आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.: 725/CHNY/2018**

निर्धारण वर्ष/Assessment Year: 2010 - 11

GE T&D India Ltd., 19/1, IOC Building, GST Road, Pallavaram, Chennai – 600 043.	vs.	**The DCIT,** Large Tax Payer Unit-1, Chennai

PAN: AAACG 2115R

(अपीलार्थी/Appellant)	(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Sriram Seshadhri, C.A

प्रत्यर्थी की ओर से/Respondent by : Shri S. Marudhu Pandian, CIT

सुनवाई की तारीख/Date of Hearing : 17.11.2022

घोषणा की तारीख/Date of Pronouncement : 23.11.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-5, Chennai, in ITA No.8/CIT(A)-5/16-17 dated 27.12.2017. The re-assessment was framed by the DCIT, Large Tax Payer Unit-1, Chennai for the assessment year 2010-11 u/s.143(3) r.w.s. 147 of the Income Tax

Act, 1961 (hereinafter the 'Act') vide order dated 24.03.2016. The original assessment was framed by the ACIT, LTU-1, Chennai u/s.143(3) r.w.s. 92CA of the Act, vide order dated 29.03.2014.

2. At the outset, the ld.AR for the assessee drew our attention to additional ground raised in regard to reopening of assessment and petition filed for raising additional ground. The ld.counsel explained that the assessee had filed an appeal before the Tribunal on February 27, 2018, which is fixed for hearing on September 17, 2019. In relation to the same, the assessee raised an additional ground in the captioned appeal. The ld.AR requested to admit the additional ground for reason that during the course of the impugned proceedings, the assessee had challenged the re-opening of assessment under section 148 of the Act, as the same was based on audit objection raised and not based on any fresh material. He further stated that this claim is already covered in the Ground 2.1 in the original grounds of appeal filed by the assessee, however in order to include a specific ground on this contention, the assessee wishes to include the same as a separate ground of appeal. The Ld.AR further submitted that that all facts relevant for adjudication of the additional ground is placed on record before the Hon'ble ITAT.

He relied on the following decisions for admissibility of additional grounds:-

Jute Corporation of India [1991] 187 ITR 688 (SC)
National Thermal Power Co Ltd (229 ITR 383 (SC)
Pruthvi Brokers & Shareholders [TS-463-HC-2012 (BOM)]

The assessee hs raised the additional ground regarding reopening, which reads as under:-

Reopening of assessment

On the facts and circumstances of the case and in law
2.1The Learned Respondent erred in re-opening the assessment without bringing any new material on record to show that the income has escaped assessment."

Additional ground of appeal
"1. The Learned Respondent erred in re-opening the assessment based on audit objection."

3. We noted that this ground was raised before CIT(A) in regard to reopening but CIT(A) rejected the ground on the basis that there is no material on record to substantiate that the assessment was reopened based on audit objection. But, it is noticed that the assessee obtained this information under RTI Act, 2005 by filing an application dated 15.07.2019 with the Principal Director of Audit, who provided the information vide dated 19.08.2019. The copy of audit objection provided by Principal Director of Audit is placed on record.

4. The ld. CIT-DR could not controvert the above fact situation and could not controvert that the ground was raised before CIT(A), who has not gone into the details of assessment and audit objection by virtue of which reopening was done. Hence, this being a legal issue which goes to root of the matter, we admit this issue as there if no new fact which needs to be investigated or brought on record. Accordingly, we admit the same and will adjudicate.

5. Brief facts are that the original assessment was completed by the AO u/s.143(3) r.w.s. 92CA of the Act vide order dated 29.03.2014 for the relevant assessment year 2010-11. Subsequently, the AO issued notice u/s.148 of the Act dated 26.03.2015 and the reasons recorded for reopening of assessment, which was provided by the AO vide letter dated 16.07.2015. The AO provided the reasons, which read as under:-

> On perusal of records for AY 2010-11, the assessee is engaged in the business of manufacturing of Heavy Electrical equipments. It is seen from the P& L Account for the year ended 31.03.2010 that under 'other manufacturing, administration and selling expenses, the assessee has debited a sum of Rs. 4419.85 lakh towards 'Data Management Charges'. Under SAP description, the details of such EDP expenses as furnished by the assessee were as under:
>
> | | |
> |---|---|
> | Software Development charges | : Rs. 66378056.00 |
> | Computer Stationery | : Rs. 1004680.46 |
> | IST expenses SLE | : Rs. 352984203.90 |
> | EDP consumables | : Rs. 20944585.07 |

PC Software	: Rs. 4962.50
Data processing charges	: Rs. 668741.00
	Rs.441985228.93

The assessee was not engaged in the production of computer software. So, excluding the expenditure on computer stationery, EDP consumables and data processing charges, the other expenses relating to Software Development Charges (Rs. 66378056) and IST expenses SLE (RS. 352984204) needs to be considered as capital expenditure only. Further, these payments are intended for enduring benefit. The claim of the assessee shall be disallowed and brought to taxation.

2. The assessee had deducted an amount of Rs.44,21,19,000 towards relocation expenses. The expenses were incurred in respect of the following three facilities which were relocated.

Factory at Kolkata to Baroda
Factory at Bangalore to Hosur
Factory at Perungudi to Padappai

The moving out expenses relates to the existing facility being located to another location for ease of administration. In this case the shifting of the factory produced an enduring advantage in the shape of transfer to a better factory site, an advantage which enabled the trade to prosper and an advantage that could be expected to last forever. Hence the expenditure claimed towards relocation expenses shall be treated as capital expenditure. The claim of the assessee shall be disallowed and brought to taxation.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment and accordingly, the assessment needs to be reopened u/s 147 of the Income-tax act.

The re-assessment was framed by the AO, which was eventually challenged before the CIT(A) and the CIT(A) confirmed the additions and also rejected the grounds raised on account of reopening based

on audit objection and also change of opinion. The assessee raised following two grounds on jurisdictional issue:-

> "1. The reopening of assessment was based on change of opinion and without fresh materials is thus bad in law.
> 2. The reopening of assessment is based on audit objection and is thus bad in law.

The CIT(A) rejected the ground challenging the reopening of assessment on audit objection by observing in para 6.3.1 to 6.3.3 as under:-

> 6.3.1 The assessee did not bring any material on record in support of the ground of appeal that the reopening was based audit objection.
>
> 6.3.2 In [2015] 61 taxmann.com 232 (Madras) PVP Ventures Ltd vs Assistant Commissioner of Income-tax, Chennai, the hon'ble High Court of Madras held - So far as the contention that the reassessment based on audit report without independent application of mind by the Assessing Officer is not sustainable, is concerned, there is no force in the said contention since the respondent has given cogent reasons in his speaking order while rejecting the objections raised by the assessee, for reopening of the assessment and, therefore, it cannot be stated that the respondent has not applied his mind and solely resorted to based on the audit report. In fact, the audit party is entitled to point out a factual error or omission in the assessment and it is settled law that reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law."
>
> 6.3.3 In the present case also, the Assessing Officer has given cogent reasons in his speaking order dated 29.10.2015 while rejecting the objections raised by the assessee, for reopening of the assessment.
>
> Hence respectfully following the above stated decision of the hon'ble High Court of Madras, ground of appeal that the reopening was based audit objection was also dismissed.

Aggrieved, assessee came in appeal before the Tribunal.

6. Before us, the ld.AR drew our attention to the letter issued by Principal Director of Audit (Central) vide No.PDA(C)/Legal/25-02(202)/2019-20/82 dated 19.08.2019 supplying the information u/s.RTI Act giving the details of Revenue audit objection in respect of assessee's case for relevant assessment year 2010-11 as under:-

Sl.No.	Information Sought	Information furnished
1	Copy of the Revenue Audit Objection	Two audit observations were raised in respect of M/s GE T&D India Ltd (formerly known M/s Areva T&D India Ltd and were issued as para No.11/IIA and Para No.20/IIA in LAR No. 11/87-62/20 14-15 runing to 5 pages is enclosed
2	Copy of the report sent by the Commissioner of Income tax concurring/denying with the method followed by the Company and accepting/not accepting the view expressed by the Revenue Audit or otherwise	Copy of communications, sent by Income Tax Department to this office with respect to Para No.20/IIA runs to 3 pages is enclosed. No reply has been received in this office from the department with reference to the Para No. 11/II A issued in LAR No. 11/87-62/2014-15.
3	The Final decision taken by the Revenue Audit (C&AG) in the same matter	Para No.11/IIA and Para No.20/IIA are pending settlement as on date for want of final reply.

