IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.07.2020

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.212 of 2018

M/s.Renault Nissan Technology &
Business Centre India Private Limited.
TP 2/1, Ascendas IT Park, Mahindra
World City, Natham Sub Post Office,
Chennai - 603 002. ... Appellant

Vs.

Commissioner of Income Tax 5
121 M.G.Road, Nungambakkam,
Chennai - 600 034. ... Respondent

Tax Case Appeal is filed under Section 260A of the Income Tax Act, 1961 against the order dated 16.11.2016 made in ITA.No.1009/Mds/2014 on the file of the Income Tax Appellate Tribunal, Madras 'D' Bench, for the assessment year 2009 - 10.

For Appellant : Mr.N.V.Balaji

For Respondent : M/s.R.Hemalatha
Senior Standing Counsel

JUDGMENT

(Judgment was delivered by **T.S.SIVAGNANAM.J**)

This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity), is directed against the order dated 16.11.2016 in ITA.No.1009/Mds/2014 on the file of the Income Tax Appellate Tribunal, Madras 'D' Bench, Chennai, for the assessment year 2009 - 10.

2. The appeal was admitted on 05.06.2018, on the following substantial questions of law.

"1. Whether the Tribunal erred in holding that the expenditure incurred in foreign currency by the appellant was to be excluded from export turnover for the purpose of computing deduction under Section 10AA of the Income Tax Act, 1961, when the same is against the provisions of the Act?

2. Is the finding of the Tribunal that the expenditure incurred in foreign currency by the appellant needs to be excluded from the export turnover for the purpose of computation of deduction under Section 10AA of the Income Tax Act, 1961 vitiated by perversity and arbitrariness?"

3. We have heard Mr.N.V.Balaji, learned counsel appearing for the appellant/assessee, and M/s.R.Hemalatha, learned Standing Counsel appearing for the respondent/revenue.

4. The assessee is a Private Limited Company incorporated under the Companies Act, on 21st September 2007 as a joint venture between Renault Group B.V ("RGBV") and Nissan International Holding B.V ("NIHBV"). The assessee is an undertaking registered as a Special Economic Zone ("SEZ") which is eligible to claim deduction under Section 10AA of the Income Tax Act, 1961 and it renders services out of this SEZ premises in Chennai. The assessee filed its Return of Income for the assessment year 2009 – 10 (hereinafter 'under consideration' for brevity) on 30.09.2009, returning a total income of Rs.5,83,39,429/-, after claiming a deduction of Rs.29,96,00,054/- under Section 10AA of the Act. The assessment was completed under Section 143(3) of the Act and the Assessing Officer proposed to exclude the following expenditure incurred in foreign currency from the 'export turnover' of the assessee for the purpose of computing deduction under Section 10AA of the Act.

Particulars	**Amount**
Travel Expenses	41,199,254
IT & Technical support services	115,521,782
Professional and consultation fees	5,364,145
Reimbursement to Renault Global Management	69,851,671
Reimbursement to Nissan Motor Co., Ltd ("NML")	29,635,976
Total	261,572,828

5. The assessee contended that what can be excluded is only expenditures in the nature of freight, telecommunication charges and insurance, if attributable, for delivery of articles or things outside India or any foreign currency expenditures which have been specifically incurred for rendering services outside India and no other expenditure could have been deducted from 'export turnover', while computing deduction under Section 10AA of the Act. This submission made by the assessee did not find favour with the Assessing Officer who passed a draft Assessment Order dated 25.03.2003 under Section 143(3) read with Section 144(c)(i), determining the assessed income at Rs.20,68,24,860/-. The assessee, being aggrieved by the draft Assessment Order, filed an application before the Dispute Resolution Panel (hereinafter 'the DRP' for brevity). The DRP accepted the case of the assessee and issued

directions dated 20.12.2013, directing the Assessing Officer not to exclude the said expenditures from the turnover of the assessee, holding that the said expenditures were not incurred for the purpose of rendering service outside India. It appears that the assessee filed a rectification application with regard to professional and consultation fee stating that the DRP did not consider the said issue specifically for exclusion or inclusion. However, the said rectification application is stated to have been dismissed on 12.03.2014, holding that the professional and consultation fee needs to be excluded from the export as well as total turnover for the purposes of computing deduction under Section 10AA of the Act. However the said issue has not been further agitated by the assessee and the issue before the Tribunal was with regard to the expenditures incurred in foreign exchange which have been set out in the tabular column above.

6. The Tribunal by the impugned order allowed the Revenue's appeal and aggrieved by the same, the assessee is before this Court by way of this Tax Case Appeal.

