IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1200 OF 2017
WITH
INCOME TAX APPEAL NO.1232 OF 2017

Pr. Commissioner of Income Tax-1 ….Appellant

V/s.

Shreepati Computer Centre ….Respondent

Mr. Suresh Kumar for Appellant
None for Respondent

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 13th OCTOBER 2021

P.C. :

1 Respondent was a software exporter. A search and seizure action under Section 132(1) of the Income Tax Act 1961 (the said Act), was undertaken on 23rd February 2005. A notice under Section 153A was issued on 8th September 2005 to file return of income within 30 days from the date of service of notice for AY 2001-2002 (Appeal No.1200 of 2017) and AY 2002-2003 (Appeal No.1232 of 2017). Respondent filed return of income on 14th October 2005 declaring total income of Rs.2,22,06,560/- for AY 2001-2002 (Appeal No.1200 of 2017) and declaring total income of Rs.4,50,89,370/- for AY 2002-2003 (Appeal No.1232 of 2017). A notice under Section 143(2) was issued on 2nd December 2005.

2 It was respondent's case as recorded in the impugned order of Income Tax Appellate Tribunal (ITAT) that it was formed in 1992-93 with object of earning income through business of development of software running training institute by appointing Shri C.L.Deshpande as Technical Director

and initially, revenue was earned only by running training institute. Subsequently, one of the partners of assessee firm came into contact with one Shri S. M. Gupta, Director of M/s Lee & Nee Software (Export) Ltd. as they were in the same field. Shri S.M. Gupta proposed the business of developing software for M/s Lee & Nee Software (Export) Ltd., which was accepted by assessee firm in consultation with technical Director, Shri C. L.Deshpande and the first contract was entered into on or about 28th December 1999 as a test case and was completed successfully.

3 On successful completion of the same, one large contract was received by respondent. The details of the contract are as under:-

Name of the Party	Date of contract
M/s. Lee & Nee Software (Exports) Ltd. (LNSEL)	28.07.2000
M/s L.T.Soft & Services	28.07.2000
M/s Raj Soft & Services	28.07.2000
M/s. M S Soft & Services	28.07.2000

Out of the above four parties, M/s L T Soft & Services, M/s Raj Soft & Services and M/s M S Soft & Services, with effect from 28th February 2000, amalgamated with LNSEL vide order dated 18th September 2000 passed by High Court of Calcutta. Hence virtually all the four contracts were entered with LNSEL.

4 On gaining even more confidence, respondent decided to apply for 100% Export Oriented Unit (EOU) under Software Technology Park of India (STPI), Bhubaneswar Centre for the development of computer software which was done vide application dated 16th December 2000. The STPI

granted permission on 1st January 2001. For the purpose, premises were also taken on lease. The contract of Lee and Nee Group was huge enough to engage assessee in export related work. As already stated above, assessee firm had already appointed Shri C.L.Deshpande as technical director as none of the partners were familiar with the Information Technology industry.

5 The software development work pursuant to the above contracts during A.Y. 2000-01 and 2001-02, was initially carried out in Bombay office under the supervision of Shri Deshpande. The said software developed were sold to LNSEL, which in turn, after making the value addition in the software developed by respondent as well as in the software, development of which was outsourced to other parties, LNSEL exported the same to M/s. Aapkidukan.com Corporation, which was a US based company. Though, respondent did not directly export the said softwares, being a supporting manufacturer, on receipt of disclaimer certificate from LNSEL, it was eligible to claim deduction u/s 80 HHE on profits earned from the sale of the said software.

6 The details of sales made to LNSEL and the details of deduction u/s 80HHE claimed were as under:-

Assessment	Amount of turnover (Rs.)	Amount of deduction U/S. 80HHE (Rs.)
2000-2001	86,50,000	69,20,471
2001-2002	10,16,00,000	7,67,33,710
2002-2003	15,57,46,280	10,33,88,045

7 LNSEL was a listed company and was an established software

developing company and engaged in export of softwares. Copy of its financials were filed before the ITAT. LNSEL had been approved as Software Technology Park by Department of Electronics vide letter of permission dated 30th April 1992. Since then, LNSEL was eligible for exemption u/s 10B of the Act. LNSEL, on 27th January 2000, undertook a major project being an order received from Aapkidukaan.com Corporation, which is a US based company, for developing a portal of Aapkidukaan.com. The main object of the said portal was to grab US market for Indian goods and services and thus to create the largest online shopping mall for Indian goods in US Market an Indian company, Aapkidukaan.com Pvt. Ltd., was established in 2001, which was engaged in the marketing of the said portal in India by procuring clients in India to have their virtual shops on the portal through its offices/associates in Kolkata, Pune, Bangalore, Bhubhaneshwar or its franchises.

8 LNSEL itself designed the main portal of Aapkidukaan.com and decided to outsource designing of various modules and templates for the said software. For said purpose, orders were placed with various other software developers apart from respondent. Once the work outsourced was completed and received by LNSEL through email, the various parts outsourced to different developers were assembled and linked with the main portal. To this extent, there was a value addition by LNSEL. On the said value addition, exemption u/s 10B was claimed by LNSEL and same was accepted by the department in ITAT.

9 Subsequently, assessee claimed deduction u/s 80HHE of the Act on supply of above device to LNSEL as supporting manufacturer.

10 The Assessing Officer disallowed and brought to tax the deduction of claim of Rs.7,67,33,946/- (Appeal No.1200 of 2017) and claim of Rs.10,33,88,045/- (Appeal No.1232 of 2017) under Section 80HHE (*deduction of in respect of profits from export of computer software etc.*) and software development charges of Rs.23,48,200/- (Appeal No.1200 of 2017) and Rs.46,20,400/- (Appeal No.1232 of 2017).

11 Following are the reasons for dis-allowance:-

(a) Shri R.R.Chaturvedi, a Director of respondent, was not having any knowledge about the development of software and respondent had no previous expertise in development and export of softwares. The said business proposition had come to Shri R. R. Chaturvedi, through luck and not through efforts or knowledge.

(b) Shri R.R. Chaturvedi voluntarily declared Rs.7 crores in his statement dated 24th March 2005 which was subsequently retracted vide his affidavit dated 30th August 2005. According to the Assessing Officer, it was an after thought as even payments were not made as contemplated in the agreement entered with LNSEL.

(c) LNSEL is only engaged in trading of software and they are not manufacturing any software. There was no mention in the return of income of LNSEL that it had given disclaimer certificate to respondent and thus it has violated the provisions of Income Tax Act. LNSEL claimed exemption under Section 10B on the same profits on which respondent claimed deduction under Section 80HHE.

(d) Further if LNSEL has been granted permission by STPI vide letter dated 30th April 1992, what is the fate of certificate of recognition of Software Export House, w.e.f., 1st April 2002 vide letter dated 3rd April 2003 issued by Joint Director General of Foreign Trade, Kolkata.

(e) The source code of the softwares developed could not be provided by respondent as well as by Director of LNSEL, Shri S.M. Gupta.

(f) With respect to the transmission of software developed to Aapkidukan.com Corporation in the enquiry made by Foreign Tax Division, it did not come across any such transaction. Further the said company had two bank accounts but the owners of Aapkidukan.com were not the owners of these accounts.

(g) Respondent never developed any software as during the course of search, field enquiries made with the persons to whom respondent had claimed to have paid job work charges, denied having worked for them. Further letter received from STPI, Bhubaneshwar, also states that no activity had been carried out.

12 The assessment was completed on 28th December 2007. Being aggrieved by the decision of the Assessing Officer, respondent filed an appeal before CIT(A) Mumbai. CIT(A) by an order dated 5th January 2009 partly allowed the appeal filed by respondent. CIT(A) deleted the addition made disallowing the deduction claimed under Section 80HHE on the

ground that the conclusions drawn against respondent by the Assessing Officer were mainly presumptions and surmises and not substantiated by any cogent evidence.

13 Aggrieved by this order of CIT(A), appellant preferred an appeal before ITAT. ITAT by its very well reasoned order dated 18th August 2016 dismissed the appeal filed by appellant. Infact, respondent had also preferred an appeal to ITAT which also came to be dismissed.

14 The substantial questions of law proposed in both appeals are identical except that the amounts vary. The same read as under:

<u>INCOME TAX APPEAL NO.1200 OF 2017</u>

> *"(i) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs.7,67,33,946/- without considering the facts brought on records which clearly established that the assessee did not conduct any software development and the assessee failed to establish the genuineness of the software development charges so paid as evidence from the replies to the summons issued to the persons to whom the assessee purportedly paid software development charge and the assessee even failed to produce the source code of the purported software developed and exported ?*
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> *(ii) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs.7,67,33,946/- without considering the facts brought on records which clearly establishes that person, i.e., Apkidukaan.com in USA for whom the purported software was developed was not active in the business as confirmed by USA revenue authorities in response to reference made?*
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> *(iii) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs,7,67,33,946/- without considering the facts revealed during the course of search and assessment proceedings that M/s Lee & Nee Software Exports P Ltd was not even entitled to issue disclaimer certificate for supporting manufacturer to the*

assessee and thereby the assessee was not entitled to deduction u/s 80HHE ?

(iv) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was correct arriving at conclusion that the claim of the assessee u/s 890HHE was genuine in spite of contrary fact brought on record to prove the claim of the assessee as false ?

(v) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing additions on account of software development charges of RS.23,48,200/- without considering the fact that the assessee firm never developed any software as the persons to whom assessee claimed who have paid job work charges denied having worked for the assessee?"

INCOME TAX APPEAL NO.1232 OF 2017

"(i) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs.10,33,88,045/- without considering the facts brought on records which clearly established that the assessee did not conduct any software development and the assessee failed to establish the genuineness of the software development charges so paid as evidence from the replies to the summons issued to the persons to whom the assessee purportedly paid software development charge and the assessee even failed to produce the source code of the purported software developed and exported ?

(ii) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs.10,33,88,045/- without considering the facts brought on records which clearly establishes that person, i.e., Apkidukaan.com in USA for whom the purported software was developed was not active in the business as confirmed by USA revenue authorities in response to reference made?

(iii) Whether on facts and circumstances of the case and in law the Hon'ble ITAT was correct in confirming order of CIT(A) allowing deduction u/s 80HHE of Rs.10,33,88,045/- without considering the facts revealed during the course of search and assessment proceedings that M/s Lee & Nee Software Exports P Ltd was not even entitled to issue disclaimer certificate for supporting manufacturer to the assessee and thereby the assessee was not entitled to deduction u/s 80HHE ?

(iv) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was correct arriving at conclusion that the claim of the assessee u/s 890HHE was genuine in spite of contrary fact brought on record to prove the claim of the assessee as false ?

(v) Whether on facts and circumstances of the case and in law the

> *Hon'ble ITAT was correct in confirming order of CIT(A) allowing additions on account of software development charges of RS.46,20,400/- without considering the fact that the assessee firm never developed any software as the persons to whom assessee claimed who have paid job work charges denied having worked for the assessee?"*

In our view, the questions as framed itself are more questions of fact and cannot be called substantial questions of law. Our view is also fortified by the findings in the order of ITAT. Each of the reasons for disallowance mentioned by the Assessing Officer have been elaborately dealt with by ITAT.

15 As regards the reason that Shri R.R.Chaturvedi was not having any knowledge about the development of software and the business proposition had come to Shri R.R.Chaturvedi through luck and not through the efforts of knowledge, ITAT has concluded and we agree with ITAT, that a person can carry on business without having any previous knowledge with respect to said business because he could take assistance of some other person, who is an expert in that field. In this case, Shri R.R.Chaturvedi had with him one Shri C.L.Deshmukh, who was technically qualified and who undertook the responsibility to get developed the software.

16 As regards the Assessing Officer's objection that Shri R.R.Chaturvedi voluntarily declared Rs.7 crores in his statement dated 24th March 2005, which was subsequently retracted vide his affidavit dated 30th August 2005, was only an after thought, ITAT has factually observed that there was nothing wrong in the retraction of the statement because Shri R.R.Chaturvedi later realised that the claim that was made by respondent was very much in accordance with law. ITAT also has correctly upheld the

view of the CIT (A) that no addition could be made on the basis of such statement unless and until it is corroborated with evidence.

17 It has also been observed factually by ITAT that the software for which supply was made by respondent has actually been transmitted and exported and the export value declared has been found in order and accepted by designated official of department of electronics of Government of India. LNSEL has also claimed deduction under Section 10B of the Act on the value addition and LNSEL issued disclaimer certificate in Form 10CCAG to respondent with respect to respondent's share in the software export. It is also noted that CIT (A) had corresponded with the Assessing Officer of LNSEL, who has informed CIT(A) that there was no dispute pending with regard to the claim of deduction under Section 10B of the Act by LNSEL and no recourse was taken to the provisions of Section 147 of the Act for AY 2000-2001 to 2002-2003. ITAT has come to the factual finding that on the basis of material on record the claim of respondent under Section 80HHE of the Act was in order. ITAT has also come to the factual finding that the source code of softwares developed have been provided by respondent to the Assessing Officer. ITAT, therefore, concluded that when the export made by LNSEL has been accepted to be genuine by the Assessing Officer in LNSEL's case, the objection of the Assessing Officer in the present case that the exporters Apkidukan.com, the ultimate purchasers of the softwares does not appear to be genuine, cannot be accepted.

18 Moreover, the Assessing Officer had relied upon statements of 5 persons who had denied having developed any software for respondent. ITAT rightly concluded that respondent should have been given an opportunity to cross-examine those 5 persons, which was not granted. ITAT has also observed that there were others, whose affidavits were filed by respondent confirming that they worked for respondent and those affidavits have not been considered by the Assessing Officer. One more point, on which ITAT has made an observation on fact is that the Assessing Officer has also overlooked the fact that TDS for the payments made were duly recorded in the books of accounts and relevant vouchers found during the search only corroborate the genuineness of such payments and that TDS duly deducted was paid to the Government account. ITAT held that nothing has been brought on record by the Assessing Officer to suggest that all such facts borne from the books of account were bogus or incorrect as the books of account have not been rejected.

19 Therefore, considering all these points and many other, which for the sake of brevity we have not reproduced from the order of ITAT, suffice to say, we approve those findings, we find that no substantial questions of law arise and the entire dispute revolves around question of facts.

20 In our view, the ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand,

then, we do not think that questions as pressed raises any substantial questions of law.

21 The appeals are devoid of merit and are dismissed with no order as to costs.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**