6.1 The ld.AR before us argued that the Department has contested the audit objection raised by audit vide SF No.11-CT/16-17 Para No.20/IIA in LAR No.11/87-062/2014-15. The AO i.e., DCIT, Large Tax Payer Unit-1 considered this objection and opposed the same by

contesting that the expenses are in the nature of revenue expenditure in regard to relocation expenses of factories because it has neither created any new facility for manufacture of new product not it has achieved any increase in installed / production capacity so as to treat the restructuring and relocation expenses as capital in nature providing enduring benefit to the assessee. The AO considered the following decisions in favour of assessee-

a) CIT Vs. Rane Madras 2007 TIOL 551 (HC Madras)
b) Jay Engineering Works Vs CIT 2008 166 Taxmann 115 (HC Delhi)
c) JCIT Vs Modi Revlon Pvt Ltd 2006 TIOL 131 (ITAT Delhi)
d) CIT Vs. Bimetal Bearings 215 ITR 675 (HC Mad)

6.2 The ld.AR further drew our attention to audit objection in regard to software development charges, computer stationery, IST Expenses SLE, EDP Consumable, PC Software, Data processing charges vide '11/IIA Incorrect Computation of Business Income' and the relevant objection as obtained by assessee from Principal Director of Audit, Central, placed before us, perused and which reads as under:-

"

Name of the assessee	M/s. Alstom T&D India Ltd (Formerly known as Areva T & D limited)
PAN Status	AAACG2115R Company

AY	DOFR	R.I (Rs.)	AOD	U/S	A.I (Rs.)	IAP
2010-11	9-10-2011	1089037600	29-3-2014	143(3)	1957766133	Not seen

The assessee is engaged in the business of "Maufacturing of Heavy Electrical equipments'. For the AY 2010-11, in the scrutiny assessment completed u/s 143(3), the total income of the assessee was determined at Rs. 1957766133 and the balance demand of Rs.367959380 was raised.

It is seen from the Profit & Loss Account for the year ended 31 March 2010 that under 'Other manufacturing, administration and selling expenses', the assessee has debited a sum of Rs. 4419.85 lakh towards "Data management Charges. Under SAP description, the details of such ELDP expenses as furnished by the assessee were as under:-

Software Development charges	: Rs. 66378056.00
Computer Stationery	: Rs. 1004680.46
IST expenses SLE	: Rs. 352984203.90
EDP consumables	: Rs. 20944585.07
PC Software	: Rs. 4962.50
Data processing charges	: Rs. 668741.00
	Rs.441985228.93

The assessee was not engaged in the production of computer software. So, excluding the expenditure on computer stationary, EDP consumables and data processing charges, the other expenses relating to Software Development Charges (Rs. 66378056) and IST expenses SLE (Rs. 352984204) needs to be considered as capital expenditure only.

In reply, it was stated that the software development charges were routine …..nce expenses towards ERP software like SAP. As regards IST expenses, it was ……. that the assessee had entered into an Information Technology Sharing Service Agreement with Alstom Grid SAS of France. According to the agreement, the foreign company was required to extend services in tge following areas:-

(a) WAN- This is a network designed for data transfer between all group companies, connection to all global applications of the company and intranet and internet traffic.

(b) Lotus Notes- Messaging system- This is Alstom Group's messaging system for email communication between the Group companies and also the third parties such as vendor, customer etc. Alstom Grid will also ensure traffic management and application user rights.

(c) License user Rights- License user rights are any license related service to enterprise contract entered into by Alston Grid for use of software release.

(d) Application Support- Application support is the technical and functional support provided by the service provider or/and Alstom Grid's central or regional support team in relation to the license user rights service.

It was also contended that the Authority for Advance Ruling held that income earned by Alstom Grid was taxable as Fee for Technical Services. and as such, the payment by the assessee company to Alstom Grid cannot be termed as capital expenditure.

The reply was examined in audit. The assessee is a subsidiary of the French Company. It is seen from the ruling of the AAR that according to the department, neither the French company nor the assessee are in the business of providing services in the area of information technology. The business of the assessee being that of executing projects for transmission and distribution of power on turnkey basis, it is obvious that the French Company and other group companies continuously upgrade designs, model and other engineering plans and formulae which are used-by the assessee for the purposes of its business. The agreement is vague about the description of the services.

The AAR while examining whether the services are 'made available' has come to the conclusion as regards the payment of tax by the foreign company on the following view:

We have noted that under-the IT agreement, the French Company is to provide support service through a central team in the area of information Technology to the Applicant (assessee), and to its other subsidiaries in he world. The provisions of support service by the French company would itself make available, the technical knowledge experience to the Applicant. In perfect Van Melle Holding B. (AARR69/2010) this authority held the view that "the expression 'make available' only, means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his

own". Here information technology relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power, commissioning and servicing of transmission and distribution system is provided to the Indian entity which applied in running the business of the Applicant and the employees of the Applicant would get equipped to carry on these systems on their own without reference to the French company, when the IT Agreement comes to an end, It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the agreement on its expiry.

We are of the view that the services provided under the IT Agreement are in the nature of Fees for Technical Services and taxable under the DTAA as well as under the Act".

Since the AAR decided that the payment is intended for enduring benefit and also has ordered to tax the same as Fees for Technical Services, it is obvious that the expenditure needs to be classified under capital expenditure only.

Copies of the following key documents were not furnished to audit:-

(a) Assessment order for the AY 2010-11
(b) Statement of computation of income
(c) Profit & Loss Account, Balance sheet and schedules there under
(d) Details for data management charges as furnished by the assessee

6.3 Similarly, in regard to 'relocation expenses', the audit raised objection vide No. '20/IIA Incorrect Computation of Business Income' in respect of relocation of company from Kolkatta to Baroda, Bangalore to Hosur and Perungudi to Padappai. The objection reads as under:-

Name of the assessee	M/s. Alstom T&D India Ltd (Formerly known as Areva T & D limited)
PAN Status	AAACG2115R Company

AY	DOFR	R.I (Rs.)	AOD	U/S	A.I (Rs.)	IAP
2010-11	9-10-2011	1089037600	29-3-2014	143(3)	1957766133	Not seen

The assessee is engaged in the business of Manufacturing of Heavy Electrical equipments'. For the AY 2010-11, in the scrutiny assessment completed u/s.143(3), the total income of the assessee was determined at Rs. 1957766133 and the balance demand of Rs.367959380 was raised.

In the statement of computation of income, the assessee had deducted an amount of Rs. 44219000 towards 'Relocation Expenses'. According to the Supreme Court's decision in Sitalpur Sugar Works Ltd vs. CIT (49 ITR 160), such expenses are required to be treated as capital expenditure.

On this being pointed out, it was stated that the expenses were incurred in respect of the following three facilities which were relocated:-

a) Factory at Kolkata to Baroda
b) Factory at Bangalore to Hosur
c) Factory at Perungudi to Padappai

By citing the following decisions, it was replied that any expenses incurred even for setting up a new factory shall be treated as revenue expenditure:-
a) CIT Vs. Rane Madras 2007 TIOL 551 (HC Madras)
b) Jay Engineering Works Vs CIT 2008 166 Taxmann 115 (HC Delhi)
c) JCIT Vs Modi Revlon Pvt Ltd 2006 (TIOL 131 ITAT Delhi)

It was also stated that the decision in the case of Sitalpur Sugars, was regarding relocation of sugar factory which was a seasonal industry and entirely different from engineering industry to which the assessee company belonged whereas the manufacturing activity of an engineering industry is closely comparable with automobiles in terms of their job execution/assembling. It was contended that the decision of the jurisdictional High Court in the case of Rane Madras is more appropriate.

> In this connection, it is to be pointed out that the decision rendered in Rane Madras was on different context and relates to the expenses pertaining to the setting up of a new industrial undertaking at Pondicherry which was an expansion of the existing business of the assessee. It is to be mentioned that the Madras High Court in CIT vs. Lyord Super Fabrics (308 TTR 78) has held that the expenditure incurred on shifting the factory premises under compelling circumstances, viz., for very survival of the, factory itself could be allowed as revenue expenditure. But, in the case of the assessee, the moving out expenses relates to the existing facility being located to another location for ease of administration. The Hon'ble Supreme Court in Sitalpur Sugar Works Ltd (49 ITR 160) held that the shifting of the factory produced an enduring advantage in the shape of transfer to a better factory site, an advantage which enabled the trade to prosper and an advantage that could be expected to last for'ever.

6.4 The ld.AR for the assessee in view of the above stated that the audit objection is the only reason and AO has nowhere applied his independent mind while recording evidence as is evident from the audit objection above reproduced and the reasons recorded which are exactly matching. The ld.AR stated that this issue is squarely covered in favour of assessee by the decision of Hon'ble Supreme Court in the case of Indian & Eastern Newspaper Society, 119 ITR 996, wherein the Hon'ble Supreme Court held that internal audit objection cannot be the basis of reopening u/s.148 of the Act and for this, the Hon'ble Supreme Court held in para 20 as under:-

> "20.Therefore, whether considered on the basis that the. nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual, we hold that the opinion of an internal audit party of the Income

> Tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961."

6.5 The ld.AR also relied on the Jurisdictional High Court in the case of Cholamandalam Investment & Finance Co. Ltd., 89 taxmann.com 337, wherein on exactly identical facts, Hon'ble High Court held that the reasons for reopening is verbatim repetition of the audit objections filed by the audit party. This position was clearly demonstrated by the assessee by comparing the audit objection and the reasons for reopening. Thus, it is clear that the Assessing Officer did not have any independent material to reopen the assessment, but merely proceeded to reopen the assessment on the ground that there was an audit objection. Accordingly, two issues arise for consideration. Firstly, whether the reopening proceedings have been initiated solely based upon the audit objection and secondly, when CBDT had taken a stand that they do not accept the audit objection whether the respondent could proceed to initiate reopening proceedings. On the first issue, the Courts have held that the Assessing Officer cannot blindly follow the opinion of an audit authority. Therefore, by applying the law laid down by the various courts, it has to be held that the impugned reopening proceedings is clearly a change of opinion and liable to be set aside. Moreover, in the assessee's own case for the assessment

year 2009-10, the Commissioner (Appeals) by taking note of the objections filed by the CBDT to the audit report has held in favour of the assessee and the appeal has been allowed. As on date, it appears that no further appeal has been preferred by the department and finally, the Hon'ble High Court held in para 5 as under:-

> "5.What is interesting to note is that the reasons for re-opening is verbatim repetition of the audit objections filed by the audit party. This position was clearly demonstrated by the learned counsel for the petitioner by comparing the audit objection and the reasons for re-opening. Thus, it is clear that the assessing officer did not have any independent material to re-open the assessment, but merely proceeded to re-open the assessment on the ground that there was an audit objection. Thus, two issues arise for consideration. Firstly, whether the re-opening proceedings have been made solely based upon the audit objection. Secondly, when CBDT had taken a stand that they do not accept the audit objection whether the respondent could proceed to initiate re-opening proceedings."

7. When these facts were confronted to ld.CIT-DR, he only relied on the reassessment order and that of the CIT(A).

8. After hearing rival contentions and going through the facts, we are of the view, in view of the above discussion and case law of Hon'ble Madras High Court in the case of Cholamandalam Investment & Finance Co. Ltd., *supra,* that the reasons recorded in the present case are verbatim what the audit objection is. It means that the AO has not applied his independent mind to the facts of the

case before recording reasons and hence, the reason merely based on audit objection cannot be a basis of reopening. Therefore, we held that reopening is bad in law and hence, the reassessment framed is quashed.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 23rd November, 2022 at Chennai.

Sd/-	Sd/-
(जी. मंजुनाथ)	(महावीर सिंह)
(G. MANJUNATHA)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 23rd November, 2022

RSR

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

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