

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

**BEFORE SHRI C. N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.8864/Mum/2010

(निर्धारण वर्ष / Assessment Year : 2001-02)

Mrs. Superna R. Motwane, Gnyanghar, 14 th Road, Khar (West), Mumbai -400 052.	बनाम/ v.	Dy. Commissioner of Income Tax, Circle - 19(1), 3 rd Floor, Piramal Chambers, Lalbaug, Parel, Mumbai.
स्थायी लेखा सं./PAN : AABPK5356 G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Shekhar Gupta
Revenue by :	Shri Sanjeev Kashyap,DR

सुनवाई की तारीख / **Date of Hearing** : 01-08-2016

घोषणा की तारीख / **Date of Pronouncement** : 05-10-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 8864/Mum/2010, is directed against the appellate order dated 22nd October, 2010 passed by learned Commissioner of Income Tax (Appeals)- 30, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2001-02, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 30th December, 2009 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 254 of the Income Tax Act,1961 (Hereinafter called "the Act"). This is the second round of litigation.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. The learned CIT (Appeals) has erred in law and on the facts of the case in sustaining the disallowance of consultancy fees paid of Rs. 18,00,000/-.

2. The learned (Appeals) has erred in law and on the facts of the case in sustaining the disallowance of deduction u/s 80 HHE of the Income Tax Act, 1961.”

3. The brief facts of the case are that the assessee is an individual deriving income from salary, income from profession, capital gain and other sources. The return of income was filed by the assessee on 31-10-2001 which was supported by the tax audit report. The assessment was originally framed u/s 143(3) of the Act on 24th October, 2003 on a total income of Rs. 33,08,658/- against the returned income of Rs. 12,60,610/- whereby the following additions were made by the Revenue while framing original assessment vide orders dated 24.10.2003:-

1.	Consultancy fees paid to husband	Rs. 18,00,000/-
2.	Business promotion expenses	Rs. 75,000/-
3.	Travelling expenses	<u>Rs. 1,01,138/-</u>
		Rs. 19,76,138/-
		=====

The assessee filed appeal before the ld. CIT(A) in the first round of litigation and the ld. CIT(A) , inter-alia, upheld the order of the A.O. in respect of consultancy charges of Rs. 18 lakhs paid by the assessee to her husband whereby disallowance was confirmed by learned CIT(A). During the course of appellate proceedings before the learned CIT(A) in the first round of litigation, the ld. CIT(A) admitted the new claim raised by the assessee u/s 80HHE of the Act which was not raised by the assessee in the return of income filed

with the Revenue and also the same was not raised during the course of the assessment proceedings before the AO in the original assessment proceedings. The A.O., however, objected the admission of the new claim in the remand report proceedings but the ld. CIT(A) overruled the objection of the A.O. and allowed the claim in favour of the assessee. The matter went before the Tribunal via second appeal in the first round of litigation whereby the assessee and the Revenue filed cross appeal against the appellate order passed by the ld. CIT(A) in the first round of litigation. The Tribunal set aside the issue back to the file of the A.O. in ITA No. 1470/M/2005 and ITA No. 1731/M/2005 dated 26.05.2008 and directed the AO to decide the following issues' afresh:-

- “1. The Hon'ble ITAT restored the matter of payment of software consultancy charges of Rs.18 lakhs to Shri Gaurav Motwane to the file of the assessing officer to examine the claim of the assessee with reference to the amount paid / payable to Shri Gaurav Motwane.
2. The Hon'ble ITAT also restored the matter to the file of the assessing officer with reference to the claim of deduction u/s.80HHE.
3. The Hon'ble ITAT also restored the issue regarding foreign travel to the file of the assessing officer to consider afresh the nature of foreign travel and to allow the claim as per law.”

4. During the relevant previous year , the assessee is stated to be engaged as consultant for MAZAA Media, Inc., New York. The assessee in second round of litigation submitted before the AO that consultancy fees was paid by the assessee to husband Shri Gaurav Motwane , proprietor of M/s Pixel Multimedia for developing complete web strategy. It was submitted that the Mr. Gaurav Motwane is an MBA graduate from USA who had helped the assessee in developing brand strategy and development services on various

communication tools. It was submitted that M/s Pixel Multimedia was in the said business for 5 years and had also rendered services to various clients. It was submitted that M/s Pixel Multimedia i.e. proprietary concern of the husband of the assessee, Mr Gaurav Motwane has also shown an income of Rs. 15 lakhs being received from the assessee during the assessment year 2002-03 on receipt basis in the return of income filed with the Revenue as he was following cash system of accounting and it was submitted that the payments have been made by the assessee for the purposes of business. The assessee also submitted a letter dated 24.12.2009 signed by Mr. Gaurav Motwane stating that the amount has been duly received by him and the same has been reflected in his return of income filed with the Revenue.