7. We have perused the order passed by the Tribunal and we find that the Tribunal did not assign any reason as to why the finding / directions issued by the DRP are not sustainable. The finding rendered by the Tribunal on the above issue is in paragraph no.4 of the impugned order. The Tribunal opined that the foreign currency expenditures cannot be considered as a part of 'export turnover' and at the same time it also cannot form part of the 'total turnover'. The Tribunal referred to the decision in the case of ***ITO Vs. Saksoft Limited [(2009) 121 TTJ 865 (ITAT) Chennai]*** and directed the Assessing Officer not to exclude the same in the 'export turnover' as well as in the 'total turnover' while computing deduction under Section 10AA of the Act.

8. We find that the Tribunal did not specifically adjudicate the contention raised by the Revenue before it. The Revenue Appeal was on the ground that the DRP erred in deleting the exclusion of foreign currency expenditures from the 'export turnover' by holding that they are either reimbursed or advanced to employees; that the expenditures incurred are not in respect of services rendered by the assessee outside

India; when the definition of 'Export Turnover' as per Section 10AA neither distinguishes nor excludes reimbursements or advances.

9. This contention raised by the Revenue was not decided by the Tribunal. Therefore, it is the submission of Ms.R.Hemalatha, learned standing counsel that in the event, the Court not agreeing with the submissions of the Revenue, the matter may be remanded back to the Tribunal for fresh decision.

10. Before we consider such a plea, we need to take note of the crux of the issue which was raised by the assessee before the Assessing Officer at the first instance, the reply to the show cause notice issued by the Assessing Officer, in their application before the DRP and their submissions before the Tribunal in the appeal filed by the Revenue. If the facts are culled out from all the proceedings, one should get answer to the controversy which would help us to answer the Substantial Question of Law framed for consideration.

11. In the Accountant's Report in Form No.56F for the assessment year under consideration, it has been stated that in respect of reimbursement of IT support, Travel and Technical related expenditure, there is no element of any provision of services and the actual cost incurred has been reimbursed. Further these reimbursements constitute a part of operating cost base of the assessee which has been recovered by the assessee from their associated enterprises at their respective arms length markups. Therefore, the arms length nature of reimbursement transactions also reviewed, aggregated and analysed under TNMM analysis conducted for the segments discussed in the report. The Report states that the reimbursement of IT support and Travel & Technical related expenses appears to be consistent with the arm's length standard from an Indian transfer pricing perspective.

12. Subsequently, the assessee submitted two letters, of which, the letter dated 13.02.2013 would be relevant. Among other things, the assessee referred to explanation 1 to Section 10 AA of the Act and stated that the Company has not incurred any expenditure in foreign exchange

on freight, telecommunication charges and insurance and thus, no amount is deductible from "export turnover" on this count. In the draft Assessment Order, the Assessing Officer refers to the show cause notice issued to the assessee, calling upon the assessee to explain as to why the expenditure incurred in foreign exchange be not excluded from the "export turnover", while computing deduction under Section 10 AA of the Act. In response to the said show cause notice, the assessee once again reiterated the definition of "export turnover" in Explanation 1 to Section 10 AA of the Act and submitted that a term 'expense' used in the above context would be only expenses in the nature of freight, telecommunication or insurance and not any other expenses. The assessee also relied upon certain decisions of the Hon'ble Supreme Court and other High Courts and Tribunals. The Assessing Officer did not agree with the assessee in referring to the decisions and explanation 1 to Section 10 AA of the Act, though noted that the explanation states that the expenses should be incurred in foreign exchange in rendering of service outside India, without considering whether any services was rendered by the assessee outside India, holding that the said provision is patent and clear and the expenditures incurred by the assessee in foreign

exchange should be excluded from the 'export turnover' for the purpose of computing deduction under Section 10 AA of the Act.

13. The assessee filed an application before the DRP, in which, on this specific issue they have stating that the assessee operates on a cost plus model, the total turnover comprises of total cost plus arm's length mark up. Further they have specifically stated that they have no element of any provision of services and only actual cost incurred has been reimbursed to the assessee; these reimbursements constitute a part of the operating cost base of the assessee which has been recovered from the associated enterprises and the foreign exchange expenditures are the components of the total turnover, as these are reimbursed at arm's length mark up. After referring to the decision in the case of ***CIT Vs. Lakshmi Machine Works [(2007) 290 ITR 667]***, ***Commissioner of Income Tax Vs. Sudarshan Chemicals Industries Limited (2000 (245) ITR 769), CIT Vs. K.Rajendranathan Nari [(2004) 265 ITR 35 (Kerala)]*** and the decision of the Special Bench of the Tribunal in the case of ***ITO Vs.. Saksoft Limited [2009 121 TTJ 865 (ITAT) Chennai]***, the assessee submitted that it follows the cost plus model approach and the total

turnover of the Company comprised of Cost plus arm's length mark up and that there is no reimbursement of any expenditures so as to exclude the same from the 'export turnover' and the 'total turnover'. While considering the said submission, the DRP took note of the definition of "export turnover" in explanation 1 to Section 10AA and observed that it necessary that any expenses incurred in foreign exchange by the assessee should be in respect of rendering of services outside India. While framing the points for determination, the DRP observed that the question is whether the expenditures incurred by the assessee in foreign exchange was in respect to services outside India. After steering clear as to what would be 'export turnover' as defined under the Act, the DRP exempted the expenditures incurred by the assessee and held that the expenditures are not in respect to services rendered by the assessee outside India and therefore, it cannot be excluded from the 'export turnover' and the Assessing Officer was directed to delete the exclusion of foreign exchange from the export turnover of the business and the deduction under Section 10 AA to be recomputed as follows:

PARTICULARS	*AMOUNT (INR)*
Travel Expenses	41,199,254
IT&Technical Support Services	115,521,782
Reimbursement to Renault Global management	69,851,671
Reimbursement to Nissan Motor Company Ltd.,	29,635,976

14. The Revenue filed an appeal before the Tribunal. To be noted the main ground on which the Revenue were on appeal before the Tribunal was on the direction of the DRP to exclude the foreign exchange expenditure. Unfortunately, the Tribunal did not discuss the matter but proceeded on the basis that foreign currency expenditures cannot be considered as part of 'export turnover' and at the same time, it cannot form part of 'total turnover'. The Tribunal did not decide as to whether it was expenses incurred by the assessee in respect of services rendered by the assessee outside India. The assessee was faced with this issue at the very first instance before the Assessing Officer. The assessee has explained, nevertheless, the Assessing Officer did not take into consideration as to whether there were any services outside India and held against the assessee and proceeded to make a draft assessment. Before the DRP, which is a fact finding expert body, the assessee placed all materials and established that the assessee did not render any services

outside India and they operate on a cost plus model and the reimbursement constitute a part of the operating cost which was recovered by the assessee from their associated enterprises. This factual matrix had not been examined by the Tribunal.

15. We find that no useful purpose would be served in remanding the matter to the Tribunal for fresh consideration as submitted by the Revenue as an alternate submission. The principal submission of the Revenue is to support the order passed by the Tribunal and seeking for dismissal of this appeal. Even in the grounds of appeal filed by the Revenue before the Tribunal, a cost plus model of functioning by the assessee appears to be have not been disputed but their contention was that the definition of "export turnover" in explanation 1 to Section 10 AA does not distinguish or exclude reimbursement or advances. In our considered view, the issue is not as to whether reimbursement or advances, but the issue is whether these were incurred by the assessee in foreign exchange in respect of rendering services outside India. If it is established that no services have been rendered outside India and the assessee has been reimbursed the actual cost only, the question of exclusion from the 'export turnover' does not arise.

16. The submission of Ms.R.Hemalatha, learned standing counsel is that the expenses should have direct nexus with the interest of the industrial undertaking. In support of such contention, reliance is placed on the decision of the Division Bench of this Court in ***CIT VS. Menon Impex Private Limited [2003 (128) Taxmann 11 (madras)]*** which was affirmed by the Hon'ble Supreme Court of India in ***India Comnet International Private Limited Vs. ITO [2012 (26) Taxmann.com 349 (SC)].***

17. In our considered view, the decision referred to by the Revenue may not be of assistance to their case because, the dispute is not with regard to whether there is direct nexus between the amount and the activity of the industrial undertaking. The issue in the instant case is whether at all expenses were incurred for rendering any of the services outside India. On facts, it has been established that no such services have been rendered. Therefore, we are of the considered view that the Tribunal fell in error in reversing the decision of the DRP.

18. For all the above reasons, appeal filed by the assessee is allowed and the order passed by the Tribunal is set aside and the order passed by the DRP is restored and the substantial questions of law is answered in favour of the assessee. No costs.

(T.S.S.J.,) (V.B.S.J.,)
17.07.2020

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Index : yes/no
Internet : yes/no
Speaking Order/Non-Speaking Order

To
The Commissioner of Income Tax 5
121 M.G.Road, Nungambakkam,
Chennai - 600 034.

T.S.SIVAGNANAM.J.,
and
V.BHAVANI SUBBAROYAN.J.,

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