,300/-."*

11.We cannot be called upon to review and redo the factual exercise in an appeal filed under Section 260A of the Act. Therefore, no substantial question of law arises with regard to the disallowance made under Sections 40A(2)(a) and 40A(2)(b) in respect of purchase of software from M/s.Diebold Inc., and M/s.Chip Trans, and there is no ground made out by the assessee to interfere with the order of the Tribunal in this regard.

12.This leaves us with the first issue, viz., deduction under Section 80IA of the Act on AMC (Annual Maintenance Charges of ATM) in respect of ATM machines sold.

13.As rightly pointed out by T.Ravi Kumar, the assessee was not able to establish before the Assessing Officer by producing records. The Assessing Officer after examining the facts of the case, found that the income earned from AMC (Annual Maintenance Charges of ATM), installation and technical charges, consultation charges and licence fee of software do not constitute income from the industrial undertaking which was established in Pondicherry, since this was not derived from the industrial undertaking, as the men, material and machinery of the Pondicherry industrial undertaking were not used to earn income and therefore, denied deduction under Section 80IA of the Act.

14.Mr.M.P.Senthil Kumar, learned counsel appearing for the appellant/assessee strenuously contended that the assessee cannot sell the ATMs unless they offer annual maintenance of the same. Further, it is contended that the assessee's business of production, sale, installation and maintenance of ATMs by providing necessary software is a very high security risk, as they dispense large amounts of cash. Further, it is submitted that in view of special type of machine, provision of maintenance service is an integral part of manufacturing and selling activity. The above submissions made by Mr.M.P.Senthil Kumar were never pleaded either before the Assessing Officer, or before the CIT(A) or before the Tribunal either in the same tenor or in a different manner. Therefore, such a plea cannot be raised at this juncture. Even assuming they were raised earlier, when the assessee has miserably failed to establish the same before the fact finding authority, they cannot be permitted to raise such a contention before this Court for the first time. Therefore, the assessee has not made out any ground to interfere with the first issue as well. With regard to the first issue, there was an alternate claim made by the assessee stating that the expenditure incurred in carrying out annual maintenance work should be excluded while computing profit under Section 80IA of the Act. This issue was considered by the CIT(A) in paragraph 4.6 of the order dated 28.02.2005 and was rejected on the ground that there was no positive income from the Pondicherry unit.

15.Thus, for the above reasons, we are of the clear view that the assessee has not made out any ground to interfere with the impugned order passed by the Tribunal and the appeal is liable to be dismissed, as there is no substantial question of law arising for consideration. No costs.

(T.S.S., J.) (V.B.S., J.)
24.06.2019

Index : Yes/No
Speaking/Non-Speaking Order

abr

To

1.The Income-tax Appellate Tribunal Chennai Bench-A.

2.The Assistant Commissioner of Income Tax,
Company Circle-I (4),
121, Nungambakkam High Road, Chennai-600 034.

3.The Commissioner of Income-tax (Appeals)-VIII,
121, Mahatma Gandhi Road, Chennai-600 034.

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

(abr)

T.C. (A) No.596 of 2008

24.06.2019