The A.O. observed that the additions have been made after a detailed and comprehensive letter was issued to Mr. Gaurav Motwane so as to examine the nature and extent of services rendered by him. The A.O. held that the disallowance was made after investigation of the matter and also after it was admitted by Shri Gaurav Motwane that there was no agreement between him and the assessee and also that there was no correspondence with the assessee with particular reference to the services rendered. No records were produced during the assessment proceedings and also in the appellant proceedings or even during the set aside proceedings. It was observed by the AO that the assessee has also vide letter dated 22nd October, 2003 withdrawn the claim of expense and agreed to the addition in the first round of litigation. The A.O. referred to the decision of the Hon'ble Bombay High Court reported in Rameshchandra & Co. v. CIT (1987) 168 ITR 375(Bom.HC) , and observed that the assessee cannot be an aggrieved party, when she herself has agreed to the additions. During the set aside proceedings no further details were filed by the assessee to show that the withdrawal of consultancy fees paid to Mr. Gaurav Motwane was erroneous. The assessee filed only a letter from Mr. Gaurav Motwane stating that the amount has been received and to this effect

no affidavit or any other evidence has been filed by the assessee to state that the withdrawal of the consultancy charges payment to her husband was erroneous. The assessment order framed on the basis of revised computation of income filed by the assessee, wherein it was observed by the AO there is no scope for allowing the said expenses. It was further observed by the AO that the assessee does not have any direct client and had done work for various customers on behalf of MAZZA Media Inc. , USA . In the set aside proceedings in second round of litigation , it was observed by the AO that the assessee did not filed copy of bills raised, copy of agreement, copy of correspondence or details of any terms and conditions for the said payment. Under these circumstances as the claim of the assessee was not supported by any new evidence in second round of litigation, Rs. 18 lacs paid to Mr. Gaurav Motwane as consultancy charges was disallowed by the A.O. vide assessment order dated 30.12.2009 passed by the AO u/s. 143(3) read with section 254 of the Act.

5. With respect to the claim of the assessee u/s 80HHE of the Act, the A.O. observed that the assessee has never made the claim in the return of income nor in the revised computation of income filed during original assessment proceedings. The claim was first made before the Id. CIT(A) in the first round of litigation and the Id. CIT(A) accordingly called for the remand report of the A.O. with respect to the claim u/s 80HHE of the Act. The AO vide remand report concluded that the assessee was not entitled for claim u/s.80HHE of the Act. During set aside proceedings, the assessee was issued show cause notice and the relevant portion of the reply of the assessee is as under:-

“The assessee had entered into an agreement with M/s. MAZZA Media Inc., USA for conceptualization and designing of the content for their website, planning features and news events on the Websites and development of content for other media.

Pursuant to the same, the assessee developed the contents of the website and for which the remuneration had been paid in foreign exchange. We are attaching certificates of foreign inward remittances along with audit report, in Form 10CCAF as required u/s. 80HHE(4) of the Income Tax Act. Since the assessee has complied with the requirements of section 80HHE, we shall request you kindly to allow deduction in respect of the same.”

From the reply, the A.O. observed that the assessee has not filed any fresh evidence in support of her claim u/s. 80HHE of the Act, hence the AO rejected the same in second round of litigation. The A.O. observed that the appointment of the assessee by MAZZA Media Inc.,USA specifically mentions that the assessee is only a consultant in India and appointment letter dated 24th November, 2003 is a document which was produced after the completion of assessment on 24th October , 2003. The said letter does not mention export of software done by the assessee. The assessee did not file any appointment letter or other document showing any transaction showing export of software neither during assessment proceedings nor during set aside proceedings. The assessee was only appointed as Editor-in-Chief and Creative Head of MAZZA Media and the various activities carried out by her were on behalf of MAZZA Media Inc.,USA . It was observed by the AO that the assessee work profile with MAZZA Media Inc. involve recruiting strong and creative team on behalf of the said company, and the assessee rendered only services in India and web designing and production was one of the services which were under control of the assessee. The assessee has received income as Editor-in-Chief in India for creative activities but there was no export of software involved. No claim of deduction u/s 80HHE of the Act was filed by the assessee while filing the return of income. Form No. 10CCAF was not filed along with the return of income as required under Section 80HHE(4) of the Act which is filed in set aside proceedings. The claim was made for the first time before the learned CIT(A) in first round of litigation. The assessee has not filed the details of certificates of foreign inward remittances along with audit report in

