

आयकरअपीलीयअधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्रीमहावीर सिंह, उपाध्यक्षएवंश्री मनोज कुमार अग्रवाल, लेखा सदस्यके समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकरअपीलसं./ITA No.: **59 & 60/CHNY/2011**

निर्धारण वर्ष /Assessment Years: 2006-07 & 2007-08

The ACIT,
Company Circle III(3),
Chennai.

Zylog Systems Ltd.,
v. 155, Thiruvallur Salai,
Kumaran Nagar,
Shollinganallur,
Chennai – 600 119.

(अपीलार्थी/Appellant)

PAN: AAACZ 1086G
(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/Appellant by
प्रत्यर्थीकीओरसे/Respondent by

: Shri AR.V. Sreenivasan, Addl. CIT
: None

सुनवाई की तारीख/Date of Hearing

: 08.06.2022

घोषणा की तारीख/Date of Pronouncement

: 29.06.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These two appeals of Revenue are arising out of order of the Commissioner of Income-tax (Appeals)-3, Chennai in ITA No. 378/08-09/A.III & 239/09-10/A.III both dated 29.10.2010. The assessments were framed by the ACIT, Company Circle III(3) / Addl.CIT, Company Range-3, Chennai for the assessment years

2006-07 & 2007-08 u/s. 143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide orders dated 10.12.2008 & 27.11.2009 respectively.

2. At the outset, it is noticed that this matter is restored back by Hon'ble Madras High Court in T.C.A. Nos.134 and 135 of 2012, vide order dated 16.09.2020 restored back only the issue raised before Hon'ble High Court i.e., vide Question No.2, which reads as under:-

2. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in restoring the issue with regard to amortization of capital expenditure to the file of the assessing officer for fresh adjudication in the light of the Special Bench decision in the assessee's own case when the issue of disallowance of amortised business acquisition expenses has not been dealt in the Special Bench decision?"

The Hon'ble High Court has considered this issue vide para 7 & 8, as under:-

7. Regarding question No.2, in paragraph 6 of the order of the learned Tribunal, the Tribunal itself has stated that the issue stands covered in favour of the Assessee by the decision of the Special Bench dated 02.11.2010 in assessee's own case. The relevant portion of the order of the Tribunal is extracted hereunder for ready reference.

" 6. At the time of hearing, it was found that his issue also stands covered in favour of the assessee by the decision of the Special Bench dated 2.11.2010 in assessee's own case. In this regard, we reproduce herein below relevant Para Nos.20 & 21 of the above order:

"20. There is no dispute about the fact that the assessee is a company engaged in business of development of software both by way of on site development and off shore development and also that it has branch in USA for which separate accounts were maintained. There is also no dispute about the fact that there is approval of the

authorized dealer namely Central Bank of India, Chennai for opening the overseas branch at New Jersey, USA.

21. Now we are called upon to adjudicate whether the Assessing Officer and the learned CIT (A) were right in excluding from the "export turnover" Rs.3,33,46,592/- incurred by the assessee outside India in foreign exchange in providing technical services, while computing deduction u/s 10B of the I.T.Act. For adjudicating this issue first of all we should consider what is "software" and what is "technical services". Explanation (ii) to sub-section 9A of Section 10B defines computer software. Explanation reads as under:

Clause (ii) "computer software" means

(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) any customized electronic data or any product or service of similar nature as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means;

Clause (iii) of Explanation (2) to sub-section 9A of Section 10B defines export turnover as under:

"(iii) "export turnover" means the consideration in respect of export (by the undertaking) of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (3) but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India." The combined reading of the definition of software as given in Clause(i) of Explanation (2) and "export turnover" as defined in clause (iii) above would go to show that "export turnover" of computer software means consideration received in respect of export of computer software but does not include freight, telecommunication charges or insurance to the delivery of computer software outside India or expenses incurred in foreign exchange in providing technical services outside India."

7. In view of the above, we restore this issue to the file of the Assessing Officer for deciding afresh following the Special Bench decision (supra) and allow this ground for statistical purposes only, in both these years.

8. In the result, both the appeals are partly allowed for statistical purposes."

8. Since apparently the issue involved in question No.2 with regard to the amortization of the expenditure was not before the Special Bench at all, the learned Tribunal seems to have committed an error in unnecessarily remitting back the matter to the Assessing Officer with reference to the Special Bench as quoted above."

The Hon'ble Madras High Court has set aside the above question No.2 to the Tribunal for deciding the issue once again on merits and in accordance with law after giving opportunity to both the sides.

3. This matter was fixed for hearing on number of occasions but none was present for assessee. Hence, we proceeded to decide this issue ex-parte qua the assessee for the reason that this is a very old matter pertaining to appeals filed in 2011. Identical is the issue in both the years. Hence, will take the facts from assessment year 2006-07. The grounds raised by Revenue i.e., Ground Nos.2.1 & 2.2 reads as under:-

“2. The learned CIT(A) has erred in deleting the addition made by the assessing officer on amortization of capital expenditure.

2.1 The learned CIT(A) ought to have seen that the profit and loss account of the assessee company was prepared by including the income and expenditure of the US Branch operation. And hence, for Income tax purposes, the global business income which includes income of the US Branch Profit was taxed and Double Taxation relief in respect of the US Branch Profits was allowed against the total tax payable by the assessee on the global income.”

4. Brief facts are that the assessee claimed a sum of Rs.3,08,08,785/- on account of amortization of business acquisition expenses. The AO required the assessee to explain and assessee explained that during the year 2002-03, the branch office of USA has acquired the clientele and human resources of three USA

companies namely Silver Spring Technologies Inc., Schumacher Consulting Group and Schmidt Systems Inc., for a total consideration of Rs.849.19 lakhs. It was explained by assessee before AO that the assessee company did not take over the assets and liabilities of the erstwhile firm and it has not acquired any business of those companies but only acquired employees as well as contracts so that they could carry out their business and claim normal expenditure incurred in the course of business. The assessee explained that no capital asset was acquired by assessee. The assessee claimed the amortization expenses during the year at Rs.8,47,48,999/- which was rightly chargeable to the accounts spread over for five years as per Accounting Standards. The cost was spread over a period of five years as deferred revenue expenditure and accordingly booked expenditure and proportionately claimed as expenses by US branch of the assessee in the profit & loss account. But, the AO noted that the assessee has acquired business of two companies namely JDAN Systems & ImpekSoft Inc for a total consideration of Rs.13,86,49,848/- for which a sum of Rs.4,59,18,900/- was paid towards advance. The balance amount was paid in installments up to September, 2005. According to AO, the said amount was amortized over a period of five years and during the year, amount claimed was Rs.1,38,64,985/- i.e.,

amortization for six months charged to profit & loss account. The AO has not accepted the explanation of the assessee and therefore, the claims of amortization of Rs.3,08,08,785/- was disallowed. Aggrieved, assessee preferred appeal before CIT(A).

4.1 The CIT(A) relying on the earlier years order, allowed the claim of assessee by observing in para 5 & 5.1 as under:-

5. The next issue pertains to allowability of expenses on acquisition of business facilities. The AO had disallowed the amount of Rs.3,08,08,785/- on the ground that the profit and loss account of the assessee company was prepared including the income and expenditure of the US branch operation and for income-tax purpose, the global business income including the US branch profit was taxed. Double Taxation Benefit in respect of the US branch profits was only allowed against the total tax payable by the assessee on the global income. The ld. AR submitted that the overseas branch in USA acquired the clientele and human resources of 3 companies in 2002-03. The cost incurred for such take over was written off over a period of 5 years. It was contended that no business was acquired but only the employees along with certain Contracts were taken over. The ld. AR has relied on the decision of the CIT(A)-III in its own case for the asst. years 2004-05 and 2005-06 on similar issue vide orders in ITANo.901/06-07/A-III and ITA No.672/07-08/A-III dated 31.10.2008 respectively wherein it was decided as under:-

" I have considered the contention of the assessee as well as reasons given by the AO for the disallowance. I find that the appellant has basically acquired the ongoing business contracts of those companies with their clients for software development along with the technical resources like employees etc. to execute contract. As has been pointed out by the appellant no capital assets has been acquired. It is in the nature of expenditure incurred for more business or expansion of business and in the process they have ensured that those three companies do not further enter into business on the same line with those clients. I am inclined to accept the contention of the appellant that it is more in the nature of revenue

expenditure. I agree that the acquisition of business contracts along with the employees from these three companies by the appellant is not in pursuance of amalgamation and hence the expenditure cannot be claimed u/s 35DD. But incurring expenditure for the expansion of the business or for the taking over of the contracts with clients alongwith their business, technical resources is certainly an expenditure which can be covered u/s 37. Hence, if the appellant claims only 1/5th of such expenditure I do not find any reason as to why it should not be allowed. Hence I delete the addition made by the AO and the appellant succeeds on this ground."

5.1 I have considered the facts of the case and the submissions of the Id.AR. I find that the Id.CIT(A) in appellant's own case for assessment years 2004-05 and 2005-06 has decided the issue in favour of the appellant in order supra. The facts being the same, I find no reason to deviate from the findings given therein. Accordingly, this ground of appeal is allowed."

Aggrieved, Revenue is in appeal before us.

5. Now, before us, the Id. Senior DR could not controvert the findings given by CIT(A) that the assessee has not acquired any capital asset where only the clientele and business contract of those parties were acquired by the assessee for software development along with technical resources. The Id. Senior DR could not controvert that how this issue is not covered because this issue was raised before Tribunal in assessment year 2004-05 in ITA No.284/Mds/2009 .

6. We have heard Id. Senior DR and gone through the facts and circumstances of the case. We noted that the issue pertains to allowability of expenses on acquisition of clientele and technical human resource i.e., employees to execute the contract and for this, assessee has incurred expenditure during the financial year 2005-06 totaling to Rs. 13,86,49,848/-, out of which the assessee has claimed 1/5th i.e., 3,08,08,785/- on account of amortization of business acquisition expenses. The Id. Senior DR could not controvert the fact situation that the assessee has practically acquired business contracts of these three US companies with their clients for software development along with the technical resources including employees to execute contracts. We noted that from the facts, it is not emerging that the assessee has acquired either complete business i.e., the profit apparatus or any capital asset. In such case, the expenses incurred are to be allowed as revenue and assessee has only amortized these expenses in 5 years and the same are allowable as revenue expenditure u/s.37 of the Act. We find no infirmity in the order of CIT(A) and hence, the appeal of Revenue is dismissed.

7. Similar are the facts in assessment year 2007-08 in ITA No.60/Chny/2011, respectfully following the same, we dismiss the Revenue's appeal.

8. In the result, the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 29th June, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 29th June, 2022

RSR

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

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|------------------------|--------------------------|-----------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकरआयुक्त (अपील)/CIT(A) |
| 4. आयकरआयुक्त /CIT | 5. विभागीयप्रतिनिधि/DR | 6. गार्डफाईल/GF. |