

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No. 2175/Bang/2017
Assessment year : 2012-13

Hewlett Packard (India) Software Operation Pvt. Ltd., Survey No.192, Whitefield Road, Mahadevapura Post, Bengaluru – 560 048. PAN: AAACH 7164B	Vs.	The Assistant Commissioner of Income Tax, [formerly DCIT], Circle 3(1)(2) Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sharath Rao, CA
Respondent by	:	Smt. R. Premi, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	09.10.2019
Date of Pronouncement	:	16.10.2019

ORDER

Per N V Vasudevan, Vice President

This appeal by the assessee is against the order dated 12.09.2017 of the CIT(Appeals)-3, Bengaluru, relating to assessment year 2012-13.

2. Grounds No.1 & 2 are general in nature.
3. Grounds Nos.3 to 13 raised by the assessee in the grounds of appeal are with regard to the action of the revenue authorities in

disallowing the claim for deduction of a sum of Rs.40,96,000 paid for acquisition of the following software:-

Vendors	Amount (Rs.)
Rogue Wave Software Inc.	1,110,000
Internet Systems Consortium	2,252,500
Edison Design Group	733,500

4. The aforesaid item of expenditure was disallowed on the ground that tax has not been deducted at source at the time of making payments to the non-resident payees as required by the provisions of Sec.40(a)(ia) of the Income Tax Act, 1961 (Act).

5. The CIT(Appeals) upheld the order of the AO by following the decision of the Hon'ble Karnataka High Court in the case of *CIT v. Samsung Electronics Co. Ltd. [2011] 201 Taxman 477 (Kar)* wherein it took the view that right to use software was akin to right to use copyright in the software and was therefore in the nature of royalty. Such payment for right to use software is chargeable to tax in India in the hands of a non-resident payee. The following were the relevant observations on facts of the disputed addition before the CIT(Appeals):-

“3.9 As regards software worth Rs.11,10,000 (\$ 25,000) purchased from Rogue Wave Software Inc, although the same is of revenue nature, the same cannot be allowed as an expense during the year under consideration as the same relates to financial year 2010-11 and hence prior period expenditure. Further, the appellant has not deducted any tax at source on the same. Since purchase of software is royalty, as per decision of jurisdictional High Court in the case of Samsung Electronics (supra), the amount would not be allowable as a deduction as per provisions of sections 40(a) of the Act.

3.10 As regards software worth Rs.7,33,500/- (\$ 15,000) purchased from Edison Design Group, although the same is of revenue nature, the same cannot be allowed as an expense as the appellant has not deducted any tax at source on the same. Since purchase of software is royalty, as per decision of jurisdictional High Court in the case of Samsung Electronics (supra), the amount would not be allowable as a deduction as per provisions of sections 40(a) of the Act.

3.11 As regards payment amounting to Rs.22,52,500/- (\$ 42,500), made to M/s Internet Systems Consortium, the appellant has submitted that the same is a membership renewal fees and not purchase of any software. This argument of the appellant is without any merit as the payment has been made to M/s Internet Systems for 'Annual BIND Forum membership'. BIND (Berkeley Internet Name Domain) is a popular software for translating domain names into IP addresses and usually found on Linux servers. BIND Forum is a professional forum which provides technical support for computer/IT professionals for DNS/BIND/DHCP/WINS issues including problem solving collaboration tools. Thus the payment made is in nature of royalty and the same has also been characterized by the appellant as software in its books of accounts. The above claim of the appellant that it is only a membership fee and not related to any software related activities is just meant to escape the rigor of Section 40(a) of the Act.

Considering above, since the appellant has not deducted any tax at source on the same, as per decision of jurisdictional High Court in the case of Samsung Electronics (supra), the amount would not be allowable as a deduction as per provisions of sections 40(a) of the Act.”

6. Before the Tribunal, the learned counsel for Assessee made submissions on disallowance of a sum of Rs.22,52,500/- paid to M/s. Internet Systems Consortium (ISC) only. The submission made by the ld. counsel for the assessee was that as regards payment made to Internet Systems Consortium of Rs.22,52,500 is concerned, the same is not for

right to use software and in this regard, filed a copy of the quotation dated 13.10.2011 issued by Internet Systems Consortium, USA, wherein the description of services for which the payment is made has been enumerated. It has been claimed by the assessee that the aforesaid document could not be provided before the lower authorities for want of proper opportunity and the CIT(Appeals) did not give effective hearing before passing the impugned order.

7. We have considered the request of the assessee for admission of additional evidence and we find from para 3 of the CIT(Appeals) order that there were two hearings on 4.8.17 and 22.8.17 before the CIT(A) and on those dates none appeared on behalf of assessee. The appeal was fixed for hearing on 11.9.17 and on that date the assessee sought time to furnish some details. The CIT(Appeals) rejected the request of assessee for grant of further time and proceeded to decide the appeal on the basis of material already available on record. Taking into consideration the above circumstances, we are of the view that the additional evidence now sought to be filed before the Tribunal requires to be admitted for adjudication as the same is considered as material necessary for consideration for effective adjudication of the appeal of assessee and accordingly the same is admitted.

8. We have perused the quotation filed by the assessee and we find that the description given in that quotation is more in the nature of providing newsletter and material on BIND software. In this quotation, there is also a reference to agreement between the assessee and Internet Systems Consortium. From the above, it is not possible to conclude whether the payment in question was for right to use software and it requires further examination which could be done only by the AO after due opportunity to the assessee. We therefore set aside the order of CIT(Appeals) to the limit extent of examining as to whether the payment made to Internet Systems

Consortium can be regarded as a payment for right to use the software. To this limited extent, ground Nos.3 to 13 are treated as partly allowed for statistical purposes.

9. The other issue that needs to be considered is as to whether provision for leave encashment should be disallowed even though the same is based on actuarial valuation and is an ascertained liability. The background of the disallowance made by the AO is that provision for leave encashment was regarded as a contingent liability and therefore cannot be allowed as a deduction under the mercantile system of accounting, as the liability cannot be said to have been accrued. The Hon'ble Supreme Court in the case of *Bharath Earth Movers v. CIT, 245 ITR 428 (SC)* took the view that even though liability on account of leave encashment is claimed by way of a provision, the same should be allowed as a deduction, if the liability of the assessee for payment of leave encashment is certain and quantification of the such liability is reasonable. Section 43B(f) was introduced by the Finance Act, 2001 w.e.f. 1.4.2002 and it was provided therein that a liability on account of leave encashment of employees will be allowed only on actual payment.

10. We find that the Hon'ble Calcutta High Court in the case of *Exide Industries Ltd vs Union of India reported in 292 ITR 470 (Cal)* had struck down the provisions of section 43B(f) of the Act as unconstitutional. The revenue had carried the matter further to the Hon'ble Supreme Court which initially in Special Leave to Appeal (Civil) CC 12060 / 2008 by order dated 8.9.2008 had held as under:-

“The petition was called on for hearing today.

Upon hearing counsel the court made the following Order.

Issue Notice.

In the meantime, there shall be stay of the impugned judgement, until further orders.”

11. Later the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No(s). CC 22889 / 2008 order dated 8.5.2009 had held as under:-

“The petition was called on for hearing today.

Upon hearing counsel the court made the following Order

Delay condoned.

Leave granted.

Pending hearing and final disposal of the Civil appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the department to recover that amount in case Civil Appeal of the department is allowed.

We further make it clear that the assessee would, during the pendency of this Civil Appeal , pay tax as if Section 43B(f) is on the statute book but at the same time it would be entitled to make a claim in its returns.”

12. Hence from the aforesaid Supreme Court judgement, it could be inferred that the Hon'ble Supreme Court had not stayed the judgement of the Calcutta High Court during Leave proceedings. But the Hon'ble Supreme Court had only passed an interim order on the impugned issue.

13. In the light of the aforesaid background, we find that the coordinate Bench of the ITAT Bangalore in assessee's own case for the AY 2011-12 in IT(TP)A No.668(B)/2016, order dated 02.08.2019 remanded the matter to the AO to revisit the issue after the decision of the Hon'ble Supreme Court.

Following the same, we set aside the order of the CIT(Appeals) and remand the issue to AO for fresh consideration in the light of decision that may be taken by the Hon'ble Supreme Court in the appeal pending before it.

14. In the result, the appeal by the assessee is treated as partly allowed for statistical purposes.

Pronounced in the open court on this 16th day of October, 2019.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 16th October, 2019.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.