Form No. 10CCAF as required u/s 80HHE(4) of the Act which are filed during the set aside proceedings in second round of litigation. The certificate is dated 16th December, 2003 whereas the assessment proceedings have been completed on 24th October, 2003 in the first round of litigation and thus the Form No. 10CCAF claim under an audit report which was dated after the finalization of assessment u/s 143(3) of the Act was not admissible as was observed by the AO. Even during the course of set aside proceedings, the assessee has not filed the required certificate of foreign inward remittances on the plea that since the issue is old, the certificate were not available. Thus the A.O. observed that the claim of the assessee u/s 80HHE of the Act is not supported by any evidence. The A.O. accordingly concluded that the claim u/s 80HHE of the Act for only assessment year 2001-02 is an attempt to avoid tax, as no such claim has been made in the subsequent year. The A.O. also held that in the remand proceedings in the first round of litigation, the A.O. objected to the admission of additional ground stating that the assessee has not claimed the said relief in the return of income and, therefore, the conditions laid down u/s 80HHE of the Act were not fulfilled for claiming the relief u/s 80HHE of the Act. However, the Id. CIT(A) did not accept the objection of the A.O. and directed the A.O. to examine the issue afresh and work out the deduction u/s 80HHE of the Act after examining the claim of deduction in form 10CCAF. Thus the A.O. observed that the claim is not allowable since the returned income tends to be lower than the assessed income. The assessee ought to have made the claim in the original return or in a revised return but the assessee has not done the same. The AO observed that this view is supported by the decision in the case of Goetze (India) Ltd. v. CIT, (2006) 284 ITR 323(SC) wherein it has been held that any change in stand by the assessee should have been taken through filing a revised return of income. The A.O. accordingly disallowed the claim u/s 80HHE of the Act and income was assessed ignoring the claim u/s. 80HHE of the Act as the claim is not legally allowable as held by the AO vide assessment order dated

30-12-2009 passed u/s. 143(3) read with Section 254 of the Act in the second round of litigation.

6. Aggrieved by the assessment order dated 30-12-2009 passed by the A.O. u/s. 143(3) read with Section 254 of the Act in second round of litigation, the assessee filed first appeal before the Id. CIT(A) in second round of litigation.

7. Before the Id. CIT(A), the assessee reiterated the submissions what were made before the A.O. The assessee submitted that the assessee has already submitted letter dated 15th March, 2004, 16th December, 2009 and 24th December, 2009 duly signed by Mr. Gaurav Motwane confirming the work done by him for the assessee and the payments received by him from the assessee. It was submitted that the letter dated 15th March, 2004 also explains why there was no written agreement between the assessee and Mr. Gaurav Motwane. It was submitted that an agreement can be oral and need not be in writing. The copy of the invoice dated 11th April, 2002 of Pixel Multimedia, proprietor Mr. Gaurav Motwane was submitted at the time of the original assessment. It was submitted that Mr. Gaurav Motwane has shown income of Rs. 15 lakhs and also paid tax on the said income and as such the disallowance of Rs. 18 lakhs will amount to double taxation. It was submitted by the assessee that since all the evidences have been submitted before the A.O. and the disallowance made by the A.O is purely on conjectures and surmises hence the disallowance should be deleted.

The Id. CIT (A) after considering the submissions of the assessee observed that the impugned disallowance had been made after a detailed and comprehensive letter was issued to Mr. Gaurav Motwane so as to examine the nature and extent of services rendered by him. The Id. CIT(A) observed that the disallowance was made after investigation of the matter and also after it was admitted by Mr. Gaurav Motwane that there were no agreement between

him and the assessee and also that there was no correspondence with the assessee with particular reference to the services rendered. The learned CIT(A) observed that the assessee also could not produce any records maintained by her neither during assessment proceedings nor during the appellate proceedings or during the set aside proceedings. Further it was observed by learned CIT(A) that the assessee has also withdrawn the claim vide letter dated 22nd October, 2003. It was observed by learned CIT(A) that in view of decision of Hon'ble Bombay High Court reported in Rameshchandra & Co. v. CIT (1987) 168 ITR 375(Bom.HC) , the assessee cannot be an aggrieved party, when she herself has agreed to the additions. It was further observed by learned CIT(A) that during the set aside proceedings no further details were filed by the assessee to show that the withdrawal of consultancy fees paid to Mr. Gaurav Motwane was erroneous or was taken back by her . It was observed by learned CIT(A) that the assessee has done work for various customers on behalf of MAZZA Media Inc as the assessee does not have direct clients. The assessee has not utilized the services of Mr. Gaurav Motwane on the ground that he has not raised any bill during the year or in the subsequent financial year was the observation of learned CIT(A). The assessee has not made any payment during the year to Mr. Gaurav Motwane but had merely made provision for consultancy fee of Rs. 18 lakhs which was reflected as a liability in the balance sheet. Mr. Gaurav Motwane has not declared any receipt from the assessee in respect of consultancy charges. As per the assessee, the assessee was following mercantile system of accounting whereas Mr. Gaurav Motwane had followed cash system of accounting and had accounted Rs. 15 lakhs during the assessment year 2002-03 when the payments were made to Mr Gaurav Motwane and the balance sum of Rs. 3 lakhs was not received by Mr. Gaurav Motwane and hence not shown as his income. The learned CIT(A) observed that the A.O. rejected the contention of the assessee on the ground that Mr. Gaurav Motwane also followed the mercantile system of accounting. The A.O. came to this conclusion on the

