आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'C'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.81/Ahd/2016**
*निर्धारण वर्ष/***Asstt. Year: 2011-2012**

DCIT, Cir.4(1)(2) Ahmedabad.	Vs.	M/s.Zydus Hospira Oncology P.Ltd. Plot No.3, Pharmez Sarkhej Bavla Highway Tal. Matoda, Ahmedabad Pin : 382 213. PAN : AAACZ 2327 A

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Revenue by	:	Shri Prasoon Kabra, Sr.DR
Assessee by	:	Shri Jigar M. Patel

*सुनवाई की तारीख/*Date of Hearing : 21/06/2018
*घोषणा की तारीख /*Date of Pronouncement: 9 /07/2018

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Revenue is in appeal before the Tribunal against order of the ld.CIT(A)-8, Ahmedabad dated 9.11.2015 passed for the assessment year 2011-12.

2. In the grounds of appeal, Revenue has mainly raised two grounds, which read as under:

> *"1. Whether the CIT(A) is erred in law and on facts in allowing depreciation @60% on computer software purchased separately*

(SAP software) against 25% applicable to intangible assets ignoring the finding of the AO.

2. Whether the CIT(A) is erred in law and on facts in allowing the assessee's claim of deduction u/s.10AA of the Act on exchange fluctuation gain, which is not of first degree and not derived from export."

3. Brief facts of the case are that the assessee-company is engaged in the business of manufacturing drugs and pharmaceuticals. It has filed return of income on 19.11.2011 declaring total income at Rs.80,99,180. The return was processed under section 143(1), and thereafter selected for scrutiny assessment by issuance of notice under section 143(2) upon the assessee. During the assessment proceedings, it was noticed by the AO that the assessee has claimed depreciation of Rs.54,14,319/- at the rate of 60% on block of assets viz. computer and software. The ld.AO doubted the claim of the assessee and issued a show cause notice asking as to why depreciation on software be not restricted to 25% instead of 60% claimed by the assessee. Assessee filed a reply dated 27.2.2015 which was been reproduced by the AO in the assessment order. Assessee submitted that the claim of the assessee was as per Appendix-I of the Income Tax Rule 5 wherein depreciation is allowable at 60% on computer including computer software. Reply of the assessee was not found convincing to the AO. The ld.AO in the assessment order discussed about the technicality of software and tried to dichotomize "software" into "system software" and "application software" so as to treat these two items as separate and mutually exclusive from the claim of depreciation at 60%. He was of the view that SAP being an application software and being an intangible asset merely a licence to use, did not qualify for 60% depreciation, and therefore, ld.AO restricted the claim of depreciation at 25%.

4. Aggrieved assessee carried the matter in appeal before the ld.CIT(A). The ld.First Appellate Authority after a detailed discussion allowed the claim of the assessee by observing that neither the Income Tax Act nor judicial pronouncements differentiate between the computer and computer software and licence to use the same. The ld.CIT(A) held that as per table of rate of depreciation at serial no.5 name of the asset is "computer including computer software". According to the note appended to the table, computer software means any computer program recorded on any disk, tap, perforated media or other information storage device. The ld.CIT(A) allowed the claim of the assessee.

5. Aggrieved Revenue is in appeal before the Tribunal.

6. The ld.DR supported the order of the ld.AO. The ld.counsel for the assessee at the outset submitted that similar issue arose in the assessment year 2010-11, wherein the order of the ld.CIT(A) allowing the claim of the assessee of depreciation at 60% was challenged by the Revenue. The Tribunal has heard arguments in ITA No.2788/Ahd/2014 on 18.6.2018. Both the representatives agreed that same view be adopted in this year as well. The Tribunal has pronounced the order on 2.7.2018 and from the website copy is being taken and placed on record.

7. We have considered rival contentions and gone through the record. We are of the view that treatment of the "software" by the AO as an intangible asset distinct from the group provided in list of tangible assets for rate of depreciation cannot be justified. As per the list of tangible assets in the table of rate of depreciation "software" has been grouped as eligible for claim of depreciation at 60%. Income Tax Act has not categorized or distinguished software into 'system software' and 'application software' for claiming depreciation in the table of assets for

application of rate of depreciation as attempted by the ld.AO in the present case. Further, SAP (System, Applications and Products in Data processing) is a business system whereby all areas of business activities are designed, integrated and executed in one dedicated SAP system by sharing common business information with everyone concerned. Deployment of SAP itself can also involve a lot of time and resources and having long term business perspective. It cannot be compared with applications like MS office or tally etc. as tried to make out by the ld.AO, which is like comparing a mountain with a mole. Assessee has implemented SAP system in their various business tasks, and is part of its integrated computer system, and therefore, the assessee is entitled for depreciation at the rate of 60% as provided in the list of assets in the table of rates of application depreciation.

It is pertinent to note that similar issue agitated by the Revenue before the Tribunal in Asstt.Year 2010-11 has been dismissed and the claim of the assessee was allowed. We find that Tribunal has relied upon the order of the Tribunal in the case of ACIT Vs. Zydus Infrastructure P.Ltd. (2016) 72 taxmann.com 199 (Ahd-Trib) and held that licenced software are also subjected to depreciation at the rate of 60%. Tribunal also observed that even if depreciation is lowered, then there would not be any change in taxable income of the assessee, as the assessee-company is a unit eligible for deduction under section 10A of the Income Tax Act, and therefore, in either way, the entire exercise would be revenue neutral and adjudication becomes merely an academic. Considering all these aspects, we reject the ground of appeal of the Revenue and confirm the order of the ld.CIT(A) allowing the claim of the assessee of depreciation at the rate of 60% on computer and software.

8. Next ground of appeal of the Revenue is allowance of claim of deduction under section 10AA of the Act on exchange fluctuation gain by the ld.CIT(A).

9. Brief facts of the case in this regard are that assessee has claimed deduction under section 10A of Rs.2,20,47,238/- under the head "other income" on account of exchange rate fluctuation gain. The ld.AO sought justification from the assessee for not excluding the forex income earned from the export turnover and profits of the business of the assessee for the purpose of calculating exemption under section 10AA of the Act. Assessee submitted that as per section 10AA(7) the profits of the business of undertaking includes the profits from export of articles as well as all other incidental income derived from the business of the undertaking; and that there was a direct nexus between exchange fluctuation gain and income of the business of the undertaking. It was submitted that forex gain was derived from the consideration realized from export and relatable to profits of the business of the undertaking. The ld.AO, however, found the submissions of the assessee unacceptable, and held that gain or profit arising out of exchange fluctuations nothing to do with sale/export of goods and not part of profit of business of an undertaking, and the same was to be treated as separate income for claiming deduction under section 10AA of the Act. The AO accordingly disallowed the claim of the assessee and recomputed eligible deduction. Issue was agitated before the ld.First Appellate Authority by the assessee. The ld.CIT(A) considered the issue elaborately and after relying upon various case laws, allowed the claim of the assessee.

10. Dissatisfied with the order of the ld.CIT(A), the Revenue is before the Tribunal.

11. Before us both parties agreed that identical issue was heard by ITAT in A.Y.2010-11 on 18.6.2018 and order is reserved. The view on this point, likely to be taken by the ITAT be adopted here. As observed earlier, we have called for the order in ITA No.2788/Ahd/2014 dated 2.7.2018 and perused the same. We have also gone through the record.

12. We find that the ld.CIT(A) has appreciated the facts in right perspective and arrived at a just conclusion by allowing the claim of the assessee. We make it a point to note the relevant findings of the ld.CIT(A) on this issue which reads as under:

> *"After going through the facts of the case and the details submitted by the AR and also the findings given by the CIT(A) in the appellant's own case for the A.Y.2010-11, it is noticed that the appellant has reduced the gains due to foreign exchange rate fluctuation from the export turn over nut not from the profit and business income as per the provisions of section 10AA(7) of the I. T. Act but the AO in his working has reduced such gain from the business profit also. This working of the AO where he has completely excluded the said gain from deduction u/s.lOAA is not justified under the provision of income tax Act nor is supported by legal position interpreted by various judicial pronouncement which are discussed in detailed by the CIT(A) in the appeal order in the case of appellant for the A.Y.2010-11.*
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> *As I have no reason to differ with the finding given by the CIT(A) in the A.Y.2010-11,1 respectfully follow the conclusion as decided in case laws relied upon by the appellant and quoted by the CIT(A) in his order mentioned above and Hon'ble ITAT Ahmedabad A Bench in the case of M/s. Zaveri & Co. P. Ltd. V. CIT-4, Ahmedabad in ITA No.l395/Ahd/2013 and ITA No.l396/Ahd/2013 in its order dated 07.05.2014 which states as under:*
>
> > *"Since the foreign exchange fluctuation gain or loss is in Indian Rupees being realized as per exchange rate, provisions of section 10AA (7) of the Act which provide the manner in which the profits derived from "Export of articles*

or things or securities is to be computed for the purpose of 10AA deduction reflect that -

"The profits of the business of the undertaking are to be computed as per the provisions of Chapter IV D of the Act and the only adjustment -which is permitted by the legislature to be made to such profits of the business is to apportion the same in the proportion of export turnover of the eligible services to the total turnover of the business carried on by the assessee. It is significant to note here that the specific provisions like explanation (baa) of Section 80HHC of the Act which provide for exclusion of 90% of interest income from the profits of business to arrive at the profits of the business has not been provided by the legislature in section I0AA of the Act."

I also agree with the finding of the CIT(A) in the order of A.Y.2010-11 that, -

"the appellant is following a consistent method of accounting such foreign exchange fluctuation as per accounting standard AS-// and tax auditor has not made any adverse remarks. The appellant submitted (hat it fulfilled all the eligible condition to claim deduction u/s.10AA of the Act for its eligible unit in Special Economic Zone(SEZ). The appellant though reduced such gain from the export turn over but the same was included as business Income / profit of eligible undertaking thereby correctly followed the provisions. As per provisions it is profit & gains of eligible unit at SEZ from the export of goods/article/services and the same be realized in foreign exchange. It is undisputed that on account of day to day fluctuation of foreign exchange, such variation in reporting of sale as per invoice and realization of such export being in two different time frames will result into such gain or loss. I am inclined with appellant that as per the ratio of Hon'ble Gujarat High Court decision in the case of Priyanka Gems upholding the Hon'ble /TAT, Ahmedabad order in the same case, such gain and loss are part and parcel of the sale of export. I am also inclined with appellant that Hon'ble Bombay High Court for same issue and in similar facts (deduction u/s.10A of the Act) following its judgement in the case of CIT vs. Amber Export (India) & Hon'ble Gujarat High Court judgement in the case of CIT vs. Amba Impex (2006) 282 /TR 144 held in favour of assessee for large

amount realized in terms of Indian Rupees as a result of a foreign exchange fluctuation that took place in the course of the export transaction. Similarly Hon'ble Mumbai /TAT in the case of Renaissance Jewellery (P)Ltd. (supra) after considering ratio of various case laws held that -

"There is no material difference bebveen the requirement of section 80HHC and section 10A. The profit on account of foreign exchange gain is directly referable to the articles and things exported by the assessee. Such profits are, therefore, in the same nature as the sale proceeds and there is no reason while deduction under section 10A should not be allowed in respect of such exchange gain."

Two important aspects in this regards required to be considered.

(a) The intention of legislature with purpose of this section is to promote export and foreign exchange earnings.
(b) There may be various accounting standard to record a particular transaction in the books of accounts but ultimate nature of such transaction will be considered for the phrase 'derived from'.

In this regard, it is undisputed that appellant realized foreign exchange on account of export from eligible unit at SEZ. Further in value terms there are two entries i.e. entry of sale on the date of export as per invoice and entry of gain / loss on account of realisation of such sale. There is no other activity of sale or services but it is on account of two different value of foreign currency for two different time frames related to one sale, hence such gain /loss is part and parcel of sale and, profit/income of the eligible unit entitled for deduction u/s.10AAoftheAct."

In consensus with my predecessor CIT(A), in this year also the AO is directed not to reduce amount of Rs.2,20,47,238/- foreign exchange rate fluctuation gain from profits of business while computing deduction u/s.10AA of the Act.

Accordingly, this ground of appeal is allowed and the AO is directed to delete the disallowance of Rs.1,24,18,439/- u/s.10AA and to allow the deduction as claimed by the appellant."

13. Similarly, the Tribunal rejected the appeal of the Revenue for the asstt.year 2010-11 on similar issue and allowed the claim of the assessee. The relevant findings of the Tribunal read as under:

> *"11. We have carefully considered the rival submissions on the issue and perused the orders of the authorities below. We have no hesitation in endorsing the view of the CIT(A) in this regard. The issue is substantially covered in favour of the assessee by the decision of the Hon'ble Gujarat High Court in the case of Priyanka Gems (supra) and CIT vs. Gem Plus Jewellery India Ltd. [2010] 194 TAXMAN 192 (BOM.). The issue is also settled in favour of the assessee by long line of judicial precedents where a consistent view has been taken that foreign exchange gains arising out of the fluctuation in the rate of foreign exchange cannot be divested from the export business of the assessee. Once export is made, the foreign exchange gains/loss may occur due to variety of reasons at the time of remission of export sale proceeds. In this view of the matter, the foreign exchange fluctuation gains required to be taken as integral part of the business profits derived from exports. Even, independently, in so far as Section 10AA of the Act is concerned, sub-Section 7 thereof explicitly explains the term 'profit derived from the export of articles or things' to mean the amount which bears to be 'profits of the undertaking', the same proportion as the export turnover bears to the total turnover of the business carried on by the undertaking. Thus, what is required to be determined is 'profits of the business of the undertaking' which is ostensibly wider than 'profits & gains derived by the undertaking'. In short, the profits derived from export have been equated when business profits of the undertaking in view of the formula provided in Section 10AA(7) of the Act. In view of the aforesaid discussion, we do not see any infirmity in the conclusion drawn by the CIT(A) in favour of the assessee and against the Revenue. We, thus, decline to interfere."*

14. Considering similarity of facts and circumstances of the case and the proposition laid down by the Co-ordinate Bench passed in the asstt.year 2010-11 in the assessee's own case (supra), we are inclined to follow the above order of the Tribunal, and accordingly confirm order of the ld.CIT(A). This ground of appeal of Revenue is rejected.

15. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Court on 9th July, 2018 at Ahmedabad.

Sd/-	Sd/-
(AMARJIT SINGH)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad; Dated 09/07/2018