

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N V VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.567/Bang/2020
Assessment year : 2012-13

Bangalore International Airport Ltd., Alpha 2, Administration Block, Kempegowda International Airport, Devanahalli, Bangalore – 560 300. PAN: AABCB 8973D	Vs.	The Deputy Commissioner of Income Tax, Circle 1(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Shri Sanjay Kumar S.R., CIT(ITAT), Bengaluru.

Date of hearing	:	16.06.2022
Date of Pronouncement	:	21.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal arises out of the order of the CIT(Appeals)-1, Bengaluru dated 13.01.2020 for the assessment year 2012-13.

2. The assessee has raised the following grounds:-

“The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:

1. The Order/ Directions are bad in law and on facts

The order issued by the Commissioner of Income Tax (Appeals) - I [‘CIT(A)’], under section 250 of the Income-tax Act, 1961 [‘the

Act'], is partially bad in law and on facts and is in violation of the principles of natural justice.

Tax effect: Nil

2. Depreciation on the intangible assets of INR 22,500,657

On the facts and in the circumstances of the case, the learned CIT(A) erred in facts and law in confirming the disallowance of depreciation on the intangible assets on the grounds that the expenditure incurred towards availing of professional and legal services during pre-operative period i.e. before commencement of the commercial operation, is revenue in nature, which qualifies for capitalization among various fixed assets.

Reduction in MAT credit – INR 7,300,338

3. Software expenses for INR 4,591,040 (net of depreciation)

On the facts and in the circumstances of the case, the learned CIT(A) erred in facts and law in confirming the disallowance made towards software expenses on the ground that complete detail of software expenses was not furnished, without considering the detailed submission made by the Appellant and treating the same as capital in nature.

4. Initiation of penalty proceedings

That the appellant prays that directions be given to grant all such relief and arising from the above grounds and also relief consequential thereto.

That the Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of appeal at any time before or during the hearing of the appeal.”

3. The assessee is engaged in the business of designing, financing, construction, operation and maintenance of Bengaluru International Airport at Devanahalli. The assessee company filed its e-return of income for the AY 2012-13 on 29.11.2012 declaring total income of

Rs.7,77,16,290 and a book profit of Rs.179,95,15,810 was computed u/s. 115JB of the Income-tax Act, 1961 [the Act]. The case was selected for scrutiny and notice served on 21.8.2013. The AO completed the assessment u/s. 143(3) of the Act making the following disallowances:-

- (i) Disallowance of concession fees – Rs.85,42,00,000.
- (ii) Disallowance of depreciation of intangible assets – Rs.2,25,00,657.
- (iii) Disallowance of repairs – Building : Rs.13,56,30,000
Machinery: Rs.17,51,85,000.
- (iv) Disallowance of software expenses – Rs.45,91,000.

4. On appeal, the CIT(Appeals) deleted the additions made towards concession fees and restricted the disallowance towards repairs to Rs.5,77,500 based on the remand report of the AO post verification of invoices. The CIT(Appeals) upheld the addition with respect to disallowance of depreciation on intangible assets and disallowance of software expenses. Aggrieved, the assessee is in appeal before the Tribunal on the disallowance of depreciation on intangible assets and disallowance of software expenses.

Depreciation on intangible assets

5. For the year under consideration, the assessee claimed depreciation of Rs.2,25,00,657 on intangible assets @ 25%. Before the AO, it was submitted that :-

- (i) The assessee had spent time and other cost prior to the commencement of business for obtaining rights under various

agreements viz., concession agreement, communication, navigation and surveillance management agreement, State support agreement and land lease agreement.

- (ii) The above agreements give the exclusive right to the assessee company to operate the airport infrastructure, to establish a proper ATM system for proper governance of airport, to receive such services as required to discharge the assessee's obligations under the project and financing agreements, to take financial support from the State and sub-lease land to concessionaries for the purpose of airport & non-airport activities.
- (iii) The above mentioned agreements provide an enabling business or commercial right to the assessee which is owned and used by the assessee for the purpose of its business, the costs identified and allocated to such rights will qualify for capitalization as intangible assets u/s. 32 of the Act, &
- (iv) The relevant intangible assets are eligible for depreciation @ 25% on the WDB.

6. The AO rejected the submissions of the assessee on the ground that the expenses are incurred by the assessee in obtaining support mostly by way of payment towards legal, technical and management fees for availing services, which cannot be termed as incurred for acquiring business or commercial rights falling under the definition of intangible assets. According to him, depreciation thereon was not

allowable. Therefore, he disallowed the entire depreciation claimed towards intangible assets.