ground that Mr. Gaurav Motwane's balance sheet for the assessment year 2001-02 disclosed current liability of Rs. 44,065/- and the balance sheet for the assessment year 2002-03 reflected current liability in respect of outstanding expenses of Rs. 93,857/-. In the original appellate proceedings the ld. CIT(A) held that the assertion that Mr. Gaurav Motwane had the technical competence and the expertise for the development of software program which has resulted in the creation of the website cannot be accepted in the absence of any positive evidence produced during the assessment proceedings. The learned CIT(A) observed that the statement given by the assessee agreeing to the addition was not voluntary and that she was advised by the A.O to give such a statement but no evidence has been furnished by the assessee in this regard to suggest that the assessee was either coerced or unduly influenced to agree to the addition. The assessee is a well educated and thus aware of her rights and obligations. It was observed by learned CIT(A) that it cannot therefore be assumed that she was intimidated or coerced by the A.O to agree to an addition of this nature. Thus, the ld. CIT(A) confirmed the addition of Rs. 18 lakhs made by the A.O. in second round of litigation vide appellate order dated 22.10.2010.

With regard to the denial of the claim of deduction u/s 80HHE of the Act, the assessee submitted before learned CIT(A) that the A.O has rejected the claim of the assessee since the assessee has not made the claim in the original return of income or in the revised return of income. In support, the A.O. has relied on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. v. CIT (2006) 284 ITR 323(SC). The assessee submitted that the action of the A.O. was not proper. The ITAT in the case of Chicago Pneumatic India Ltd. (2007) 15 SOT 252 (Mum) wherein the Tribunal relied on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra) and held in the said order that the learned CIT(A) has powers coterminous with the powers of the A.O and the appellate proceedings are continuation of

the original proceedings and the learned CIT(A) have entertained the claim of the assessee and allowed it if other provisions of law are satisfied. The Tribunal has entertained the claim and had directed the A.O to examine the claim of the assessee and hence the issue is stale , was the contention of the assessee before the learned CIT(A). It was submitted that during the course of the reassessment set aside proceedings, the assessee had filed foreign inward remittance certificate to the extent of Rs. 18,43,937/-, hence, the A.O. was wrong that the foreign inward remittance certificates were not filed during the course of reassessment. It was submitted that as per the A.O. the assessee had rendered services in India and the assessee had not exported software so as to qualify for deduction u/s 80 HHE of the Act. In this regard the assessee referred to the ld. CIT(A)'s order wherein the assessee had submitted her exhaustive objections to the A.O and the CIT(A) , and after going through the same , the ld. CIT(A) had considered the same and directed that deduction u/s 80HHE of the Act was allowable in principle in the first round of litigation. The assessee contended that the A.O. has not brought on record anything fresh so as to disallow the claim u/s 80HHE of the Act.

The ld. CIT(A) in the second round of litigation after considering the submissions of the assessee, rejected the same on the ground that the assessee should have made the claim in the return of income or in the revised return but the assessee did not do the same. The ld. CIT(A) observed that even during the set aside proceedings, the assessee has not filed any supporting certificates of foreign inward remittances and simply stated that since the issue is old, the certificates were not available, hence, the claim of the assessee u/s 80HHE of the Act is not supported by evidence. The assessee is only consultant in India. The appointment letter dated 24th November, 2003 is a document which is produced after the completion of assessment on 24th October, 2003. There is no mention of export of computer software. The assessee has not filed any appointment letter or other

document showing any transaction of export of computer software during assessment proceedings or during set aside proceedings. There was not any evidence to show that the assessee had exported computer software out of India, hence, the learned CIT(A) held that the assessee is not entitled for deduction u/s 80HHE of the Act vide appellate orders dated 22.10.2010.

8. Aggrieved by the appellate order dated 22.10.2010 passed by the ld. CIT(A), the assessee carried the matter before the Tribunal in second round of litigation.

