IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH : BANGALORE

BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA 192/Bang/2019
Assessment Years : 2015 – 16

M/s. Aquarlle India Pvt. Ltd., No. 94 & 95, New No. 113, Bull Temple Road, Basavangudi, Bangalore – 560 019. **PAN NO : AAGCA 1203 Q**	**Vs.**	Deputy Commissioner of Income Tax, Circle – 1 (1) (1), Room No. 215, 2nd Floor, BMTC Building, 80 Feet Road, Koramangala, Bangalore.
APPELLANT		**RESPONDENT**

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ITA 984/Bang/2019
Assessment Year : 2016 – 17

M/s. Aquarlle India Pvt. Ltd., No. 94 & 95, New No. 113, Bull Temple Road, Basavangudi, Bangalore – 560 019. **PAN NO : AAGCA 1203 Q**	**Vs.**	Assistant Commissioner of Income Tax, Circle – 1 (1) (1), Room No. 215, 2nd Floor, BMTC Building, 80 Feet Road, Koramangala, Bangalore.
APPELLANT		**RESPONDENT**

Appellant by	:	Shri. Padamchand Khincha, CA
Respondent by	:	Shri. Priyadarshi Misra, JCIT – DR

Date of Hearing	:	04-03-2020
Date of Pronouncement	:	06-03-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeals for years under consideration has been filed by assessee against order is dated for December 2018 for assessment year 2015-16 and 29/03/2019 for assessment year 2016-17 passed by Ld. CIT (A)-1, Bangalore.

2. Admittedly grounds raised by assessee in both appeals are same and identical, accordingly for sake of convenience grounds for assessment year 2015 – 16 are reproduced hereunder:

ITA 192/B/2019

1. **General ground:**

1.1 The learned Deputy Commissioner of Income Tax, Circle 1(1)(1), Bengaluru (hereinafter referred to as 'AO') has erred in passing the assessment order in the manner passed by him and the learned Commissioner of Income tax, Bengaluru - 1 ['CIT(A)'] has erred in sustaining the disallowance made by the learned assessing officer. The order passed by the CIT(A) is bad in law and liable to be quashed.

2. **Grounds relating to deduction under section 80JJAA:**

[Tax effect= 1,03,16,988* 33.99%=35,06,744]

2.1 The learned CIT(A) has erred in confirming disallowance of deduction under section 80JJAA amounting to Rs 1,03,16,988 made by the AO.

2.2 The learned CIT(A) has erred in not appreciating that all the conditions specified under section 80JJAA of the Act are satisfied for being entitled to the deduction.

2.3 The learned CIT(A) has erred in confirming the conclusion of AO that deduction under section 80JJAA will be available only if new workmen is employed for a period of 300 days in the previous year.

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2.4 The learned CIT(A) has erred in not appreciating that:

(a) the appellant is eligible to the deduction on the wages paid to new workmen employed during the year who have completed 300 days of employment at least on or before filing return of income;

(b) the objective behind introduction of section 80JJAA as stated by the Finance Minister in the course of the Budget Speech are met by the appellant.

(c) that the provisions conferring deductions is to be interpreted in a manner that promotes the objective sought to be achieved and not frustrate it, and that in the eventuality of any duality of opinion, the view in favour of the appellant is to be adopted.

2.5 The learned CIT(A) has erred in placing reliance on the tribunal decisions of ACIT v Texas Instruments India P Limited [ITA Nos.273 & 274/Bang/2005] and Bosch Limited v ACIT (2016) 74 taxmann.com 161 (Bang-ITAT), which are distinguishable.

2.6 In any case and without prejudice, deduction under section 80JJAA should be provided from the year in which the workman is employed for more than 300 days in a year even if it is not the year in which he is recruited.

2.7 Without prejudice, the following amendments are clarificatory and hence retrospective in nature:

a) Clause (ii) of Explanation to sub-section (2) of section 80JJAA [by the Taxation Laws (Amendment) Act, 2016];

b) First proviso to Clause (ii) of Explanation to sub-section (2) of section 80JJAA [by the Taxation Laws (Amendment) Act, 2016]; and

c) Second proviso to Clause (ii) of Explanation to sub-section (2) of section 80JJAA [by the Finance Act, 2018].

3. **Grounds relating to disallowance of Marketing Commission:**

*[Tax effect- 3,57,76,554*33.99%=1,21,60,451]*

3.1 The learned CIT(A) has erred in confirming disallowance of payment of marketing commission amounting to Rs.3,57,76,554 made by the AO.

