

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री अब्राहम पी.जॉर्ज, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2079/Chny/2014

निर्धारण वर्ष / Assessment Year : 2007-08

The Assistant Commissioner of  
Income Tax,  
Large Taxpayer Unit-1,  
Chennai - 600 101.

v. M/s Areva T & D India Limited,  
(Now Alstom India T & D India  
Ltd.),  
19/1, IOC Building, GST Road,  
Pallavaram, Chennai - 600 043.

(अपीलार्थी/Appellant)

PAN : AAACG 2115 R

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.2090/Chny/2014

निर्धारण वर्ष / Assessment Year : 2007-08

M/s Alstom T & D India Limited,  
19/1, IOC Building, GST Road,  
Pallavaram, Chennai - 600 043.

v. The Deputy Commissioner of  
Income Tax, LTU,  
Chennai.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by : Shri S. Bharath, CIT

निर्धारिती की ओर से /Assessee by : Shri Tushar Jarwal, Advocate  
Shri Rahul Sateerja, Advocate

सुनवाई की तारीख/Date of Hearing : 14.03.2018

घोषणा की तारीख/Date of Pronouncement : 23.03.2018

**आदेश / O R D E R**

**PER N.R.S. GANESAN, JUDICIAL MEMBER:**

Both the appeals of the Revenue and assessee are directed against the common order passed by the Commissioner of Income Tax (Appeals), Large Taxpayer Unit, Chennai, dated 29.05.2014 and pertain to assessment year 2007-08. Therefore, we heard both the appeals together and disposing of the same by this common order.

2. Let's first take the assessee's appeal in I.T.A. No.2090/Chny/2014.

3. The first issue arises for consideration is disallowance of ₹1,06,65,000/- provision for contingencies.

4. When the appeal is taken up for hearing, the Ld.counsel for the assessee submitted that he is not pressing this ground of appeal. In view of this, this ground of appeal is dismissed as not pressed.

5. The next ground of appeal is with regard to disallowance of depreciation on non-compete fee.

6. Shri Tushar Jarwal, the Ld.counsel for the assessee, submitted that depreciation on non-compete fee of ₹83,05,664/- was allowed by this Tribunal in the assessee's own case for assessment year 2006-07 in I.T.A. No.561/Mds/2011. On a query from the Bench, when the first claim for depreciation was made? The Ld.counsel submitted that the assessee claimed depreciation from the assessment year 2001-02. According to the Ld. counsel, the Assessing Officer allowed the claim of the assessee right from the assessment year 2001-02. However, for the first time it was disallowed for assessment year 2007-08. The Ld.counsel submitted that the copies of the assessment orders from assessment years 2001-02 to 2006-07 are not readily available. According to the Ld. counsel, this Tribunal by placing reliance in the judgment of Madras High Court in M/s Pentasoft Technologies Ltd. in (2014) 41 taxmann.com 120, allowed depreciation on the non-compete fee since it is in the nature of commercial right of similar nature such as patents, copyright and trademarks, etc.

7. On the contrary, Shri S. Bharath, the Ld. Departmental Representative, submitted that the non-compete fee does not give any commercial right to the assessee. Therefore, according to the

Ld. D.R., it cannot be considered as capital asset for allowing depreciation under Section 32(1) of the Income-tax Act, 1961 (in short 'the Act'). Moreover, the Ld. D.R. submitted that it is not known whether the depreciation was allowed for the assessment years 2001-02 to 2006-07 as claimed by the assessee. This fact was also not brought to the notice of this Bench which heard the case for assessment year 2006-07. Referring to the order of the CIT(Appeals), the Ld. D.R. submitted that the assessee has not claimed the depreciation in the return of income, therefore, there is no question of allowing the claim of depreciation at this stage.

8. We have considered the rival submissions on either side and perused the relevant material available on record. For the assessment year 2006-07, this Tribunal allowed depreciation on non-compete fee by placing reliance on the judgment of Madras High Court in M/s Pentasoft Technologies Ltd. (supra). The assessee claims that the depreciation was allowed right from the assessment year 2001-02 to 2005-06 and it was disallowed only during the year under consideration. However, the copies of earlier orders are not available on record. Even on query from the Bench, the Ld.counsel for the assessee could not file copies of the

assessment orders. Moreover, it was also not brought to the notice of the earlier Bench with regard to depreciation allowed by the Assessing Officer from the assessment year 2001-02 to 2005-06. Therefore, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer. Accordingly, the orders of both the authorities below are set aside the claim of depreciation on non-compete fee is remitted back to the file of the Assessing Officer. The Assessing Officer shall examine the earlier record from the assessment year 2001-02 to 2005-06 and the order of this Tribunal for assessment year 2006-07 and thereafter decide the issue afresh in the light of the judgment of Madras High Court in M/s Pentasoft Technologies Ltd. (supra), after giving a reasonable opportunity to the assessee.

9. The next issue arises for consideration is disallowance of depreciation on goodwill.

10. Shri Tushar Jarwal, the Ld.counsel for the assessee, submitted that the depreciation was allowed by this Tribunal in the assessee's own case for assessment year 2006-07 in I.T.A. No.561/Mds/2011 dated 27.11.2017. According to the Ld. counsel, earlier, Delhi Bench of this Tribunal disallowed the claim of the

assessee. However, the Delhi High Court reversed the order of this Tribunal and allowed depreciation. According to the Ld. counsel, the SLP filed by the Revenue before the Apex Court was dismissed.

11. We heard the Ld.counsel for the assessee and the Ld. Departmental Representative. The Ld. D.R. submitted that he is placing reliance on the observation made by the Assessing Officer as well as on the grounds of appeal. As rightly submitted by the Ld.counsel for the assessee, this Tribunal by placing reliance on the judgment of Delhi High Court in the assessee's own case for assessment year 2005-06, allowed depreciation on the goodwill. Since facts are identical, this Tribunal is of the considered opinion that the decision of co-ordinate Bench of this Tribunal for the assessment year 2006-07 is equally applicable for the year under consideration. Therefore, by following the decision of this Tribunal for assessment year 2006-07 and for the reasons stated therein, the orders of both the authorities below are set aside and the Assessing Officer is directed to allow depreciation on goodwill.

12. The next issue arises for consideration is disallowance made by the Assessing Officer under Section 40(a)(i) of the Act in respect

of the payment made to non-resident without deducting tax at source.

14. Shri Tushar Jarwal, the Ld.counsel for the assessee, submitted that the assessee has made three payments to the non-resident. According to the Ld. counsel, the first payment was made to Kema, Netherlands towards testing fee to the extent of ₹25,48,440/-. The assessee also paid to Areva T&D Finance, France towards reimbursement of cost recovery from Syrian customer. In fact, according to the Ld. counsel, the CIT(Appeals) allowed the claim of the assessee, therefore, the Revenue is in appeal before this Tribunal. According to the Ld. counsel, the next payment is made to Converteam, USA towards erection and commissioning charges of ₹7,59,050/-. According to the Ld. counsel, testing fee was paid to test the products manufactured by the assessee. The testing technology was not made available to the assessee. Therefore, according to the Ld. counsel, the payment made for testing cannot be construed as fee for technical services. Moreover, according to the Ld. counsel, the non-resident Kema, Netherlands and Converteam, USA have no place of business in

India. Therefore, their income is not taxable. Hence, the assessee is not required to deduct tax.

15. Referring to the payment made to Converteam, USA, the Ld.counsel for the assessee submitted that the payment was made for the purpose of erection and commissioning, which are integral part of the purchase of machinery. On a query from the Bench, is there any agreement between the parties or any invoice which discloses that the payment for erection and commissioning charges is inclusive of cost of machinery purchased by the assessee? The Ld.counsel submitted that the agreement and invoice are not available. Referring to the payment made to Areva T&D Finance, France, the Ld.counsel submitted that it is only a reimbursement of the expenses. The Ld.counsel clarified that there was no agreement for reimbursement of expenditure. According to the Ld. counsel, it is only a reimbursement, therefore, the CIT(Appeals) allowed the claim of the assessee. Hence, the Revenue is challenging the same in its appeal.

16. On the contrary, Shri S. Bharath, the Ld. Departmental Representative, submitted that Kema, Netherlands is performing no independent function. According to the Ld. representative, it is

testing the transformers manufactured by the assessee. Referring to Section 9(1)(vii) of the Act, the Ld. D.R. submitted that the service rendered by the non-resident for testing the machinery manufactured by the assessee was utilised for doing business in India. Since the services rendered by the non-resident by testing the transformers manufactured by the assessee were used in the business carried on by the assessee in India and for the purpose of earning income in India, according to the Ld. D.R., the income earned by the non-resident by way of testing fee is taxable in India. Hence the provisions of Section 9(1)(vii) of the Act would come into operation.

17. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee is a resident in India and paid testing fee to Kema, Netherlands for the purpose of testing the transformers manufactured by it. The claim of the assessee before this Tribunal is that the technology of testing the transformers was not made available to the assessee, therefore, the payment is not taxable in India. The Ld.counsel placed his reliance on the decision of Delhi Bench of this Tribunal in *Romer Labs Singapore Pte. Ltd. v. ADIT* (2013) 30 taxmann.com 362. We

have gone through this decision of Delhi Bench. In the case before Delhi Bench, the Singapore company tested the components manufactured by the assessee. The test reports were sent to the company in India. The Singapore company was not having any permanent establishment in India. Therefore, this Tribunal found that in view of the Indo-Singapore Treaty, more particularly Article 12(4) of Double Taxation Avoidance Agreement, the income is not taxable in India. A similar agreement for Double Taxation Avoidance Agreement was entered into between the Government of India and Government of Netherlands. As per Article 12(4), "fees for technical services" means payment to any person for consideration for technical or consultancy services for such services to make available technical knowledge, experience, skill, know-how or processes, etc. As in the case before Delhi Bench and in the case in our hand also, the transformers manufactured by the assessee are sent to Netherlands for testing and the Netherlands company sent only report. Therefore, the knowledge of testing was not made available to the assessee. Hence, it cannot be considered as fee for technical services. In view of the above, this Tribunal is of the considered opinion that the payment made to Kema, Netherlands is not liable to deduct tax at source.

18. Now coming to payment made to Areva T&D Finance, France, the assessee claims that it is only a reimbursement of cost. In fact, the CIT(Appeals) allowed the claim of the assessee on the ground that it is only a reimbursement. The Revenue is challenging the order of the CIT(Appeals) in I.T.A. No.2079/Chny/2014. No agreement or any other document was placed either before the lower authorities or before this Tribunal to indicate that what was paid by the assessee is only reimbursement of expenditure incurred by the France company. In the absence of any material to indicate what was paid by the assessee is only reimbursement of expenditure, this Tribunal is of the considered opinion that the CIT(Appeals) is not justified in allowing the claim of the assessee only on the basis of oral submission made before him. If it is a real reimbursement, there should be a communication between the parties with regard to nature of expenditure and reimbursement. In the absence of any material, this Tribunal is of the considered opinion that the matter needs to be re-examined. Accordingly, orders of both the authorities below are set aside and the payment made to Areva T&D Finance, France is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the

matter and find out whether there is any obligation on the part of the assessee to reimburse the expenditure and also find out whether the expenditure was to be incurred by the assessee or by the France company and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

19. Now coming to payment made to Converteam, USA, the claim of the assessee before this Tribunal is that erection and commissioning charges are integral cost of machinery. However, no material evidence is produced before this Tribunal to indicate that the erection and commissioning charges are integral part of the cost of machinery. No agreement or invoice was produced either before the Assessing Officer or before this Tribunal. However, this Tribunal is of the considered opinion that the matter needs to be re-examined by the Assessing Officer. Accordingly, the orders of both the authorities below are set aside and the issue with regard to Converteam, USA is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter in the light of the material that may be filed by the assessee and thereafter

decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

20. The next issue arises for consideration is disallowance of claim for warranties.

21. We heard both the Ld.counsel for the assessee and the Ld. Departmental Representative. According to the Ld. counsel, the provision was made on the scientific basis. On a query from the Bench how this provision was made and what is the method? The Ld.counsel could not explain the expenditure incurred on the earlier years. Therefore, this Tribunal is of the considered opinion that the matter needs to be re-examined by the assessee. Accordingly, the orders of both the authorities below are set aside and the issue with regard to disallowance of provision for warranties is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter and find out the method for provision made by the assessee after comparing the expenditure made in the earlier years and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

22. The next issue arises for consideration is with regard to additional depreciation claimed by the assessee.

23. The Ld.counsel for the assessee purchased the machinery during the assessment year 2006-07 and claimed depreciation. The Assessing Officer allowed 50% of the additional depreciation and the balance additional depreciation was claimed during the year under consideration. On a query from the Bench, the Ld.counsel submitted that the copy of assessment order for assessment year 2006-07 is not readily available even with the assessee. This Tribunal is of the considered opinion that for claiming additional depreciation, the assessee has to establish that the machinery was purchased and installed. If the depreciation could be allowed in the earlier assessment year, the balance depreciation can be claimed in the subsequent year. This Tribunal is of the considered opinion that the matter needs to be re-examined by the Assessing Officer. Accordingly, orders of both the authorities below are set aside and the issue of additional depreciation is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter and find out whether the assessee, in fact, purchased and installed the machinery in the assessment year 2006-07 and

whether the additional depreciation was claimed and allowed at the rate of 10% and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

24. Now coming to Revenue's appeal in I.T.A. No.2079/Chny/2014.

25. The first issue arises for consideration is depreciation on UPS.

26. We heard the Ld. D.R. and Ld.counsel for the assessee. The depreciation was claimed at the rate of 60%. However, the Assessing Officer restricted the same to 15%. This Tribunal in I.T.A. No.1774/Mds/2012 in the case of Sundaram Asset Management Co. Ltd. dated 19.07.2013 allowed depreciation at the rate of 60% on UPS. In view of the above, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

27. Now with regard to disallowance made under Section 40(a)(i) of the Act, this Tribunal examined this issue elaborately in the earlier part of this order and it was remitted back to the file of the Assessing Officer.

28. In the result, both the appeals of the assessee and Revenue are partly allowed for statistical purposes.

Order pronounced on 23<sup>rd</sup> March, 2018 at Chennai.

sd/-

(अब्राहम पी.जॉर्ज)

(Abraham P. George)

लेखा सदस्य/Accountant Member  
चेन्नई/Chennai,

दिनांक/Dated, the 23<sup>rd</sup> March, 2018.

Kri.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. आयकर आयुक्त (अपील)/CIT(A), LTU, Chennai
4. आयकर आयुक्त/CIT, LTU, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.