9. The ld. Counsel for the assessee submitted that the Revenue has disallowed the consultancy expenses of Rs. 18 lakhs and also denied the deduction u/s 80HHE of the Act. The ld. Counsel submitted that this is the second round of litigation and the ld. CIT(A) dismissed the appeal of the assessee on both the grounds. In the first round, the Tribunal has set aside the matter to the file of the A.O. in ITA No. 1470/Mum/2005 and ITA No. 1731/Mum/2005 vide orders dated 26th May, 2008. It was submitted that the assessee got the contract from MAZZA Media Inc., USA for conceptualization and designing for their website, planning features and news events on the website and development of content for other media for MAZZA Media Inc., USA. It was submitted that out of the total receipt from MAZZA Media Inc., USA, the assessee had incurred expenditure of Rs. 18 lacs for the services rendered by Mr. Gaurav Motwane. Provision for consultancy expenses were made for Rs. 18 lacs during relevant assessment year with respect to consultancy services rendered by Mr. Gaurav Motwane for which payment of Rs. 15 lacs was made to Mr. Gaurav Motwane in the immediately subsequent year i.e. assessment year 2002-03 which has been offered to tax by said Mr. Gaurav Motwane by declaring the said income of Rs.15 lacs received in the previous year relevant to the assessment year 2002-03 as income of the assessment year 2002-03 and paid the due taxes on these

income to Revenue. It was submitted by learned counsel for the assessee that the assessee agreed for the additions before the AO in the first round of litigation under insistence from the AO. The ld. Counsel relied on the decision of the Hon'ble Bombay High Court reported in Rameshchandra & Co. v. CIT (1987) 168 ITR 375(Bom.HC) and submitted that retraction was filed by way of affidavit before the learned CIT(A) as the A.O. insisted the assessee to surrender the amount. Mr. Gaurav Motwane had given letter to the A.O. dated 24th December, 2009 stating that he has rendered the services and the said amount was offered to tax in the return of income filed by said Mr Gaurav Motwane with the Revenue in the assessment year 2002-03. Mr. Gaurav Motwane has duly paid the taxes on the said amount of Rs. 15 lacs received by him during assessment year 2002-03 and hence there is no evasion of taxes. It was submitted that the A.O. could have summoned Mr. Gaurav Motwane u/s 131 of the Act in set aside proceedings and cross examined him. The ld. Counsel also relied on the following case laws and contended that where there is no tax evasion and hence no disallowance is called for :-

1. Ashish Plastic Industries v. ACIT, (2015)373 ITR 45 (SC)
2. CIT v. Indo Saudi Services (Travel) P. Ltd., 310 ITR 306 (Bom)
3. ACIT v. Malhar Information Services, 307 ITR (AT) 29 (Mumbai)

It was submitted by the learned counsel for the assessee that if there is no tax evasion , Section 40A(2) of the Act cannot be invoked.

With respect to the denial of deduction u/s 80 HHE of the Act by the A.O. on the ground that the assessee has not claimed the same in the original return of income nor filed a revised return of income. The claim is filed with the ld. CIT(A) for the first time in the original proceedings. The ld. Counsel for the assessee submitted that there is computer software export through internet.

The money has come in the form of convertible foreign exchange. The auditors certificate was also given in form no 10CCAF. The assessee relied on the following decisions:-

1. Nirmala L. Mehta v. CIT 269 ITR 1 (Bombay HC)
2. Rachana S. Talreja v. DCIT 16 ITR (Trib) 53 (Mumbai)

On being asked by the Bench, the assessee submitted that the assessee did not file any Softex form with government authorities as mandated under law for exporting computer software. The assessee submitted that the assessee was assigned the job of designing website by Maaza Media Inc, USA and the assessee was Editor-in-Chief of Maaza Entertainment India Private Limited , a company promoted by Maaza Media Inc., USA in India and they are two different assignments.

10. The ld. D.R. submitted that there is no documentary evidence submitted by the assessee with respect to the consultancy expenses of Rs. 18 lacs paid by her to her husband Mr. Gaurav Motwane. No copy of agreement was submitted by the assessee. No document has been furnished to prove that the husband of the assessee Mr. Gaurav Motwane has rendered services to the assessee. It is also not brought on record that Sh. Gaurav Motwane is computer software professional. There is no proof that her husband Mr Gaurav Motwane has paid the taxes on Rs. 15 lacs received by him from the assessee in the immediately succeeding assessment year which is not emanating from the record. The learned DR drew our attention to para 3.1 of the appellate orders of the learned CIT(A) dated 22.10.2010. The ld. D.R. drew our attention to paper book page 20 & 21 whereby balance sheet of the assessee is placed and also drew our attention to the P&L account vide paper book page 29 to 39 of Mr. Gaurav Motwane is placed. With respect to the second issue of claim under Section 80HHE of the Act, the ld. D.R also drew

our attention to paper book page 51 to 56 whereby the purpose of remittance received in convertible foreign exchange as mentioned in FIRC is consultancy fees and not export of computer software. It was submitted that no claim for deductions u/s. 80HHE of the Act was made by the assessee in the original return of income and hence the assessee is now not entitled to deduction u/s. 80HHE of the Act as no revised return of income has been filed by relying on the decision of Hon'ble Supreme Court in the case of Goetze India Limited(supra). Further no such claim for deduction u/s 80HHE of the Act was made in subsequent years by the assessee. It is submitted by the learned DR before the Tribunal that this is the second round of litigation and even in the set aside proceedings, no evidences were filed by the assessee to prove her claim of deduction u/s 80HHE of the Act. The assessee did not submitted FIRC even in second round of litigations and now copies of FIRC are filed before the Tribunal and genuineness and authenticity of FIRC cannot be determined.

11. In the rejoinder, the ld. Counsel for the assessee submitted that the decision in the case of Goetze India Limited(supra) does not apply in this case as the claim can always be lodged with the appellate authorities. It was submitted that the Tribunal has power to consider new claim during appellate proceedings and in any case in first round of litigation the Tribunal set aside the issue and directed AO to verify the claim of the assessee which itself indicate that the claim with respect to allowability of deduction u/s. 80HHE of the Act was admitted by the Tribunal in the first round of litigation itself. In nutshell the ld. Counsel submitted that the claim of the assessee may be accepted.

12. We have considered the rival contentions and also perused the material available on record including case laws relied upon by rival parties. We have observed that the assessee rendered services to overseas client MAZZA Media

Inc., USA for which the assessee has received income in foreign exchange against which the assessee has submitted the copies of FIRC wherein the purpose of foreign remittance mentioned in FIRC is 'consultancy fees', the copies of FIRC are placed at page 51-66/paper book. The assessee has also submitted certificate from MAZZA Media Inc., USA that the assessee is assigned the overall responsibility of developing the website, providing content and site development activities for the said concern. The said letter is placed at paper book page 44. The assessee has also placed certificate from her husband Mr. Gaurav Motwane with respect to the services rendered by him to the assessee, which certificate is placed at paper book page 45 wherein Gaurav Motwane has stated that he rendered consultancy services to the assessee relating to developing brand strategy through internet and development of various communication tools during the previous year relevant to assessment year 2001-02. The said Gaurav Motwane has also raised invoice on the assessee dated 11-04-2002 for Rs.20,06,000/- against which the assessee made provision of Rs. 18 lacs towards consultancy expenses in the instant assessment year 2001-02 which is placed in paper book /page 41-43 and professional and educational profile of Mr. Gaurav Motwane was also placed vide paper book pages 40 to contend the capabilities of Mr Gaurav Motwane to perform the job undertaken by him. It is the say of the Id. Counsel for the assessee that the assessee is following mercantile system of accounting which is supported by the tax audit report u/s 44AB of the Act issued by chartered accountant which is filed by the assessee and also the balance sheet, which are placed at paper book pages 18 to 28 whereby it is mentioned that she is following mercantile system of accounting in the tax audit report(page 22/pb) issued by chartered accountant to justify making the provision for consultancy expenses of Rs 18 lacs in the books of accounts for the instant assessment year. Further it is the say of learned counsel for the assessee that her husband Mr. Gaurav Motwane is following cash system of accounting which contention is

supported by the audited accounts and tax audit report u/s 44AB of the Act issued by chartered accountant of Sh Gaurav Motwane , which are placed at paper book pages 29 to 39 whereby it is mentioned in the tax audit report issued by chartered accountant in the case of Mr Gaurav Motwane that the said Mr Gaurav Motwane is in the business of website development and consultancy as well following cash basis of accounting(pb/page 33) , to justify the offering of income of Rs. 15 lacs by Gaurav Motwane to tax in the succeeding assessment year i.e. 2002-03 on receipt basis as the assessee made the payment of Rs. 15 lacs in the previous year 2001-02 relevant to assessment year 2002-03 against the provisions of consultancy expenses of Rs 18lacs in her books of accounts in the previous year 2000-01 relevant to the assessment year 2001-02 . The ld. Counsel for the assessee had submitted that the assessee made provision for consultancy expenses of Rs. 18 lacs towards consultancy fee payable to Mr. Gaurav Motwane in her books of account during the previous year relevant to assessment year 2001-02 on accrual basis against which the assessee has made payment of Rs. 15 lacs to Mr. Gaurav Motwane in the succeeding previous year relevant to the assessment year i.e. 2002-03 which are stated to be included by Mr. Gaurav Motwane in his return of income filed with the Revenue and due taxes are stated to have been paid to the Revenue , on receipt basis. The assessee has also filed an affidavit explaining the manner in which the assessee surrendered the amount at the insistence of the assessee, which is placed at paper book page 48 to 50 and its retraction thereof. In our considered view keeping in view the facts and circumstance of the case and also in the interest of substantial justice , the assessee has duly discharged the primary onus cast on her and has brought on record sufficient material to substantiate her contention that the assessee has received the consultation fee for website development from MAZZA Media Inc.,USA and also with respect to her claim for deduction of expenses towards consultancy fee of Rs. 18 lacs payable to Mr. Gaurav Motwane subject to verification of the claim and contentions of

