

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 449/Mds/2016

निर्धारण वर्ष /Assessment year : 2011-2012.

Value Source Technologies Private Ltd,
165/110, 6th floor,
Menon Eternity Building,
St. Mary's Road,
Alwarpet,
Chennai 600 018.

Vs. Deputy Commissioner of
Income Tax,
Corporate Circle 3(2)
Chennai 600 034.

[PAN AABCV 1503D]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. N.V. Balaji, Advocate
प्रत्यर्थी की ओर से /Respondent by : Dr. B. Nischal, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 03-05-2016
घोषणा की तारीख /Date of Pronouncement : 19-05-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the assessee is directed against order of the Commissioner of Income-tax (Appeals)-11, Chennai in ITA No.440/2014-2015-CIT(A)-11, dt 29.12.2015 for the assessment

year 2011-2012 passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The assessee has raised the following grounds:-

"Ground No.1 - Minimum Alternate Tax 'MAT' credit under section 115JAA of the Act

2. *The Learned Assessing Officer ('AO') erred in not granting the credit towards MAT paid in A Y 2008-09, A Y 2009-10 & A Y 2010-11 to the extent of surcharge, education cess and secondary and higher education cess while determining the tax payable in the AY 2011-12. The Learned CIT(A) has erred in confirming the same.*

3. *The Learned AO failed to appreciate that having not denied the Carry-forward of tax to the extent of surcharge, education cess and secondary and higher education cess while completing the assessments for the AY 2008-09, AY 2009-10 and AY 2010-11, he cannot deny the set-off in AY 2011-12. The Learned CIT(A) has erred in confirming the denial of set-off to the extent of surcharge, education cess and secondary and higher education cess.*

3. *The learned AO and CIT(A) have failed to appreciate that tax for the purpose of section 115JAA of the Act includes surcharge, education cess and secondary and higher education cess.*

Ground No.2 - Deduction for Gratuity paid to employees under section 40A(7) of the Act

5. *The Appellant humbly seeks directions to be issued to the Learned AO by this Hon'ble Tribunal grant deduction towards gratuity paid to the employees which it is eligible for, though not claimed before the lower authorities".*

3. The Brief facts of the case that the assessee company is in software development services and filed return of income on 29.11.2011 admitting total income of ₹17,05,70,172/- and the return of income was processed u/s.143(1) of the Act. The case was selected for scrutiny and notice u/s.143(2) of the Act dated 18.09.2012 was issued. Further notice u/s.142(1) of the Act was issued for submissions of details. The Id. Authorised Representative of assessee appeared from time to time and furnished information. The assessee has filed audit report form No.3CEB in respect of international transactions entered with related parties above ₹15 Crores and with the prior approval, the case was referred to TPO. The Id.TPO vide order No.F. No.V-316/TPO-III/A.Y.2011-12, dated 24.09.2014 found the value of transaction for determining Arms Length Price (ALP) is correct and there is no requirement of adjustment of international transactions. The Id. Assessing Officer considering the TPO order and disallowed interest on service tax and passed assessment order u/s.143(3) dated 06.03.2015. The assessee company is also covered by provisions of Sec. 115JB of the Act and Id. Assessing Officer calculated tax and raised demand without considering the surcharge and cess of MAT credit. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the Id. Authorised Representative raised grounds on disputed issue of allowing MAT credit. The Id. Authorised Representative submitted that for the assessment years 2008-2009, 2009-2010 and 2010-2011, the assessee company has paid taxes under provisions of Sec. 115JB of the Act and filed return of income. In the current assessment year, the assessee has brought forward MAT credit of earlier years of ₹2,65,46,067/- under provisions of Sec.115JAA of the Act. Since the tax liability as per normal computation of income is higher, the Assessing Officer determined tax liability by limiting the MAT credit to ₹2,46,69,447/- excluding the surcharge and cess. The Id. Commissioner of Income Tax (Appeals) on perusal of the provisions of Sec. 115JB of the Act relied on the decision of Vishakapatnam Tribunal in the case of *3F Industries Ltd vs. JCIT (2014) 44 taxmann.com 200 (Vishakhapatnam)* on MAT credit to be carried forward. The Id. Commissioner of Income Tax (Appeals) also relied on the decisions of Delhi Tribunal referred at para 8.4 and 8.5 of his order and concluded that for the purpose of MAT credit carried forward and set off of earlier years, such MAT credit shall not include surcharge and cess and dismissed the grounds and Id. Commissioner of Income Tax (Appeals) directed Assessing Officer to verify and allow the claim based on the alternative ground raised by the assessee that if the MAT credit is not considered

to include surcharge and cess alternatively tax liability for the current assessment year shall be calculated excluding surcharge and cess and allow MAT credit and levy surcharge and cess. Aggrieved by the order of Commissioner of Income Tax (Appeals), the assessee has assailed an appeal before Tribunal.

5. Before us, the Id. Authorised Representative reiterated the submissions made in the assessment and appellate proceedings and substantiated his arguments, supporting the provisions of law and alleging the action of the Assessing Officer as bad in not granting MAT credit u/sec. 115JAA of the Act including surcharge, education cess and secondary and higher education cess in determining tax liability. Prime facie the Id. Assessing Officer has denied carried forward of surcharge, education cess, and secondary and higher education cess while completing the assessment and argued that tax also includes surcharge and cess and prayed for allowing the appeal.

6. Contra, Id. Departmental Representative relied on the orders of lower authorities and provisions of law in respect of MAT credit and opposed the grounds.

7. We heard rival submissions, perused the material on record, judicial decisions cited. The only contention of the Id. Authorised Representative being that Assessing Officer has restricted MAT credit to the extent of tax portion of earlier years and not allowed surcharge and educational cess. In the current assessment year, the assessee company liable to pay income tax based on the normal computation of income, in such circumstances the assessee is eligible for MAT credit carried forwarded from earlier assessment years u/s.115JA of the Act. Under the provisions of Sec. 115JB tax components deemed to have included surcharge and educational cess. This view was considered by the Apex Court in the case of *CIT vs. K. Srinivasan 83 ITR 0346* where words "income-tax" in the Finance Act of 1964 in sub-sec(2)(a) and sub-se(2)(b) of Sec. 2 would include surcharge and additional surcharge. A similar issue was decided by the Co-ordinate Bench of the Tribunal in ITA No.2122/Mds/2015, dated 03.02.2016 in the case of *M/s. Saint Gobain Gyproc India Ltd* in assessment year 2013-2014 held in para 7 as under:-

'We heard the rival contentions of both the parties perused the material on record and also judicial decision cited. The assessee company has claimed Mat credit set off against income tax on normal provisions which is allowable and such MAT credit can be carried forward also. Under the provisions of Sec. 115JB tax components also includes surcharge and education cess. The Id.

Authorised Representative reiterated his submissions made before the appellate proceedings were relief was granted. Before us, the Id. Departmental Representative relied on the findings of the Assessing Officer and argued to set aside the appeal. In reply, the Id. Authorised Representative relied on the decision of ITAT, Mumbai Bench Wyeth Limited vs. ACIT in ITA No.6682/Mum/2011, Dated 09.01.2015 which has endorsed the provisions of allowing MAT credit observed at page 4 in para 5 as under:-

"5. Thus it is clear that the Hon'ble High Court has taken into account the order of entries in the form ITR-6 for the A.Y. 2011-12 in the said case and held that as per form ITR-6, the MAT credit has to be given against the gross tax payable exclusive of surcharge /cess and only after the MAT credit tax liability, the surcharge and cess has to be calculated for the purpose of working out the grand tax liability. We also find merit and substance in the alternative contention of the assessee that if the MAT credit is taken into account without including the surcharge and education cess then the surcharge and education cess on the tax liability has to be calculated only after allowing the MAT credit. Alternatively, the amount of MAT credit should also include surcharge and education cess for the purpose of allowing the credit against the tax liability inclusive of surcharge and education cess. Therefore, the MAT as well as normal tax before allowing the MAT credit has to be taken on parity either exclusion of surcharge and education cess or inclusive of surcharge and education cess or inclusive of surcharge and education cess. Accordingly we set aside the orders of authorities below and direct the Assessing Officer to allow the MAT credit against the tax liability payable before surcharge and education cess or alternatively the amount of MAT credit should also be inclusive of surcharge and education cess and then allow the credit against the tax payable inclusive of surcharge and education cess".

We respectfully following the above decision, upheld the order of the Commissioner of Income Tax (Appeals) and dismiss the Revenue appeal".

We respectfully following the Co-ordinate Bench decision on MAT tax credit u/s.115JAA of the Act and allow the grounds in favour of the assessee.

8. On the second ground, the assessee has filed additional ground and filed a petition for admission of fresh claim of deduction towards gratuity paid as same was not claimed in the original return of income. The Id. Departmental Representative has objected to additional grounds because assessee has not preferred the claim in the assessment proceeding or in appellate proceedings and the Id. Assessing Officer was deprived of opportunity to verify the claim. The Id. Authorised Representative explained that the assessee company has paid gratuity to the employees who left the company during the financial year 2010-11 ₹2,94,719/- and due to change in management the company has failed to claim the deduction and supported the claim with documentary evidence and confirmations. The Id. Authorised Representative submitted that the assessee company has made provision for gratuity in the books of account and at the time of preparing computation of income the assessee has disallowed provision for gratuity which also includes gratuity payments. The Id. Authorised Representative further substantiated the grounds by providing the actual valuation report under AS-15 of ICAI and ledger

account of gratuity and actual payment incurred in the financial year. The gratuity of ₹2,94,719/- was paid to four employees who left the services and included in the form no.16 issued by the employer and prayed for admitting the additional ground and allow the deduction for actual gratuity paid.

9. Contra, the Id. Departmental Representative relied on the order of Commissioner of Income Tax (Appeals) and findings of the Assessing Officer were the disputed issue was not part of assessment records. The assessee has defaulted in explaining the reasons for claiming for the first time before Tribunal and is in the nature of fresh evidence under Rule 46 of the Income Tax Rules and admission of additional evidence rules are to be followed. The Assessing Officer should be provided adequate opportunity to verify the genuineness of the claim and prayed for dismissal of ground.

10. We heard rival submissions, perused the material on record and judicial decisions and the additional evidence filed for admitting additional ground. The Id. Authorised Representative for the first time has raised claim before Tribunal and filed a petition and was strongly opposed by the Department. Considering the supporting evidence and claim, being legal issue, we admit and adjudicate the additional ground. The Id. Authorised Representative has argued and filed paper

book including ledger copy of bank account, salary payable account and computation of income and financial statements. The Id. Authorised Representative drew our attention to page no.44 of paper book where provision of gratuity was disallowed and referred to ledger copy of gratuity at page no.7 of paper book where statement of employees who left the services and gratuity was paid ₹2,94,719/-. The Id. Authorised Representative to substantiate the genuineness of payment supported the grounds with copies of form no.16 issued by the assessee company as employer to employees and the breakup was reflected in the profit and loss account for the year ending 31.03.2011 under the schedules of personal expenses at page No.52 of paper book. The assessee filed extract of ICICI Bank statement in support of gratuity payments. Prime facie it is a clear case of mistake in not claiming deduction by the assessee company. Considering the provisions of law, subject to verification by the Assessing Officer and we rely on the Apex Court decision *CIT vs. Shelly Products* and *Another 261 ITR 367* where it was held as under:-

" We cannot lose sight of the fact that the failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh

assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of the return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of the assessment proceeding. He can certainly make such a claim also before the concerned authority calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, include in his income any amount which is exempted from payment of income-tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the assessing authority which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case where refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by section 240 of the Act, an obligation is cast upon the Revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases therefore, it is open to the assessee to bring facts to the notice of the concerned authority on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under section 237 of the Act. The concerned authority, for the limited purpose of calculating the amount to be refunded under section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantageous position than what he would have been, had an assessment been made in accordance with law."

Considering the apparent facts, factual evidence, claim of deduction and decision of Apex Court, we remit the disputed issue to the file of Assessing Officer to verify and examine the genuineness of the claim and

allow deduction and Assessing Officer shall provide adequate opportunity of being heard to assessee before passing the order.

11. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced on Thursday, the 19th day of May, 2016, at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 19.05.2016

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आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |