

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.2464/Bang/2018
Assessment Year : 2012-13

Tata Elxsi Ltd., ITPB Road, Hoody, Whitefield, Bengaluru-560 048. PAN - AA ACT 7872 Q	Vs.	The Dy. Commissioner of Income Tax, Circle-7(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, C.A
Respondent by	:	Shri Fwihat Hussain Qureshi, CIT (DR)

Date of Hearing	:	03-11-2020
Date of Pronouncement	:	05-11-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 09/08/2018 passed by Ld.CIT(A)-7, Bangalore for assessment year 2012-13 on following grounds of appeal:

1.1. The Id. AO has erred in disallowing deduction under section 80JJAA amounting to Rs.8,93,19,981 and the ld. CIT(A) has erred in confirming the said disallowance. On facts and circumstances of the case and law applicable, deduction under section 80JJAA should be allowed as claimed in the return of income.

2.1. The learned AO has erred in disallowing deduction claimed in respect of share of loss from M/s A Squared Elxsi Entertainment LLC (A2E2), USA amounting to Rs.4,11,75,000/- and the ld.

CIT(A) has erred in confirming the said disallowance. On facts and circumstances of the case and law applicable, the impugned disallowance should be deleted in entirety.

3.1. In view of the above and other grounds to be adduced at the time of hearing, the appellant company prays that the order passed by the learned Commissioner of Income tax (Appeals) 7, in so far it is prejudicial to the appellant, be quashed Or in the alternative

- (i) Deduction under section 80JJAA be allowed as claimed in the return of income;*
- (ii) Deduction in respect of share of loss from A2E2, USA be allowed as claimed in the return of income.*

Brief facts of the case are as under:

2. Assessee is a company engaged in the business of distributed systems, design and development of hardware and software and digital content creation. It filed its return of income for year under consideration on 29/11/2012 declaring total income of Rs.26,38,79,760/-. The case was selected for scrutiny and notice under section 143(2) and 142(1) of the Act were issued.

2.1. During the scrutiny proceedings Ld.AO noticed that assessee claimed deduction of Rs.8,93,19,981/-under section 80JJAA of the Act. Ld.AO rejected the claim of assessee for non-fulfilment of following the reason that the condition of 300 days to be fulfilled by the regular workmen as per the provisions does not stand fulfilled.

2.2. Ld.AO observed that assessee has claimed deduction of Rs.4,11,75 000/-towards share of loss from M/s.A Squard Elxsi Entertainment LLC. Ld.AO accordingly called for details in respect of the same and found noted that assessee has not been allotted shares in M/s A Squard Elxsi Entertainment LLC, USA (hereinafter referred to as A2E2) during the year under

consideration. It has been noted by him that 50% loss claimed by assessee is not in accordance with provisions of the Act and accordingly the claim was disallowed.

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

3. Ld.CIT(A) upheld the disallowance following decision of *Hon'ble Delhi Tribunal* in case of *LG Electronics India Pvt.Ltd* reported in *(2013) 33 Taxmann.com 465*, wherein, it was held that only new workmen employed for a period of 300 days in relevant previous year are eligible for deduction under section 80 JJAA of the Act. He also placed reliance on Full Bench by decision *Hon'ble Supreme Court* in case of *Commissioner of Customs (Import) Vs. Dinesh Kumar & Co. & Ors.* reported in *Civil Appeal No.3327 of 2007* by order dated 30/07/2018.

3.1. In respect of the 2nd issue Ld.CIT(A) observed that in the absence of shares in the joint-venture claim of 50% loss on the same on account of ownership in joint-venture by assessee does not stand to logic and legally not sustainable. He thus rejected the claim of assessee.

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

4. At the outset it has been submitted that Ground 3.1 is general in nature and therefore do not require adjudication.

4.1. Ground No.1.1 is in respect of disallowance under section 80JJAA of the act amounting to Rs.8,93,19,981/-.

Ld.AR submitted that, for purposes of section 80JJAA of the act, gross total income of eligible assessee should include income from an industrial undertaking engaged in the manufacture or production of an article or thing. He submitted that, the term “Industrial undertaking’ is not defined in this section however it is defined in section 10(15) of the Act. He also referred to ‘The Industrial Disputes Act’, to which, substantial reference has been made in section 80JJAA of the Act, that defines ‘Industry’ as under:

Industry means any business, trade, undertaking, manufacture or calling of employers and includes all calling, service, employment, handicraft or industrial occupation or revocation of workmen.”

4.2. He also submitted that the term “article or things” is not defined in the income tax act and they must be understood with reference to the context. Ld.AR placed reliance on decision of coordinate bench of this *Tribunal* in case of *Texas Instruments (India) Pvt.Ltd vs ACIT* reported in (2020) 115 *Taxmann.com* 154, wherein, the issue regarding, whether, employees employed in software industries could be regarded as workmen has been considered in this case wherein this tribunal held that software industry has also been notified as industry for purpose of Industrial Disputes Act, 1947, by state of Karnataka, and that, the employees employed in the software development industry rendered technical services and not services in the nature of supervisory or management character.

4.3. Ld.AR submitted that, this is the 3rd year of claim by assessee and that the employees against whose wages the deduction has been claimed satisfies the necessary conditions. He placed reliance on the observations of this *Tribunal in Texas Instruments (India) Pvt.Ltd vs ACIT (supra)* regarding allowability of claim to assessee.

4.4. On the contrary Ld.CIT.DR placed reliance on observations of Ld.CIT(A) and para 4.2 of impugned order. He submitted that Ld.CIT(A) relied on his order for assessment year 2012-13. He thus submitted that nothing on record establishes the submission of Ld.AR that this is the 3rd year of claim. Ld.CIT.DR submitted that details with regard to employees on salary deduction has been claimed under section 80JJAA of the act has not been produced in the paper book. He thus requested for the issue to be remanded to authorities below for verification.

5. We have perused submissions advanced by both sides in light of records placed before us.

We note that the Ld.AO denial of benefit to assessee is based on the reasoning that assessee was denied benefit against these employees in the 1st year of their employment and that assessee being a software development company is not eligible for deduction.

5.1. We note that the 1st of objection of Ld.AO regarding non-satisfaction with respect to additional wages paid to new employees in the 1st year of employment is concerned, this

Tribunal has expressed following view in case of *Texas Instruments (India) Pvt.Ltd vs ACIT (supra)*:

*“9. We have given a very careful consideration to the rival submissions. The only reason given by the AO for denying the benefit of deduction u/s.80JJAA of the Act, which is the reason that survives for consideration by the Tribunal is according to the AO since the additional wages paid to these 287 employees were not eligible to deduction u/s.80JJAA of the Act because these employees did not work for more than 300 days in FY 2006-07 relevant to AY 2007-08, the wages paid to these employees in AY 2008-09 will also not qualify for deduction u/s.80JJAA of the Act. In other words according to the AO if the condition for grant of deduction u/s.80JJAA of the Act is not satisfied with reference to additional wages paid to new employees in the first year of their employment, then the additional wages paid to such new employees will not allowed in the second and third Assessment Years also. As pointed out by the learned counsel for the Assessee, this approach of the revenue authorities is contrary to the AO's stand on claim for similar deduction u/s.80JJAA of the Act in AY 2007-08. In the order of assessment passed by the AO for AY 2007-08, he has while disallowing the claim for deduction u/s.80JJAA of the Act for that AY, accepted the position that on additional wages paid to new workmen employed during the previous year relevant to AY 2005-06 who have worked more than 300 days during the previous year relevant to AY 2007-08, the Assessee is entitled to deduction u/s.80JJAA of the Act. In the decision rendered in the case of *Bosch Ltd. (supra)* the Bangalore ITAT at paragraph 23 of the aforesaid order the Tribunal observed that the deduction u/s.80JJAA of the Act is allowed for three years including the year in which the employment is provided. Hence, in each year it has to be seen that the workmen was employed for at least 300 days during that previous year and that such workmen was not a casual workmen or workmen employed through contract labour. Therefore, if some workmen were employed for a period of less than 300 days in the previous year then no deduction is allowable in respect of payment of wages to such work men in the present year even if such workmen was employed in the preceding year for more than 300 days but in the present year, such workmen was not employed for 300 days or more. By the very same reasoning the fact that in the first year of employment the additional wages paid is not allowed deduction for the reason that the workmen did not work for 300 days or more but if the next two Assessment years, if he works for more than 300 days each, then the deduction u/s.80JJAA of the Act has to be allowed. It is not proper to say that if the deduction is refused in the first year of employment of the new employee then for the next two succeeding Assessment Years also, the benefit of deduction will not be available. Such an approach defeats the very purpose for which deduction u/s.80JJAA of the Act is allowed for three consecutive Assessment years. This aspect has now been clarified in the Finance Act, 2018 by adding a second proviso to*

the definition of additional employee in Explanation (ii) to Sec.80JJAA of the Act. Even prior to such curative or clarificatory amendment, we are of the view that the claim for deduction u/s.80JJAA of the Act cannot be and ought not to have been disallowed on this ground. We therefore direct that the deduction claimed by the Assessee should be allowed.”

5.2. From the above observations, there is no doubt that assessee cannot be denied deduction under section 80JJAA of the Act, provided that, such employees fulfil the condition of being employed for 300 days for year under consideration , even though such employees do not fulfil the condition of being employed for 300 days in the immediately preceding assessment year.

5.3. We also note that, details fulfilment of number of days of such employees, on whose salary deduction has been claimed by assessee, are not available on record. Therefore, we are unable to verify, whether necessary condition of 300 days stands fulfilled. We are therefore of opinion that the issue needs to be remanded to Ld.AO to verify these details in terms of new employees having satisfied the 300 days criteria during the year.

5.4. We direct assessee to provide all details regarding number of regular workmen/employees, number of new workmen/employees added for each of the immediately three preceding assessment years to Ld.AO. Ld.AO is then directed to analyse fulfilment of the condition in respect of new employees/workmen against whom the claim has been made by assessee under section 80JJAA of the Act. Ld.AO is then directed to allow deduction under section 80 JJAA of the Act.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

6. Ground number 2.1 is in respect of not allowing the loss claimed in respect of assessee's share from A2E2 amounting to Rs.4,11,75,000/- that was claimed during assessment proceedings.

At the outset, both parties admit that various details in respect of the claim has not been verified by Ld.AO as the same was made by way of submissions during assessment proceedings.

6.1. Brief facts as has been submitted by assessee in respect of this issue is that assessee entered into a joint venture agreement with M/s.A Squad Entertainment LLC having its headquarters at California, USA. It has been submitted that the joint venture was for the purpose of creating venture companies named A2E2 which was incorporated as per the law is off USA on 16/06/2011. It has been submitted that in terms of the agreement share holding of assessee with A2E2 would be the paid-up equity capital amounting to USD 2 million comprising of 2 million shares of USD 1 each. Assessee had agreed to pay cash of USD 1,000,001 words 1,000,001 shares of A2E2 and balance of 999,999 equity shares would be allotted as to M/s.A Squad Entertainment LLC in consideration of it assigning its rights to certain animated proprieties to A2E2. Assessee accordingly remitted USD 1,000,001 words its share of equity contribution in A2E2 during November 2011. M/s.A Squad Entertainment LLC delayed and pertaining the requisite no objection certificate from the respective assigned for assignment of assessee's rights to

A2E2 that prevented the board of management and allotting equity shares to both the joint venture partners in A2E2.

6.2. It is submitted that A2E2 opted to be assessed at partner's level. Ld.AR submitted that A2E2 was considered as a passthrough entity and that the profits or losses arising from A2E2 was assessable in the hands of joint venture partners during the year under consideration. The Ld.AR submitted that the loss claimed by assessee is assessee's 50% share in the loss suffered by A2E2 during the year in USA.

6.3. With the above factual background, we note that authorities below rejected the claim as assessee assessee was not allotted shares in the LLC wherein it was a partner. In our view this issue needs to be remanded to Ld.AO to consider the claim of assessee in light of evidences/documents, joint venture Agreements, declaration by the U.S. LLC before the tax authorities therein etc, OECD commentary is in respect of the same, the manner in which such incomes/loss as the case may be are treated in USA being the source country and the manner in which such income/loss are to be treated as per Indian income tax act. Ld.AO shall take a view based upon all the documents in light of the provisions applicable during the relevant period under the act. Needless to say that proper opportunity of being heard shall be granted to assessee in accordance with law Filed by assessee, accordance with law.

6.4. Accordingly, the issue is remanded to Ld.AO. Assessee is directed to file all requisite details in support of its claim in

accordance with law which shall be considered by Ld.AO upon verification.

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

In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in open court on 5th Nov, 2020

Sd/-

(B. R. BASKARAN)
Accountant Member
Bangalore,
Dated, the 5th Nov, 2020.
/Vms/

Sd/-

(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-10-2020		Sr.PS
3.	Draft proposed & placed before the second member	-10-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-10-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-10-2020		Sr.PS/PS
6.	Kept for pronouncement on	-10-2020		Sr.PS
7.	Date of uploading the order on Website	-10-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-10-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS