आयकर अपीलीय अधिकरण "ए" न्याय□पीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

मा□नीय श्री विकास अवस्थी, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI VIKAS AWASTHY, JM AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आ□करअपील सं./ I.T.A. No.2079/Mum/2003
(**निर्धारणवर्ष** / Assessment Year: 1998-99)
&
आयकरअपील सं./ I.T.A. No.1642/Mum/2003
(**निर्धारणवर्ष** / Assessment Year: 1999-00)
&
आयकरअपील सं./ I.T.A. No.3443/Mum/2004
(**निर्धारणवर्ष** / Assessment Year: 2000-01)

Zensar Technologies Ltd. (earlier known as International Computers India Ltd) Zensar Knowledge Park, Plot No.4, MIDC Kharadi, Off Nagar Road Pune – 411 014	**बनाम**/ Vs.	**ACIT (Inv.) Circle 2(1)** Aaykar Bhavan, M.K. Road Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACI-0342-Q		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से/ **Appellant by**	:	Shri Nitesh Joshi- Ld.AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Michael Jerald- Ld. DR

सुनवाई की तारीख/ **Date of Hearing**	:	16/12/2019
घोषणा की तारीख / **Date of Pronouncement**	:	02/01/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid appeals by assessee for Assessment Years [in short referred to as 'AY'] 1998-99 to 2000-01 contest separate orders of learned first appellate authority. Since grievance of the assessee in all the years is substantially the same, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience and brevity. The name of the erstwhile assessee namely *International Computers (India) Limited (ICIL)* has undergone change to *Zensar Technologies Limited* w.e.f. 14/01/2000 vide fresh certificate of incorporation issued by appropriate authority, a copy of which has been placed on record. Finding the same in order, we take-up the appeal for AY 1998-99 as the lead year.

ITA No. 2079/Mum/2003: AY 1998-99

2. This appeal assails the order of learned Commissioner of Income Tax (Appeals)-XXXIII, Mumbai [CIT(A)] dated 09/12/2002 on following grounds of appeal: -

> Ground No. 1
> The Commissioner of Income-tax (Appeals) XXXIII, Mumbai [hereinafter referred to as the CIT(A)]erred in not allowing deduction of Rs.2,00,00,000/- being the amount of non-compete fees charged to the accounts for the year ended 31st March, 1998 on the ground that the same constitutes capital expenditure.
> Ground No. 2
> The CIT (A) erred in upholding the ACIT's action in holding that Interest and Rent totaling to Rs.64,94,107/- (90% being Rs.58,44,696/-) is assessable under the head "Income from other Sources".
> Ground No. 3
> The CIT (A) erred in upholding the action of the ACIT in reducing the entire amount of Rs.63,91,317/- consisting of provision no longer required Rs.40,30,766, miscellaneous recovery

Rs.7,01,244, trade creditors amounts written back as no longer payable Rs.1,49,220 royalty recovery Rs.10,85,784 and miscellaneous receipts Rs.4,24,303 from the head 'Business Income' and assessing the same under the head 'Income from other Sources'.

Ground No. 4

The CIT(A) erred in upholding the action of the ACIT in holding that while computing "Profits of the business" for the purpose of deduction under section 80HHE, 90% of income totaling Rs.63,91,317, should be reduced from "Profits of business" treating the same as covered by 'any other receipt of similar nature' as appearing in Explanation (d) to section 80HHE."

3. We have carefully heard the rival submissions, perused relevant material on record and deliberated in various judicial pronouncements as cited before us. Our adjudication to various grounds of appeal would be as given in succeeding paragraphs.

4. Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged in development and marketing of software was assessed for year under consideration u/s. 143(3) on 30/03/2001 wherein the income of the assessee was determined at Rs.185.59 Lacs under normal provisions after certain additions / disallowances / adjustments as against returned income of Rs.125.71 Lacs filed by the assessee on 30/11/1998.

Ground No.1-Disallowance of Non-compete fee.

5.1 During assessment proceedings, it transpired that assessee purchased software business of *M/s. Fujitsu ICIM Ltd. (FIL)* (assessee's holding company) and entered into a non-compete agreement with the said entity on 31/12/1996 for a period of 10 years which was to be effective from 01/10/1996. The total consideration paid by the assessee was Rs.20 Crores and the accordingly, the same was amortized over a period of 120 months being duration of the non-compete agreement. As per the terms of the

agreement, the said consideration was to be satisfied partly by issue of shares / securities or by payment of cash in the agreed manner. In the financial statements, the assessee has accumulated the said expenditure under the head *miscellaneous expenditure* and adopted an accounting policy to write-off the same over a period of 10 years. Accordingly, an amount of Rs.2 Crores, being amount written-off for the year under consideration was debited to Profit & Loss Account and claimed as deduction.

5.2 The Ld. AO, forming an opinion that non-compete fee would be capital in nature, show-caused the assessee as to why the same should not be disallowed. In defense, the assessee submitted that the terms of software business were embodied into two agreements. Non-compete fee agreement bound FIL for a period of 10 years from entering into any software business arrangement for carrying out any software business relating to development and export of computer software and consultancy services including design development, maintenance, implementation, upgradation and porting of software for overseas market. The fee was based on projected profit, that would be forgone by FIL and therefore, the expenditure was deductible expenditure. As benefit was spread over 10 years, the same was being claimed over such period instead of being claimed in one year. The assessee further submitted that expenditure was in the nature of deferred revenue expenditure over a period of 10 years and therefore, the same was being amortized over such a period.

5.3 However relying upon the decision of Hon'ble Supreme Court in **CIT Vs. Coal shipments (P.) Ltd (82 ITR 902)** and decision of Hon'ble Orissa High Court in the case of **Orissa Road Transport Co. Vs. CIT [75 ITR 126],** Ld. AO opined that non-compete fee was to free the business from competition and therefore, the expenditure would be capital in nature. In other words, the payments made to rival to ward-off competition in business would constitute capital expenditure.

5.4 It was also observed that although the non-compete fee received by FIL was added to its income, however, Ld. first appellate authority held that since there was transfer of capital asset, no capital gain could be taxed since cost of the acquisition was indeterminate.

In the above background, the said amount was disallowed and added to the income of the assessee.

6. The learned first appellate authority confirmed the stand of Ld. AO by observing as under: -

> 5.2 I have carefully examined the above facts of the case. The appellant has relied on various case laws as cited above but in the appellants case the facts are different, and not similar to the facts as narrated in the above case laws. In the appellants case it had purchased the total software business of FICIM and the appellant entered into a non-compete agreement with FICIM for a period of 10 years for a consideration of Rs.20 crs which has been amortised over a period of 10 years and accordingly, an amount of Rs.2 crs was debited to the P & L A/c for the year under consideration. In the case of Coal Shipment Pvt. Ltd., the arrangement between the assessee and H.B.Law & Co. was not for any fixed term but could be terminated any time as such the payments made by the assessee were held not of capital nature. In the appeallant case the payment has been made to ward off competition in the business of a rival wouid constitute capital expenditure as the duration is for very long period and permanent and no clause for terminating the agreement at any time has been brought to my notice. Thus the case referred by the appellant is not at all relevant in the appellants case. Similarly, the facts of the case i.e Lt.G.D. Naidu & Others are also not similar to the facts of the appellants case, in the case of Empire Jute Co. Ltd, the Hon'ble Court held that what is material to consider is the nature of advantage in a commercial sense. The advantage consists

merely in facilitating assessees trading operations enabling the management and conduct of the assessee's business to be carried more efficiently or more profitable while leaving the fixed capital untouched. In the appellants case it is not the case that the advantage consisted of merely facilitating the assessee trading operations but the whole software business was purchased by the appellants company. Therefore, the case relied on by the appellant is not applicable in the appellants case. In the case of Alembic Chemical Works Ltd. also the Hon'ble Court has held that the business of the appellant from the commencement of its plant in 1961 was the manufacture of pencillin. Even after the agreement the product continued to be penicillin and the agreement with Japanese enterprise stipulated the supply of the most suitable sub cultures evolved by Japanese company for the purpose oi augmentation of the yield of penicillin. Thus the Hon'ble Court held that the improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. But in the appellants case a total new business has been acquired by the appellant company. The contention of the appellant that the period of 10 years does not give the appellant any enduring benefit is not correct as it is evident from the agreement. The relevant part of the agreement is reproduced as under: "By and under an agreement dt. 31/12/1996 entered into between the parties hereto, FIL has agreed to transfer by sale its undertaking relating to the software business to ICIL together with all its assets and liabilities for the consideration and upon terms and conditions contained therein". Thus it is clear that that non-compete lees has not been paid by the appellant to FUJITSU merely for the reason that it would not sale manufacture, distribute, deal or otherwise do any act which would compete with the development and sale of software but it has been paid as a part of the payment made to the FIL for transferring by sale its undertaking relating to the software business to ICIL with all its assets and liabilities. Hence I hold that the payment is capital in nature and thus has been rightly disallowed by the A.O In the result appeal is dismissed.

It is evident that Ld. CIT(A) has confirmed the stand of Ld. AO by observing that there was a transfer of undertaking with all assets and liabilities and the payment was made as part of the transfer process. We find that it is exactly this observation which is at fault. Upon perusal of documents on record, we find that the assessee has entered into 2 separate agreement, both dated 31/12/1996, the copies of which have been placed on record. By virtue of agreement for purchase of software business undertaking, the assessee has acquired the undertaking for a consideration of Rs.25 Crores. There is another agreement titled as non-compete agreement which restrict FIL to

compete with assessee in development and sale of software for exports market for a period of 10 years. The consideration has been fixed at Rs.20 Crores payable in the specified manner. Thus, there are two separate agreements against which separate payments have been made by the assessee to the transferor. This being so, the following binding judicial precedents would substantiate the case of the assessee that the aforesaid payment would not be capital in nature but deductible revenue expenditure:-

(i) Hon'ble Bombay High Court in **CIT V/s Everest Advertising Pvt Ltd [ITA No 6539 of 2010 04/12/2012]**

(ii) Hon'ble Madras High court in **Carborandum Universal Ltd. V/s JCIT [26 Taxmann.com 268 10/09/2012]** subsequently followed by same Court in **Asianet Communication Ltd V/s CIT [96 Taxmann.com 399 26/06/2018]**

(iii) Hon'ble Bombay High Court in the case of **CIT V/s Six Sigma Gases India Pvt Ltd [ITA No 1259 of 2016 28/01/2019]** after considering all the above decisions.

In above case laws, the unanimous view is that any payment to ward-off rival competition over a certain period of time in furtherance of business interest would be revenue in nature. If the advance consisted merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. We find that fact of the present case to be quite similar and are of the considered opinion that the aforesaid payment made by the assessee to ward off rival competition in a particular business segment in overseas market would be in furtherance of assessee's business interest and would enable the assessee to carry out its business more efficiently

and profitably. Therefore, we hold that the said expenditure would be deductible revenue expenditure. Accordingly, Ground No. 1 of the appeal stands allowed.

Additional Ground of Appeal

7.1 The assessee, vide letter dated 11/09/2019 has pleaded for admission of an additional ground of appeal concerning payment of non-compete fees. It has been explained that the quantum order was passed on 30/03/2001 which was adjudicated Ld. CIT(A) on 09/12/2002 wherein it was held that non-compete fees was capital in nature. In the meantime, the assessee by virtue of order dated 16/08/2001 passed by Hon'ble Bombay High Court, got merged with FIL which was effective from 01/04/2000. Therefore, the benefit of non-compete agreement was effectively valid only for a period of 3 years. In the above background a without prejudice additional ground has been raised which read as under: -

> **Deduction of Rs. 20,00,00,000 being the payment made towards non-compete fees**
> Without prejudice to Ground No.1, on the facts and in the circumstances of the case and in law, the entire amount of non compete fees of Rs. 20,00,00,000 paid by the appellant ought to be allowed as a revenue expenditure in AY 1998-99.

In support of the same, the assessee has pleaded for admission of additional evidences vide letter dated 14/12/2019. The additional evidences are in the shape of copy of order of Hon'ble Bombay High Court approving the scheme of amalgamation, Copy of certificate of incorporation evidencing change in the names etc. The Ld. DR opposed the admission of the same by submitting that the same ought not to be admitted at this stage of proceedings keeping in view the fact that the said plea was never taken

up before first appellate authority. The attention was drawn to the fact that the impugned order was passed in the year 2002 against which the appeal was preferred in the year 2003 and therefore, the lapse of time would debar the assessee to raise this claim, at this stage of proceedings.

7.2 Upon due consideration, we find that the additional ground is only without prejudice ground and since we have already allowed main ground, this alternative ground would become infructuous. Nevertheless, we concur with the submissions made by Ld. DR since the amalgamation was approved by Hon'ble Court in the year 2001 which was much before the passing of order by learned CIT(A). The assessee never took this ground or made such claim either before learned first appellate authority nor before Tribunal while filing the appeal in the year 2003. Further, the assessee seek to file additional evidences at this stage of proceedings, which were never appreciated or delved into by any of lower authorities. Keeping in view the fact that main ground has already been allowed by us, we see no useful purpose to remit the matter back to the file of lower authorities for reconsideration of alternative additional ground as well as additional evidences. Most importantly, Hon'ble Apex Court in **Taparia Tools Ltd. V/s JCIT (55 Taxmann.com 361 23/03/2015)** has held that normally the ordinary rule is to be applied namely revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if assessee claims that expenditure in that year, the department cannot deny the same. However, in those cases, when the assessee himself wants to spread the expenditure over a period of ensuing years, if can be allowed only if the matching

concept is satisfied. We find that it was the assessee's submissions all along that the benefits were perceived over a period of 10 years, being the life of restrictive covenants and accordingly, the claim was spread over a period of 10 years. Therefore, once the assessee himself chose to claim the same in a staggered manner, applying the '*matching principle'* and when the same has been allowed, there could be no occasion for the assessee to be aggrieved, on this point. Therefore, in view of the stated reasons, we decline to entertain the additional ground as well as additional evidences. Accordingly, the same stand dismissed.

Ground No.2-Taxability of Interest & Rent

8.1 It transpired that while determining the deduction u/s 80HHE, the assessee deducted 90% of interest on Bank deposits / staff and rental income aggregating to Rs.64.91 Lacs. The Ld. AO opined that the said receipts were to be treated as *income from other sources*. The assessee submitted that the said receipts were arising out of business and therefore, chargeable as *business income*, However, the said submissions were declined and adjustment thereof while computing deduction u/s 80HHE was denied. The stand of Ld. AO, upon confirmation by first appellate authority, is under challenge before us. The Ld. AR has relied upon the order of Hon'ble Delhi High Court rendered in **CIT V/s Koshika Telecom Ltd. (287 ITR 479)** for the submissions that interest on fixed deposits which were inextricably linked to business of the assessee, could not be treated as *Income from other sources.*

8.2 We find that this issue stood against the assessee by the decision of this Tribunal for AY 2001-02, ITA No.4538/M/2005 & Co. No.76/M/2006 order dated 15/12/2010 wherein similar income has been held to be assessable under the head *income from other sources.* Respectfully following the same, we dismiss Ground No.2 of the appeal.

Ground Nos. 3 & 4-Taxability of Misc. Receipts

9.1 It was noted that while computing deduction u/s 80HHE, the assessee did not reduce 90% of miscellaneous items aggregating to Rs.63.91 Lacs. These items were in the nature of provisions written back, miscellaneous / special / royalty recovery & misc. receipts etc. The assessee submitted that provisions envisage adjustment of specified category of income and since these items would not fall within the same, the same were excluded. However, Ld. AO opined that all these items could not be held relatable to export outside India and therefore, the same were to be treated as *Income from other sources.* The Ld. CIT(A) confirmed the same on the logic that turnover should be restricted to such receipts which would have element of profit in it. It is the only actual sale price which would be relevant. Therefore, since the stated items do not have profit element and could not be considered as part of the sales, the assessee's claim could not be accepted. Reliance was placed on the decision of Hon'ble Bombay High Court rendered in **CIT V/s Sudharshan Chemicals India Ltd. (245 ITR 769)** and **CIT V/s Kantillal Chottalal (246 ITR 439)** to arrive such a conclusion. Aggrieved, the assessee is in further appeal by way of Ground Nos. 3 & 4.

9.2 We are of the considered opinion that the aforesaid items represented miscellaneous write-backs & recoveries which arose in the course of carrying on business activities. The same could not be said to be an altogether of new stream of income for the assessee and therefore, could not be assessed under residuary head viz. *Income from other sources.* In fact, reversal of provision for doubtful debts was similarly treated as income from other sources in AY 2001-02 which was reversed by Ld. CIT(A). Upon further appeal by revenue, Tribunal confirmed the stand of Ld. CIT(A) and dismissed this ground vide ITA No. 4538/M/2005 order dated 15/12/2010. Therefore, we direct Ld.AO treat these receipts to be part of business income and accordingly consider the same for the purpose of Sec. 80HHE. Ground Nos. 3 & 4 stands allowed.

10. Finally, the appeal stands partly allowed in terms of our above order.

ITA No. 1642/M/03, AY 1999-2000

11.1 The assessment for this year has been framed u/s 143(3) on 19/03/2002 on similar lines. Certain additions / adjustments, upon confirmation by Ld. CIT(A) vide impugned order dated 11/12/2002 is under challenge before us. Ground No. 1 is similar to Ground No. 1 of AY 1998-99 wherein the assessee is pleading for deduction of amortization of non-compete fees for Rs.2 Crores. Facts being pari-materia the same as in AY 1998-99, we direct Ld. AO to allow the aforesaid deduction of Rs.2 Crores. Ground No.2 concern with assessability of Rent & interest income which would stand dismissed on similar lines as in AY 1998-99. In ground Nos. 3 & 4, the assessee is pleading for inclusion of certain items and

consideration thereof for the purpose of Sec. 80HHE. These grounds being similar to Ground Nos. 3 & 4 of AY 1998-99, stands allowed.

11.2 The assessee has raised an additional ground with respect to software expenditure for Rs.11.67 Lacs. During assessment proceedings, it transpired that the assessee purchased software for Rs.30.34 Lacs during December, 1995 to April, 1997 and amortized the expenses over a period of 36 months. Accordingly, for year under consideration, it claimed proportionate expenditure of Rs.12.22 Lacs which included exchange variation of Rs.0.75 Lacs. As done in earlier years, the exchange variation was not allowed. It was also noted that there was no import of software during the year and thus, there would be no question of payment of exchange variation. However, Ld. CIT(A) after considering assessee's submissions, allowed the same. Upon due consideration of factual matrix, we find that no such addition of Rs.11.67 Lacs as stated in the additional ground has been made while computing assessee's income and therefore, this ground is dismissed as infructuous.

12. The appeal stands partly allowed.

ITA No. 3443/M/04, AY 2000-2001

13. The assessment for this year has been framed u/s 143(3) on 21/03/2003 on similar lines. Certain additions / adjustments, upon confirmation by Ld. CIT(A) vide impugned order dated 04/02/2004 is under challenge before us. Ground No. 1 is similar to Ground No. 1 of AY 1998-99 wherein the assessee is pleading for deduction of amortization of non-

compete fees for Rs.2 Crores. Facts being pari-materia the same as in AY 1998-99, we direct Ld. AO to allow the aforesaid deduction of Rs.2 Crores. Ground No.2 concern with assessability of Rent & interest income which would stand dismissed on similar lines as in AY 1998-99. In ground Nos. 3 & 4, the assessee is pleading for inclusion of certain items and consideration thereof for the purpose of Sec. 80HHE. These grounds being similar to Ground Nos. 3 & 4 of AY 1998-99, stands allowed.

14. The appeal stands partly allowed.

Conclusion

15. All the appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 02nd January, 2020.

Sd/-	**Sd/-**
(Vikas Awasthy)	**(Manoj Kumar Aggarwal)**
न्याि क सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 02/01/2020
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
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