7. On appeal, the CIT(Appeals) confirmed the disallowance relying on the decision of the CIT(A) in assessee's own case for the AY 2010-11 wherein the depreciation was disallowed. Aggrieved, the assessee is in appeal before the Tribunal.

8. Before us, the Id. AR reiterated the submissions made before the lower authorities and prayed for deletion of the disallowance. On the other hand, the Id. DR supported the orders of the lower authorities.

9. We have considered the rival submissions and perused the material on record. We notice that the coordinate Bench of this Tribunal in assessee's own case for AY 2010-11 in ITA No.510/Bang/2014 dated 27.09.2016 upheld the order of the CIT(Appeals) disallowing depreciation on intangible assets held that :-

“5. We heard rival submissions and perused material on record. As submitted by the learned authorised representative of the assessee, the expenditure was incurred wholly in connection with entering into various agreements. Most of the expenditure was towards availing of professional and legal services during pre-operative period i.e. before commencement of the commercial operation. In our considered opinion, this expenditure is revenue in nature incurred during pre-operative period which qualifies for capitalization among various fixed assets. As a result of this expenditure, it cannot be said that the assessee had acquired any commercial rights. Furthermore, some of the expenditure also related to leasehold rights in land which par takes character of the land which does not qualify for depreciation. We uphold the order of the CIT(A) and dismiss the ground of appeal filed by the assessee-company.”

10. This issue in the instant case is similar to the facts and circumstances in AY 2010-11. Therefore, respectfully following the aforesaid decision of the Tribunal for AY 2010-11, we uphold the disallowance of depreciation on intangible assets. This ground is held against the assessee.

Disallowance of software expenses

11. During the year under consideration, the assessee claimed a sum of Rs.74,77,601 as software expenses. Before the AO, the assessee submitted that the said sum was incurred towards purchase of software, programme license, updation of software, etc. It was further submitted that the software purchased have short life span and do not yield any enduring benefit to the assessee and it is used in day to day management of the business of the assessee. The assessee relied on the decision of the Delhi High Court in the case of *CIT v. Asahi India Safety Glass Ltd. [2011] 15 taxmann.com 382 (Delhi)* and certain other judicial pronouncements to submit that the expenditure incurred on computer software which has a short duration should be treated as revenue in nature.

12. The AO rejected the submissions of the assessee on the ground that the software acquired provides firstly, the right, and secondly, enduring benefit to the assessee. The AO was of the view that the assessee has the right to exploit the software as per the requirement which is the commercial right in the nature of intangible asset and relied on the Supreme Court decision in *Devidas Vithaldas & Co. v.*

CIT, 84 ITR 227 (SC). He concluded that the software expenses bring enduring benefit to the assessee and was capital in nature but the AO allowed depreciation @ 60% on the capitalized software expenses.

13. On appeal, the CIT(Appeals) upheld the order of the AO on the reasoning that assessee has not furnished any break-up of the expenditure to analyse whether the payments are made towards acquisition of software license or annual updation to decide the enduring benefit. Aggrieved, the assessee is in appeal before the Tribunal.

14. Before us, the assessee has filed application for admission of additional evidence consisting of detailed break-up of software expenditure and prayed for admission of additional evidence. The Id. AR drew our attention to the description of items and claimed that they are in the nature of application software and have a short life span without any enduring benefit. He relied on the jurisdictional High Court decision in *CIT V. IBM India Ltd. [2014] 43 taxmann.com 470 (Kar)* in addition to various decisions cited before the lower authorities.

15. The Id. DR submitted that generally the software have a life of more than 2 years and gives enduring benefit in the day to day business of the assessee and hence it is capital in nature. He relied on the jurisdictional High Court decision in *CIT v. Toyota Kirloskar Motor (P) Ltd.* He submitted that and the life span of these software need to be considered.

16. We have considered the rival submissions and perused the material on record. The additional evidence now produced before us goes to the root of the matter to decide the issue whether the expenditure incurred towards software is in revenue or capital field. Therefore the additional evidence is admitted taken on record for adjudication.

17. The description of the list of items submitted in the additional evidence shows that expenditure is incurred towards 'windows', 'Core call', and 'Auto cad' which according to the Id AR have a very short span of life and requires periodic renewal and upgradation by payment of license fee. We notice that the jurisdictional High Court decision in the case of *IBM India Ltd. (supra)* while considering similar issue held that –

“10. The Tribunal, on consideration of the material on record and the rival contentions held, when the expenditure is made not only once and for all but also with a view to bringing into existence an asset or an advantage for the enduring benefit, the same can be properly classified as capital expenditure. At the same time, even though the expenses are once and for all and may give an advantage for enduring benefit but is not with a view to bringing into existence any asset, the same cannot be always classified as capital expenditure. The test to be applied is, is it a part of the company's working expenses or is it expenditure laid out as a part of the process of profit earning. Is it on the capital layout or is it an expenditure necessary for acquisition of property or of rights of a permanent character, possession of which is condition on carrying on trade at all. The assessee in the course of its business acquired certain application software. The amount is paid for application of software and not system software. The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not

work on stand alone basis. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Thus, for payment of such application software, though there is an enduring benefit, it does not result into acquisition of any capital asset. The same merely enhances the productivity or efficiency and, hence, to be treated as revenue expenditure. In fact, this court had an occasion to consider whether the software expenses is allowable as revenue expenses or not and held, when the life of a computer or software is less than two years and as such, the right to use it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure and these softwares if they are licensed for a particular period, for utilizing the same for the subsequent years fresh licence fee is to be paid. Therefore, when the software is fitted to a computer system to work, it enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Though certain application is an enduring benefit, it does not result into acquisition of any capital asset. It merely enhances the productivity or efficiency and, therefore, it has to be treated as revenue expenditure. In that view of the matter, the finding recorded by the Tribunal is in accordance with law and does not call for any interference. Accordingly, the second substantial question of law is answered in favour of the assessee and against the Revenue.

11. The third substantial question of law relates to the computation of the income under the provisions of section 115JA of the Act.

12. The case of the assessee is that, while computing, within the meaning of section 115JA, the provision made for doubtful debts should not be added as it does not amount to provision made for meeting liabilities other than ascertained liabilities within the meaning of section 115JA(ii). The assessee in its profit and loss account depicted a sum of Rs. 30,45,96,133 as provision for bad and doubtful debts. The Assessing Officer held that the provision is for unascertained liabilities. Since it was merely a provision for unascertained liabilities and as per clause (c) of section 115JA(ii), the same cannot be reduced while computing the "book profit" under section 115JA of the Act. The said view was accepted by

the first appellate authority. However, the Tribunal held that the amount being provision made for bad and doubtful debts cannot be considered as provision for meeting any liability, which is not ascertained liabilities and, hence, "book profit" is not to be increased for such amount provided for. This court had an occasion to consider this question in the case of CIT v. Weizmann Homes Ltd. in I. T. A. No. 918/2006 and connected matters decided on March 4, 2013-since reported in [2013] 357 ITR 74 (Karn.) where it was held, if the total income of the company as computed under the provisions of this Act is less than 30 per cent. of book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to 30 per cent. of such book profit. The Explanation to the section states for the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under subsection (2) as increased by the amount mentioned in the Explanation. One such amount which we are concerned is in sub-clause (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities. By the Finance (No. 2) Act of 2009, with effect from April 1, 1998, the present clause (g) has been substituted by including the amount or amounts set aside as provision for diminution in the value of any asset. Therefore, in the light of the aforesaid judgment, the finding recorded by the Tribunal cannot be sustained. The said amount is to be added to the book profit and in that view of the matter, the third substantial question of law is answered in favour of the Revenue and against the assessee."

18. We notice that the Hon'ble High Court in this case has held that even if the application has an enduring benefit, it does not result in acquisition of capital asset.

19. The decision relied on by the Id. DR in *Toyota Kirloskar Motor (P) Ltd. (supra)* was rendered based on the specific facts in that case where the software viz., 'lotus notes' had shelf life of less than two years based on which the Hon'ble High Court held that it is revenue in

nature. The decision cannot be applied generally to state that any software having a shelf life of more than two years is capital in nature since the decision in *Toyota Kirloskar Motor (P) Ltd. (supra)* was with respect to a particular software and that the nature of software whether it is a system software or application software needs to be analysed to decide the treatment under the Act.

20. In view of the above discussion, we remit the issue back to the AO to verify the facts afresh after considering the breakup of the software expenses submitted as additional evidence filed by the assessee and decide the issue after taking into consideration the ratio laid down by the jurisdictional High Court in the case of *IBM India Ltd. (supra)*. Needless to say that assessee shall be given reasonable opportunity of being heard. This ground of the assessee is allowed for statistical purposes.

21. In result the appeal of the assessee is partly allowed.

Pronounced in the open court on this 21st day of June, 2022..

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Sd/-
(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 21st June 2022.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.