

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.Nos.134 and 135 of 2012

The Commissioner of Income Tax
Chennai

...Appellant in both appeals
Vs.

M/s.Zylog Systems Limited
No.155, Thiruvallurvar Salai
Kumaran Nagar, Chennai 600 119.

...Respondent in both appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal 'D' Bench, Chennai dated 30.06.2011 in ITA Nos.59 and 60/Mds/2011

against the order of the Commissioner of Income Tax (Appeals)III dated 29.10.2010 in I.T.A. No. 239/2009-2010/A III and I.T.A. No. 378/2008-2009/A-III respectively against the orders of the Assistant Commissioner of Income Tax i) dated 10.12.2008 made in GIR/PAN No. AAACZ1086G and 27.11.2009 and made in PAN GIR No. AACCCZ1086G respectively.

For Appellant : Mr.M.Swaminathan
Senior Standing Counsel

For Respondent : Mr.S.Gopalakrishnan

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET
KOTHARI, J)

These two appeals have been filed by the Revenue for Assessment Years 2006-07 and 2007-08 raising the following two substantial questions of law arising from the order of the learned Income Tax Appellate Tribunal 'D' Bench, Chennai dated 30.06.2011. The two questions are reproduced below.

"1. Whether on the facts and circumstances of the case, the Income- Tax Appellate Tribunal was right in holding that the expenditure incurred in foreign exchange for providing technical services outside India could not be excluded from the export turnover for the purpose of computing deduction u/s 10B without

properly applying the provisions of Explanation 2(iii) to Section 10B?

2. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in restoring the issue with regard to amortization of capital expenditure to the file of the assessing officer for fresh adjudication in the light of the Special Bench decision in the assessee's own case when the issue of disallowance of amortised business acquisition expenses has not been dealt in the Special Bench decision?"

2. Learned counsel appearing for the appellant Revenue Mr.M.Swaminathan fairly submitted that as far as question No.1 is concerned regarding the expenditure incurred for providing technical services outside India is concerned, this Court has already held in the Assessee's own case itself in T.C.A.Nos.312 and 385 of 2011 (Commissioner of Income Tax -Vs- M/s.Zylog Systems Limited) decided on 20.02.2020 in favour of the Assessee and therefore the said question may be answered in favour of the Assessee and against the Revenue.

3. However, Mr.M.Swaminathan submitted that as far as question No.2 quoted above is concerned regarding the amortization of capital expenditure incurred by the Assessee, the Assessee himself has amortized the said expenditure over five years and therefore the learned Tribunal has erred in unnecessarily remitting the said issue also to the Assessing Officer to decide the issue in terms of the decision of the Special Bench of the Tribunal dated 02.11.2010 in the own case of the Assessee. Learned counsel also submitted that the Special Bench was not concerned with the said issue of amortization at all as would be clear from Para 6 of the order of the learned Tribunal itself.

4. Mr.Gopalakrishnan, learned counsel for the respondent Assessee submitted that question No.1 may be decided in favour of the Assessee while the question No.2 may be remitted back to the learned Tribunal for deciding the issue afresh.

5. We have heard both the learned counsels. The relevant portion of the order passed in the case of the Assessee on question No.1 in T.C.A.Nos.312 and 385 of 2011 dated 20.02.2020 is extracted below for ready reference.

"4. The learned Tribunal decided in favour of the Assessee the question that the expenditure incurred by the Assessee in foreign currency in the foreign country where they exported computer software will be included in the 'export turnover', on which the Assessee is entitled to the benefit of deduction

under Section 10B of the Income Tax Act. The relevant portion of the order of the learned Tribunal is quoted below for ready reference.

"6. The next issue raised vide Ground No. IV relates to confirming the action of the Assessing Officer in excluding Rs. 4,43,19,916/- as not forming part of export turnover who has excluded this amount on the reasoning that the amount represented expenses incurred in foreign exchange in providing technical services outside India. The facts of this issue have already been narrated above.

7. After hearing both sides on this issue, we find that in view of the Special Bench decision (supra) in assessee's own case, wherein it has been held that such amount cannot be excluded from export turnover, this addition cannot survive. Consequently, by following the Special Bench decision (supra) we order to delete the impugned addition."

5. Learned counsel for the Revenue fairly submitted that the controversy is no longer res integra in view of the decision of the Hon'ble Supreme Court in the case of "Commissioner of Income Tax -Vs- Mphasis Ltd" reported in [2020] 113 taxmann.com 74 decided on 13.11.2019, has affirmed the view taken by the Division Bench of the Karnataka High Court and the Hon'ble Supreme Court has held that such expenditure incurred by the Assessee in foreign currency will be includible in the definition of 'export turnover' for the purpose of computing deduction under Section 10B of the Act.

6. The relevant portion of the judgment of the Division Bench of the Karnataka High Court in "CIT -Vs- Mphasis Ltd.," reported in [2016] 74 taxmann.com 274 (Karnataka) is quoted below for ready reference.

" 2. The first substantial question of law arose for consideration before this Court in ITA No. 776/2007 disposed of on 13.06.2014, wherein this Court has held at paras 18 and 19 as under:-

18. From the aforesaid provision it is clear that the consideration in respect of

computer software received in or brought into India by the assessee in convertible foreign exchange is deducted from the profits of the said business. In other words the assessee is not liable to pay any income tax on such consideration received from export of computer software. However the said export turnover does not include freight, telecommunication charges or insurance attributable to the delivery of computer software outside India or expenses if any incurred in foreign exchange in providing technical service outside India. In other words out of the said export turnover the following amounts have to be deducted;

a. freight b. telecommunication charges c. insurance attributable to the delivery of computer software outside India; d. expenses, if any, incurred in foreign exchange in providing technical services outside India;

19. If the assessee is engaged in the business of providing technical services outside India in connection with the development or production of computer software then expenses if any incurred in foreign exchange in providing technical services outside India is liable to be deducted out of export turnover. The said provision has no application in the case of export out of India of computer software or its transmission from India to a place outside India by any means. The law makes a distinction between technical services rendered in connection with export of computer software and export of technical services for the purpose of development or production of computer software outside India. If the technical services rendered by the assessee's Engineers is in connection with the export of computer software for the purpose of testing, installation and monitoring of software such a turnover do not fall within clause (ii) of subsection (1) of section 80HHE of the Act. Such a turnover falls within sub-clause (i) of subsection (1) of Section 80HHE of the Act, that is export out of India of computer

software or its transmission from India to a place outside India by any means. The expenditure incurred in the form of foreign exchange for such services cannot be excluded in computing the export turnover as it forms part of the export turnover. In the instant case as is clear from the order of the Assessing Authority, he proceeds on the assumption that the assessee is a company engaged in rendering technical services outside India in connection with production of said software. Therefore the expenditure incurred in foreign exchange in providing such technical services outside India of Rs.62.7 lakhs was excluded in computing the export turnover and total turnover for arriving at deduction under Section 80HHE of the Act. The assessee is engaged in the business of export out of India of computer software and its transmission to places from India outside India. Before a computer software is exported, the Software Engineers of the assessee would have initial discussion with regard to the requirements, specifications etc. Thereafter computer software is manufactured and then it is transmitted from India to a place outside India. The software Engineers deputed abroad who among other things have to do testing, installation and monitoring of software supplied to the client. Though the said services are technical in nature it does not fall within clause (ii) of subsection (1) of section 80HHE of the Act of providing technical services outside India in connection with the development or production of computer software. It falls under sub-clause (1) of sub-section (1) of Section 80 HHE of the Act. Therefore, the said expenditure cannot be excluded in computing export turn over. In that view of the matter we do not see any merit in this appeal. Accordingly, the said question of law is answered in favour of the assessee and against the revenue. Ordered accordingly.

3. In view of the said judgment, the substantial question of law is answered in favour of the assessee and against the Revenue.

4. Insofar as the second substantial question of law is concerned, the same was considered by this Court in the case of Commissioner of Income-Tax And Another Vs. Tata Elxsi Ltd., reported in (2012) 349 ITR 98 (Karn) . It has been held as under "17. From the aforesaid judgments, what emerges is that, there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10-A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relatable to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of Section 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in Section 10-A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in Section 10-A, there is nothing in the said Section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though

when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the total turnover means, then, when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore the formula for computation of the deduction under Section 10-A, would be as under:

Profits of the business $\frac{\text{Export turnover}}{\text{Export turnover} + \text{domestic turnover}} \times \text{Total turnover}$

5. Accordingly, the said substantial question of law is answered in favour of the assessee and against the Revenue. "सत्यमेव जयते"

6. Accordingly, question No.1 quoted above is answered in favour of the Assessee and against the Revenue.

7. Regarding question No.2, in paragraph 6 of the order of the learned Tribunal, the Tribunal itself has stated that the issue stands covered in favour of the Assessee by the decision of the Special Bench dated 02.11.2010 in assessee's own case. The relevant portion of the order of the Tribunal is extracted hereunder for ready reference.

" 6. At the time of hearing, it was found that his issue also stands covered in favour of the assessee by the decision of the Special Bench dated 2.11.2010 in

assessee's own case. In this regard, we reproduce herein below relevant Para Nos.20 & 21 of the above order:

"20. There is no dispute about the fact that the assessee is a company engaged in business of development of software both by way of on site development and off shore development and also that it has branch in USA for which separate accounts were maintained. There is also no dispute about the fact that there is approval of the authorized dealer namely Central Bank of India, Chennai for opening the overseas branch at New Jersy, USA.

21. Now we are called upon to adjudicate whether the Assessing Officer and the learned CIT (A) were right in excluding from the "export turnover" Rs.3,33,46,592/- incurred by the assessee outside India in foreign exchange in providing technical services, while computing deduction u/s 10B of the I.T.Act. For adjudicating this issue first of all we should consider what is "software" and what is "technical services". Explanation (ii) to sub-section 9A of Section 10B defines computer software. Explanation reads as under:

Clause (ii) "computer software" means

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

(b) any customized 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 any place outside India by any means;

Clause (iii) of Explanation (2) to sub-section 9A of Section 10B defines export turnover as under:

"(iii) "export turnover" means the consideration in respect of export (by the undertaking) of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (3) but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles

or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India."

The combined reading of the definition of software as given in Clause(i) of Explanation (2) and "export turnover" as defined in clause (iii) above would go to show that "export turnover" of computer software means consideration received in respect of export of computer software but does not include freight, telecommunication charges or insurance to the delivery of computer software outside India or expenses incurred in foreign exchange in providing technical services outside India."

7. In view of the above, we restore this issue to the file of the Assessing Officer for deciding afresh following the Special Bench decision (supra) and allow this ground for statistical purposes only, in both these years.

8. In the result, both the appeals are partly allowed for statistical purposes."

8. Since apparently the issue involved in question No.2 with regard to the amortization of the expenditure was not before the Special Bench at all, the learned Tribunal seems to have committed an error in unnecessarily remitting back the matter to the Assessing Officer with reference to the Special Bench as quoted above.

9. Therefore, we dispose of the present appeals and while answering the Question No.1 in favour of the Assessee, we remit the issue of Amortization of capital expenditure under Question No.2 back to the learned Tribunal for deciding the issue once again on merits and in accordance with law after giving opportunity to both the sides. With these observations, the present appeals are disposed of. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

KST

To

1.The Deputy/Assistant Registrar
Income Tax Appellate Tribunal
'D' Bench, Chennai

2. The Commissioner of Income Tax (Appeals)III
121, Mahathma Gandhi Road
Chennai 600 034.

3. The Additional Commissioner of Income Tax
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+1 Cc to Mr.M.Swaminathan, Advocate sr 30355.

T.C.A.Nos.134 & 135 of 2012

MP (CO)
SP (15/12/2020)



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