the assessee that Mr. Gaurav Motwane has included income of Rs.15 lacs received from the assessee in the return of income filed by him with the Revenue for the assessment year 2002-03 and due taxes are paid to Revenue, as from the records before us the aforesaid contention of the assessee could not be verified. Thus, we are setting aside and restoring this matter to the file of the AO for the purposes of limited verification whether the said Mr. Gaurav Motwane has included Rs. 15 lacs received from the assessee as an income in his return of income for the assessment year 2002-03 filed with the Revenue and paid due taxes to the Revenue and with respect to balance Rs. 3 lacs similar verification be carried out by the AO on the same lines. In our considered view, the claim of the assessee for deduction of Rs 18 lacs as consultancy fee payable to her husband Mr Gaurav Motwane is allowable subject to the necessary limited verification by the A.O. as indicated by us above. We order accordingly.

16. With respect to the claim of deduction u/s 80 HHE of the Act, we have observed that the said claim was raised for the first time before the Id. CIT(A) in the first round of litigation and the same was not raised by the assessee vide return of income filed with the Revenue nor vide revised return filed with the Revenue. The Tribunal has directed the A.O. to verify the same and the observation of the Tribunal are as under:-

“We have considered the issues and submissions. As seen from the file the assessee earned software consultancy charges/fee from M/s Mazaa Media, INC and claimed an amount of Rs. 18,00,000/- payable to M/s Pixel Multimedia, owned, by her husband Shri Gaurav Motwane. It is also a fact that only an Amount of Rs. 15,00,000/- was paid in the later year which was offered to tax. As different methodology of accounting is followed by husband and wife the Assessing Officer considered the amount

and did not allow as the same was not offered by the husband in the assessment year. It is the submission of the assessee that Mr. Gaurav Motwane is also a qualified software person and the amount is payable to him for developing the web services and there are evidences that services were utilized by the assessee. As the nature of services and the expenditure on services has not been examined by the Assessing Officer in detail and further as the claim of 80 HHE has been made for the first time before the CIT(A) and both the assessee and the Department are aggrieved, in the interest of justice, we restore the matter back to the file of the Assessing Officer for fresh consideration. The Assessing Officer is free to examine the claim of the assessee with reference to the amount paid or payable to Mr. Gaurav Motwane and also with reference to the claim of 80 HHE. The issue is to be decided afresh on the facts and as per the law. To that extent grounds are considered partly allowed in both the appeals.”

In the second round of litigation, the authorities rejected the claim of the assessee with respect to deduction u/s 80HHE of the Act. The claim has been rejected on the ground that the same has not been filed in the return of income filed with the Revenue as well not filed vide revised return of income with the Revenue while the said claim was raised in the appellate proceedings for the first time before the learned CIT(A) in the first round of litigation. The other ground of rejection was that the claim of the assessee is not supported by any evidence. Section 80 HHE of the Act as was applicable for the assessment year 2001-02 stood as under:-

Section 80 HHE of the Act read as under:

“[Deduction in respect of profits from export of computer software, etc.

80HHE. (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of,—

(i) export out of India of computer software or its transmission from India to a place outside India by any means;

(ii) providing technical services outside India in connection with the development or production of computer software,

there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, [a deduction of the profits] derived by the assessee from such business.

[***]

[Provided that if the assessee, being a company, engaged in the export out of India of computer software, issues a certificate referred to in clause (b) of sub-section (4A), that in respect of the amount of the export specified therein, the deduction under this sub-section is to be allowed to a supporting software developer, then the amount of deduction in the case of an assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export, the same proportion as the amount of the export turnover specified in such certificate bears to the total export turnover of the assessee.

(1A) Where the assessee, being a supporting software developer, has during the previous year, developed and sold computer software to an exporting company in respect of which the said company has issued a certificate under the proviso to sub-section (1), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee a deduction of the profits derived by the assessee from the developing and selling of computer software to the exporting company in respect of which the certificate has been issued by the said company [to such extent and for such years as specified in sub-section (1B)].

The following sub-section (1B) shall be inserted after sub-section (1A) of section 80HHE by the Finance Act, 2000, w.e.f. 1-4-2001:

(1B) For the purposes of sub-sections (1) and (1A), the extent of deduction of profits shall be an amount equal to—

(i) eighty per cent of such profits for an assessment year beginning on the 1st day of April, 2001;

(ii) sixty per cent of such profits for an assessment year beginning on the 1st day of April, 2002;

(iii) *forty per cent of such profits for an assessment year beginning on the 1st day of April, 2003;*

(iv) *twenty per cent of such profits for an assessment year beginning on the 1st day of April, 2004,*

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.

(2)The deduction specified in sub-section (1) shall be allowed only if the consideration in respect of the computer software referred to in that sub-section is received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, [within such further period as the competent authority may allow in this behalf].

Explanation [1].—The said consideration shall be deemed to have been received in India where it is credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

[Explanation 2.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.]

(3) For the purposes of sub-section (1), profits derived from the business referred to in that sub-section shall be the amount which bears to the profits of the business, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

[(3A) For the purposes of sub-section (1A), profits derived by a supporting software developer shall be,—

(i) in a case where the business carried on by the supporting software developer consists exclusively of developing and selling of computer software to one or more exporting companies solely engaged in exports, the profits of such business;

(ii) in a case where the business carried on by a supporting software developer does not consist exclusively of developing and selling of computer software to one or more exporting companies, the amount which bears to the profits of the business, the same proportion as the turnover in respect of sale to the respective exporting company bears to the total turnover of the business carried on by the assessee.]

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

[(4A) The deduction under sub-section (1A) shall not be admissible unless the supporting software developer furnishes in the prescribed form along with his return of income,—

** (i) the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed on the basis of the profits of the supporting software developer in respect of sale of computer software to the exporting company; and*

(ii) a certificate from the exporting company containing such particulars as may be prescribed and verified in the manner prescribed that in respect of the export turnover mentioned in the certificate, the exporting company has not claimed deduction under this section :

Provided *that the certificate specified in clause (b) shall be duly certified by the auditor auditing the accounts of the exporting assessee under the provisions of this Act or under any other law.]*

(5) Where a deduction under this section is claimed and allowed in respect of profits of the business referred to in sub-section (1) for any assessment year, no deduction shall be allowed in relation to such profits under any other provision of this Act for the same or any other assessment year.

Explanation.—For the purposes of this section,—

(a) “convertible foreign exchange” shall have the meaning assigned to it in clause (a) of the Explanation to section 80HHC;

(b) “computer software” means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme [or any customised electronic data] which is transmitted from India to a place outside India by any means;

The following item (b) shall be substituted for the existing item (b) in the Explanation below sub-section (5) of section 80HHE by the Finance Act, 2000, w.e.f. 1-4-2001 :

(b) “computer software” means,—

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

(ii) *any customised 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 a place outside India by any means;

(c) *“export turnover” means the consideration in respect of computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (2), but does not include freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;*

[(ca) “exporting company” means a company referred to in sub-section (1) making actual export of computer software;]

(d) *“profits of the business” means the profits of the business as computed under the head “Profits and gains of business or profession” as reduced by—*

(1) *ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and*

(2) *the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;*

(e) *“total turnover” shall not include—*

(i) *any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28;*

(ii) *any freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India; and*

(iii) *expenses, if any, incurred in foreign exchange in providing the technical services outside India.]*

[(ea) “supporting software developer” means an Indian company or a person (other than a company) resident in India, developing and selling computer software to an exporting company for the purposes of export.]”

As could be seen above that the said section is a beneficial provisions and hence the said provisions is to be strictly construed at the first initial stage to determine the eligibility of the tax-payer for the grant of the relief and once the eligibility and entitlement of the tax-payer for the deduction u/s. 80HHE of the Act is established , then full effect is to be given to the beneficial provision by liberally construing the same so that intended objective of beneficial provision is achieved . The assessee has stated to have received payment from MAZZA Media Inc.,USA towards consultancy fees for designing website and content development as per records before us. We have observed that the assessee is not able to substantiate and prove by cogent evidences that the assessee exported any computer software which falls within the four corners of the definition of computer software mandated by the provisions of the said section. On being asked by the Bench to bring on record evidences of actual export of computer software, the assessee could not bring the same on record such as filing of softex form etc . and other cogent evidences to substantiate actual export of computer software to become eligible for claim u/s 80HHE of the Act. In our considered view, the assessee could not bring on record cogent evidences of having actually exported any computer software within the mandate of Section 80HHE of the Act to be eligible for deduction u/s 80HHE of the Act. The assessee has also not produced any certificate such as softex form etc regarding declaration of export of computer software with the Government Authorities which is a mandatory requirement stipulated by Government of India for declaration of export of computer software. In the absence of any evidence on record, the claim of the assessee for deduction u/s 80HHE of the Act cannot be allowed as the assessee is consultant providing website designing and content development for web site of Maaza Media, Inc , USA, whereby based on material on record it cannot be said that the assessee has actually exported any computer software as mandated u/s 80HHE of the Act in the absence of cogent evidences on record. As such the claim of deduction u/s 80 HHE of the Act as filed by the assessee

cannot be allowed to the assessee and hence in our considered view the deduction u/s 80 HHE of the Act cannot be granted to the assessee on merits itself as claimed by the assessee based on material on record. We order accordingly.

17. In the result, appeal filed by the assessee in ITA No. 8864/Mum/2010 for the assessment year 2001-02 is partly allowed as indicated above.

Order pronounced in the open court on 5th October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 05-10-2016 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 05-10-2016

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai