IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF AUGUST 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

I.T.A. NO.89 OF 2013

BETWEEN:

M/S. MINDTREE LTD.,
(FORMERLY MINDTREE CONSULTING PVT. LTD.,)
GLOBAL VILLAGE, RVCE POST
MYLASANDRA, MYSORE ROAD
BENGALURU-560059.

... APPELLANT

(BY SRI. CHYTHANYA K.K., ADV.,)

AND:

THE ASST. COMMISSIONER OF INCOME TAX
CIRCLE-12(1), LTU
BENGALURU-560085.

... RESPONDENT

(BY SRI. K.V. ARAVIND, ADV.,)

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THIS ITA IS FILED UNDER SECTION 260-A OF I.T. ACT, 1961 ARISING OUT OF ORDER DATED 11.01.2013 PASSED IN ITA NO.428/BANG/2012 FOR THE ASSESSMENT YEAR 2008-09, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

(I) FORMULATE THE SUBSTANTIAL QUESTION OF LAW STATED THEREIN.

(I) ALLOW THE APPEAL AND SET ASIDE THE ORDER BY THE ITAT, BANGALORE 'B' BENCH BEARING ITA NO.428/BANG/2012 DATED 11-01-2013, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2008-09. The appeal was admitted by a bench of this Court vide order dated 09.04.2013 on the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case, the Honourable ITAT was right in upholding the action of the Learned Respondent in excluding expenditure of Rs.198,17,58,814/- incurred in foreign currency from export turnover under Section 10B and Section 10AA of the IT Act when the Appellant is engaged in software development?

(ii) Whether on the facts and in the circumstances of the case, the Honourable ITAT was right in upholding the action of the Learned Respondent in excluding

telecommunication charges of Rs.3,70,62,460/- from export turnover under Section 10B and Section 10AA of the IT Act when the same represented payment made for standard facility?

(iii) Whether on the facts and in the circumstances of the case, the Honourable ITAT was right in upholding the action of the learned respondent in excluding expenditure of Rs.198,17,58,814/- incurred in foreign currency from export turnover under Section 10B and Section 10AA of the IT Act when the appellant is engaged in software development?

(iv) Whether on the facts and in the circumstances of the case, the Honourable ITAT was right in upholding the orders of lower authorities in excluding telecommunication charges of Rs.83,19,013/- from export turnover under Section 10B and Section 10AA of the IT Act when the same was not incurred in foreign currency?

(v) *Whether on the facts and in the circumstances of the case, the Honourable ITAT was right in upholding the action of the learned respondent in excluding telecommunication charges of Rs.3,70,62,460/- from export turnover under Section 10B and Section 10AA of the IT Act when the same represented payment made for standard facility?*

2. The factual backdrop in which the aforesaid questions arise for consideration in this appeal needs mention. The assessee is a company engaged in software development and filed its return of income for Assessment year 2008-09 by declaring a total income of Rs.17,71,91,200/-. The return was processed under Section 143(1) of the Act and was selected for scrutiny assessment under Section 143(3) of the Act. Thereupon, a notice under Section 143(2) of the Act was issued. The Assessing Officer by an order 31.12.2010 inter alia held that deductions as claimed by the assessee under Section 10B and Section 10AA are required to be

recomputed and the return of income after re-computation of the deduction was assessed along with interest and penalty. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) by an order dated 03.02.2012 partly allowed the appeal. Being aggrieved, the assessee as well as the revenue filed appeals before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal', for short). The Tribunal vide order dated 11.01.2013 dismissed the appeal preferred by the assessee. In the aforesaid factual background, the assessee has filed this appeal.

3. Learned counsel for the parties at the outset submitted that substantial question of law Nos. III and V in substance arise for consideration in this appeal.

4. It is submitted by learned counsel for the assessee that assessee had incurred expenditure of Rs.198,17,58,814/- in foreign currency from export turnover when the assessee was engaged in software

development and therefore, in view of Explanation 2(iii) to Section 10B of the Act, the term 'export turnover' does not include any expenses incurred in foreign exchange in providing technical services outside India. However, notwithstanding the fact that having found that assessee is engaged in the development of computer software, which would qualify for deduction under Section 10B of the Act, the Commissioner of Income Tax (Appeals) and the Tribunal have failed to appreciate the aforesaid aspect of the matter. It is further submitted that the expression 'export turnover' used in Explanation 2(iii) to Section 10B of the Act does not include trade, telecommunication charges or insurance attributable to delivery of articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services. It is therefore, submitted that the aforesaid expenses could not have been excluded from the export turnover. In support of aforesaid submissions, reference has been made to order dated 26.12.2011 passed by the

Assessing Officer in the case of assessee itself for the Assessment year 2009-10, and the expenditure incurred by the assessee towards telecommunication expenses, foreign currency expenses was excluded from the export turnover. The aforesaid order was upheld by the Income Tax Appellate Tribunal vide order dated 11.05.2016 passed in I.T.A.Nos.1328, 1347/bang/2011 and 1391/bang/2013. Thereafter, an order was passed on 31.01.2017 by which the order of the Tribunal was given effect to. It is further submitted that substantial questions of law involved in this appeal are no longer res integra and have been answered by a division bench of this court in I.T.A.No.42/2008 vide judgment dated 20.10.2014. The aforesaid order was upheld by the Supreme Court vide order dated 22.02.2019. Reliance has been placed on decisions of this court in ***'COMMISSIONER OF INCOME-TAX, BANGALORE VS. MPHASIS LTD.', (2016) 74 TAXMANN.COM 274 (KARNATAKA)*** which has been upheld by Supreme Court vide order dated 13.11.2019 passed in

SLP(C)No.766/2015. Reference has also been made to decisions of this court in ***'COMMISSIONER OF INCOME TAX AND ANR. VS. M/S TATA ELXSI LTD AND ANR.', I.T.A.NO.386, 387 & 388/2015 DECIDED ON 15.02.2016*** and ***'COMMISSIONER OF INCOME-TAX, BANGALORE VS. RELQ SOFTWARE (P) LTD.', (2015) 53 TAXMANN.COM 78 (KARNATAKA)***.

5. On the other hand, learned counsel for the revenue submitted that the finding with regard to nature of contracts entered into by the assessee has not been returned either by Commissioner of Income Tax (Appeals) or by Income Tax Appellate Tribunal and therefore, the matter deserves to be remitted for adjudication of the aforesaid factual aspect to the Commissioner of Income Tax (Appeals). It is also urged that the aforesaid questions of fact cannot be adjudicated by this court in this appeal and the decisions relied upon by the learned counsel for the revenue are distinguishable as in the aforesaid cases, the findings

were recorded with reference to the facts of the case.

6. We have considered the submissions made by learned counsel on both the sides and have perused the record. Before proceeding further, it is apposite to take note of the relevant provisions of Section 10B and Section 10AA of the Act.

Explanation 2(iii) to Section 10B

"export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with Section 10B(3), but ***does not include****:-*

(a) *Freight, telecommunication charges or insurance* ***attributable to the delivery of the articles or things or computer software outside India.***

or

(b) *Expenses, if any, incurred in foreign exchange* ***in providing the technical services***

outside India.

7. From perusal of aforesaid provision, it is evident that expression 'export turnover' does not include any expenses incurred in foreign exchange in providing technical services outside India.

Explanation 1(i) to Section 10AA and Explanation 2 to Section 10AA read as under:

"export turnover" means the consideration in respect of export by the undertaking, being the Unit of articles or things or services received in, or brought into, India by the assessee but ***does not include –***

a. *Freight, telecommunication charges or insurance* ***attributable to the delivery of the articles or things outside India.***

or

expenses, if any, incurred in foreign exchange ***in rendering of services*** *(including computer software) outside India*

Explanation 2 – For the removal of

doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

8. In the light of aforementioned statutory provisions, the facts of the case in hand may be examined. It is pertinent to note that Commissioner of Income Tax (Appeals) in paragraph 5.2 of the order has taken note of the agreements entered into by the assessee and has reproduced the relevant extracts of the agreement in the tabular form. Thereafter, in paragraph 5.4, the Commissioner of Income Tax (Appeals) has held as follows:

"In the instant case, it is true that the appellant is engaged in development of computer software, which is then exported outside India."

9. Thus, the Commissioner of Income Tax

(Appeals) has recorded a categorical finding that assessee is engaged in the development of computer software, which is exported outside India. The aforesaid finding has not been set aside by the Tribunal. Therefore, in view of Explanation 2(iii) to Section 10B of the Act, the expression 'export turnover' does not include any expenses incurred in foreign exchange in providing technical services outside India. The assessee has incurred expenditure of Rs.198,17,58,814/- in foreign currency from export turnover for software development. Similarly, the telecommunication charges attributable to delivery of computer software outside India could not have been excluded from the export turnover in view of Explanation 1(i) to Section 10AA of the Act. It is also noteworthy that Explanation 2 to Section 10AA provides that profits and gains derived from; on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

10. It is pertinent to mention here that in the case of assessee itself, for the Assessment year 2009-10, the expenditure incurred in foreign currency was not reduced from export turnover and total turnover, which is evident from the order dated 31.01.2017 passed by the Assistant Commissioner of Income Tax. A bench of this court in Tata Elxsi Limited supra has also taken a view that technical services rendered by the assessee's engineers in connection with export of computer software, cannot be excluded in computing the export turnover as it forms part of export turnover. The aforesaid order was upheld by the Supreme Court vide order dated 22.02.2019 passed in SLP (C) No.19150/2015. A division bench of this court in Mphasis Ltd., supra has held that foreign currency expenditure incurred for providing software development services outside India cannot be excluded from export turnover for the purpose of computing deduction under Section 10B of the Act and the aforesaid decision has been upheld by the Supreme Court vide

order dated 13.11.2019 passed in SLP (C) No.766/2015.

In view of preceding analysis, substantial questions of law No.3 and 5 are answered in favour of the assessee and against the revenue. In the result, the impugned order dated 11.01.2013 to the extent it is prejudicial to the assessee is hereby quashed. In the result, the appeal is allowed.

Sd/-
JUDGE

Sd/-
JUDGE

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