3.2 The learned CIT(A) has erred in concurring with the AO and in:

(a) Concluding that the appellant had not submitted any details to prove the marketing services rendered by Aquarelle International Limited,

(b) not appreciating the business, commercial and economic realities,

(c) concluding that the payments are a colourable device to inflate expenses and reduce tax liability,

(d) not appreciating that the profit margins of the appellant post the payment of commission was higher than the profits earned by comparable companies,

(e) Disallowing expenditure under section 37 of the Act.

3.3 The learned CIT(A) has erred in concurring with AO that right to receive commission arises in India.

3.4 The learned CIT(A) has erred in concurring with the conclusions of AO that payments made to Aquarelle International Limited, Mauritius (AIL) constitute fees for technical services under section 9(1)(vii).

3.5 The learned CIT(A) has erred in not appreciating that:

(a) in the absence of the article on Fees for Technical Services in a Tax Treaty, the payment would continue to be classified as Business Profit under Article 7 of the relevant Tax Treaty;

(b) since the payments to overseas entities were in the nature of business profit and in the absence of a Permanent Establishment of the overseas entities in India, the impugned payments were not chargeable to tax in India and consequently there was no requirement to deduct tax at source in respect of the said payments.

3.6 The learned CIT(A) has erred in concurring with AO that payment of marketing commission to AIL is to be disallowed under section 40(a)(i) of the Act.

3.7 The learned CIT(A) has erred in concluding that the appellant had not provided any submission/arguments in support of the grounds raised which is bad in law.

4. **Grounds relating to levy of Interest under section 234B:**

4.1 The learned AO has erred in levying interest under section 234B of Rs. 50,58,176. On facts and circumstances of the case, interest of under section 234B is not leviable. The appellant denies its liability to pay the interest under 234B.

5. **Prayer:**

5.1 In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) be quashed Or in the alternative

(a) Claim of deduction under section 80JJAA amounting to Rs.1,73,71,102 as claimed in the return of income be accepted and the disallowance as made be deleted,

(b) Allow commission of Rs. 3,57,76,554 paid to AIL as a deduction, and

(c) Interest levied under section 234B amounting to Rs. 50,58,176 is to be deleted.

A. Y : 2015 – 16

2. Brief facts of the case are as under:

Assessee is engaged in the business of manufacturing garments for years under consideration and has claimed deduction u/s. 80JJAA of the Act. Entire dispute revolves around allowability in respect of additional wages paid to new employees incurred in regular course of business u/s. 80JJAA of the Act.

3. Ld. AO during assessment proceedings was of the view that, deduction u/s. 80JJAA of the Act was allowable from profits and gains derived by assessee to the extent of 30% of additional employee cost incurred in course of business during previous

year relevant to assessment year under consideration. In respect of additional wages paid to new employees, employed on regular basis and completed 300 days of employment in the preceding assessment year relevant to assessment years under consideration.

4. Ld.AO observed that, some workmen completed 300 years during the year. Ld.AO accordingly called for details to be furnished by assessee, regarding employees who but joined in preceding year did not complete 300 days. Ld. AO observed that, in Form 10 DE furnished by assessee did not have any column in respect of employees employed during preceding years and accordingly rejected arguments of assessee on the premise that employees had not completed 300 days in the year should be taken in current year when he or she completes 300 days. Ld.AO, accordingly, was of the opinion that assessee was eligible only for a sum of Rs.70,54,113/- and disallowed balance deduction claimed u/s. 80JJAA amounting to Rs.1,03,16,988/-. Another disallowance made by Ld.AO was in respect of marketing commission amounting to Rs.3,57,76,554/-.

5. Ld. AO observed that, assessee during previous year, debited said sum has commission to its holding company on account of marketing. Ld.AO called upon assessee to explain as to why deduction should not be disallowed u/s. 40 (a) (ia) of the Act, since assessee failed to deduct TDS. Assessee submitted that, payment made by it is not chargeable to tax in India, therefore question of deduction of tax at source under section 195 of the Act does not arise. Assessee also submitted that, it has no business connection as defined u/s. 9 (1) (vii) of the Act and

that marketing commission is not in the nature of fee for technical services under Indo-Mauritius double taxation avoidance agreement. It is submitted that is no article containing any provision regarding taxability of fees for technical services. It was thus submitted that, in absence of any provision related to the business income in double taxation avoidance agreement and in absence of permanent establishment in India, payment of commission is not liable to be taxed in India.

6. Ld. AO called for agreements with holding company from where it was observed that, assessee has not submitted any details to establish that, holding company rendered marketing services. Ld.AO thus held that, payment to its holding company is a colourable device to inflate expenses of assessee company and to reduces tax liability, therefore genuineness of commission paid to its holding company could not be proved. Ld.AO, accordingly, disallowed the same u/s. 37 (1) of the Act.

Aggrieved by additions made by Ld.AO, assessee preferred appeal before Ld. CIT-(A).

7. Ld. CIT-(A) dismissed the appeal of assessee holding that, assessee is eligible for deduction u/s. 80JJAA of the Act only in respect of employees who completed their employment for not less than 300 days during the previous year under consideration and that such workmen should not be casual workmen employed to contract labour. Ld. CIT-(A) after considering his own view in preceding assessment years observed that, these appeals were pending before this *Tribunal,* held as under:

"6.1.1 The facts and circumstances of the appeal of the appellant for the current Assessment Year 2015 – 16 are identical to that of the Assessment Year 2013 – 14 & 2014 – 15, considering the same I do not find any reason to deviate from the stand taken by me for the Assessment Year 2013 – 14 & 2014 – 15 referred supra. Accordingly, for the same reasoning I confirm the action of the AO in restricting the claim of the appellant u/s. 80JJAA by concluding in para 3.5 that deduction in respect of workmen who completed 300 days of employment during the current year in assessment and last 2 financial years is allowable amounting to Rs. 70,54,113 (disallowed the remaining claim of deduction amounting to Rs.1,03,16,988 (ie, 1,73,71,102 – 70,54,113). In the result, the grounds of appeal relating to 2-8 are dismissed".

8. On the issue of disallowance u/s. 40(a)(ia) of the Act, assessee had filed additional evidence which was considered by Ld. CIT-(A). He was of the opinion the additional evidences so filed did not establish that M/s. Aquarelle International Ltd., rendered marketing services warranting payment of commission. He thus upheld the view of Ld.AO.

Aggrieved by order of Ld. CIT(A) assessee is in appeal before us now.

Ld.AR submitted that, both these issue stands squarely covered by order of this *Tribunal* for *assessment year 2013-14 in ITA No. 2737/B/2017* by *order dated 03/04/2019* and order of this *Tribunal* for *assessment year 2014-15 in ITA No. 28/B/2018* by *order dated 20/12/2019.*

9. Ld. AR submitted that, **Ground No.1** is general in nature and therefore do not require adjudication.

9.1. Ground No.2 is on disallowance confirmed by Ld. CIT-(A) u/s. 80 JJAA of the Act. He submitted that, this issue has

been considered by this *Tribunal* in assessment year 2014-15 (supra) as under:

6. We heard the rival submissions and perused the material placed on record. In the instant case, the assessee submitted that the assessee is eligible for deduction under section 80JJAA of the Act, if the workmen has employed for more than 300 days irrespective of the year in which they were recruited for three consecutive years, whereas the AO disallowed deduction under section 80JJAA of the Act relating to the workmen who have not completed 300 days in the year under consideration. The identical issue has been considered by the ITAT in the assessee's own case for the assessment year 2013-14, and held that the assessee is eligible for deduction under section 80JJAA of the Act.,on additional wages paid to the new regular workmen employed in the financial year relevant to the assessment year 2012-13 provided they continue to be qualified under the regulation of regular workmen. We extract the relevant part of the tribunal order in the assessee's own case for the sake of clarity, which reads as under:

> *8. We heard the parties and perused the record. We notice that the deduction u/s 80JJAA is allowed for three years. Accordingly, during the year under consideration, the assessee shall be eligible for deduction in respect of wages paid to new regular workmen employed in the financial year relevant to assessment year 2011-12, as the present assessment year is the third year. Similarly, the assessee shall be eligible for deduction in respect of wages paid to new regular workmen employed in the financial year relevant to assessment year 2012-13, as the present assessment year is the second year. Hence the assessee should be eligible for deduction u/s 80JJAA of the Act in respect of eligible regular*
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> *workmen employed in Financial years relevant to AY 2011-12, 2012-13 and 2013-14, provided they continue to qualify under the definition of "regular workman" during this year also.*

6.1 Therefore, we consider it is deem it fit to remit the matter back to the file of AO to examine the issue in the light of the decision of this Tribunal and direct the AO to allow the deduction as per the direction given in the order supra. The assessee has to furnish the details of new workmen employed and the additional wages incurred before the AO. Accordingly, the order of the lower authorities are set aside and the issue is remitted back to the file of the AO to decide the issue afresh on merits and the assessee is free to make all the claims before the AO. Accordingly, the appeal of the assessee on this ground is allowed for statistical purpose.

9.2. Respectfully following the same, we direct Ld. AO to calculate number of days of employment in case of each workmen and to consider claim of assessee in accordance with the law. Assessee is directed to provide all relevant details in order to assist Ld. AO to carry out verification. Needless to say, that assessee shall be granted proper opportunity of being heard in accordance with law.

Accordingly, this ground of assessee is allowed for statistical purposes.

10. Ground No.3 is regarding disallowance of marketing commission. Ld. AR submitted that, this issue has been sent back by this *Tribunal* in assessment year 2014-15 (supra) by observing as under:

9. We have heard the rival submissions and perused the material placed on the record. From the order of AO we find that the AO has made the addition of Rs. 4,7655,888I- under section 37(1) of the Act and also invoked the provisions

of section 40(a)(ia) of the Act. With regard to the disallowance made under section 37(1) of the Act, the AO issued the notice under section 142(1) of the Act directing the assessee to establish the marketing services rendered by the assessee and made the addition holding that the assessee did not establish the marketing services rendered by the holding company M/s. Aquarelle International Ltd. However in subsequent paragraphs though without prejudice, the AO made the addition under section 40(a)(ia) of the Act. While making the disallowance under section 40(a)(ia) of the Act the AO made the observation that payment was genuine and the agents have rendered the services. Therefore, as rightly argued by the Ld. AR there was a contradictory finding in respect of the services rendered by the foreign agent to the assessee. The Ld. CIT(A) rejected the application of the assessee for admission of additional evidence, however, the Ld. CIT(A) reached conclusions on the basis of additional evidence produced by the assessee, without even calling for the remand report. Having rejected the application for admission of additional evidence the Ld. CIT(A) ought not to have placed reliance on the same additional evidence for concluding that the M/s. Aquarelle International Ltd., has not rendered the marketing services to the assessee. The Ld. CIT(A) also ought to have called for the remand report and made verification of the facts submitted in the additional evidence before taking the additional evidence as basis for coming to conclusions. Therefore, we are of the considered view that the entire issue needs to be re-examined by the AO to establish whether the M/s. Aquarelle International Ltd. has rendered the services for receipt of commission or not and whether the payment is in the

nature of technical services or not. Hence we remit the matter back to the file of the AO to examine the entire issue and decide the issue afresh on merits. Accordingly, we set aside the order of the AO for denovo consideration. Accordingly, the appeal of the assessee is allowed for statistical purposes.

10.1. Respectfully following the same we direct Ld. AO to consider the issue afresh on merits. Needless to say, that assessee shall be granted proper opportunity of being heard in accordance with law.

Accordingly, this ground filed by assessee stands allowed for statistical purposes.

Ground No.4 is regarding levy of interest which is consequential.

Ground No.5 is general in nature.

Accordingly, appeal filed by assessee for assessment year consideration stands allowed for statistical purposes.

Assessment year 2016-17:

11. As both sides submit that, issues alleged by assessee before this *Tribunal* are identical in assessment year 2016-17. It is also submitted that, facts and circumstances have also not changed during the year under consideration.

Accordingly **Ground No.2** regarding disallowance u/s. 80JJAA is decided mutatis mutandis as has been decided for assessment year 2015-16 (supra) in para 9.1 – 9.2.

Similar is the submission for **Ground No.3,** regarding disallowance under section 40 (a) (ia) of the Act. This issue also stands decided mutatis mutandis as has been decided for assessment year 2015-16 (supra) in para 10 above.

Other grounds raised by assessee in this year are general in nature and therefore do not require adjudication.

Ground No. 4 is consequential and therefore do not require any adjudication.

Accordingly, grounds raised by assessee for assessment year under consideration stands allowed for statistical purposes.

In the result, appeals filed by assessee for assessment years, 2015-16 and 2016-17 stands allowed for statistical purposes.

Order pronounced in the open court on 06th March, 2020.

Sd/-	Sd/-
(B. R. BASKARAN)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 06th March, 2020.
/MK/

Copy to:

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

By order

Assistant Registrar,
IncomeTax Appellate Tribunal.
Bangalore.