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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 07.12.2023*

+ **ITA 715/2023 & CM Appl.63260/2023**

THE PR. COMMISSIONER OF INCOME TAX -7..... Appellant

Through: Mr Ruchir Bhatia, Sr Standing
Counsel with Ms Deeksha Gupta,
Adv.

versus

ST MICROELECTRONICS PVT. LTD. Respondent

Through: Mr Neeraj Jain with Mr Aditya
Vohra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM Appl.63260/2023 [*Application moved on behalf of the appellant/revenue seeking condonation of delay of 460 days in re-filing the appeal*]

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.
2. According to the appellant/revenue, there is a delay of 460 days.
3. Mr Neeraj Jain, learned counsel, who appears on behalf of the respondent/assessee, says that he would have no objection if the prayer made in the application is allowed.
 - 3.1 It is ordered accordingly.
 - 3.2 Delay in re-filing the appeal is condoned.
4. The application is disposed of in the aforesaid terms.



ITA 715/2023

5. This appeal concerns Assessment Year (AY) 2008-09. Via the instant appeal, the appellant/revenue seeks to assail the order dated 28.09.2020 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

6. A perusal of the appeal discloses that the following questions of law are proposed for consideration, by this Court:

“(i) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in considering *M/s Helios & Matheson Information Technology ltd.* as functionally non comparable without considered the finding of the TPO i.e. it satisfied all the qualitative and quantitative filters adopted by the TPO to be considered as comparable?

(ii) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in considering *M/s Tata Elxsi Ltd.* as functionally non comparable without considered the finding of the TPO i.e. it satisfied all the qualitative and quantitative filters adopted by the TPO to be considered as comparable?

(iii) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in considering *M/s Persistent Systems Ltd.* as functionally non comparable without considered the finding of the TPO i.e. it satisfied all the qualitative and quantitative filters adopted by the TPO to be considered as comparable?

(iv) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in considering that *M/s Infosys Technologies Ltd.* as functionally non-comparable without considered the finding of the TPO i.e. it satisfied all the qualitative and quantitative filters adopted by the TPO to be considered as comparable?

(v) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in considering *Kals Information System Ltd. (Kals)* as functionally non comparable without considering the finding of the TPO i.e. if the functional similarity between the assessee and *Kals Information Ltd.* and also the business of development of software products should not be considered as software development?

(vi) Whether on the facts and circumstances of the *ld.* ITAT erred in law in treating expenses made on software licenses as revenue in nature when appropriated benefit of depreciation has already been provided to the assessee by the law?

(vii) Whether on the facts and circumstances of the case *ld.* ITAT erred in law in treating the training expenses as Revenue in nature?”

7. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, does not dispute the fact that insofar as



proposed questions (i) to (v) are concerned, they are covered against the appellant/revenue by the decision rendered by this Court in the matter of ***Principal Commissioner of Income Tax vs. ST Microelectronics Private Limited***, 2017:DHC:6442-DB.

8. Accordingly, insofar as the proposed questions of law nos. (i) to (v) are concerned, no substantial question of law arises for consideration, by the Court.

9. Insofar as proposed questions (vi) and (vii) are concerned, as would be evident, they veer around the treatment given to the expenses incurred on software licenses and training by the respondent/assessee.

9.1 It is the stand of the appellant/revenue that the expense incurred by the respondent/assessee for purchasing software licenses must be treated as an expense incurred on the 'capital' account.

9.2 Likewise, regarding training expenses, the appellant/revenue contends that the expenses incurred on training are also on the 'capital account' and hence, could not have been debited to the profit and loss account.

9.3 To buttress these submissions, Mr Bhatia states that the expenses incurred on the purchase of proprietary software licenses and training resulted in an 'enduring benefit' to the respondent/assessee and therefore, are in the nature of 'capital' expenditure.

10 Insofar as the expenditure incurred on software license is concerned, the addition amounted to Rs. 1,36,03,473/- [*albeit*, after allowing for depreciation at the rate of 60%].

10.1 On the other hand, the stand of the respondent/assessee was that the software was licensed to it. It was also the assertion of the respondent/assessee that the arrangements had a tenure of one (1) year.



10.2 In sum, the respondent/assessee contended before the statutory authorities that it had no ownership of the licensed software and that it was only a licensee. The thrust of the respondent's/assessee's submission was that the proprietary and intellectual property rights in the software in issue remained with the vendor and that the terms of the license prohibited commercial exploitation of the software.

11. The statutory authorities, which included the Assessing Officer (AO) and Dispute Resolution Panel (DRP), were not persuaded by the aforementioned submissions made on behalf of the respondent/assessee. As indicated hereinabove, the test applied by the AO and DRP was that the licensed software resulted in an advantage of 'enduring' nature, and hence, the expenses incurred in purchasing the same could not be treated as revenue expenditure.

12. We may note that the Tribunal, however, ruled in favour of the respondent/assessee. The Tribunal held that the expenses incurred on the purchase of licensed software were in the nature of 'revenue' expenditure for the reason that software licences failed the test of ownership. It would be relevant to note that the Tribunal also took account of the fact that in the respondent's/assessee's case, concerning AY 2007-08, it had deleted the addition made by the AO concerning expenses incurred by the respondent/assessee towards purchasing licensed software.

13. Mr Bhatia fairly informs us that the appeal preferred against the order of the Tribunal for AY 2007-08 [2017:DHC:6442-DB] did not concern deletion of addition by the Tribunal involving the expenses incurred by the respondent/assessee on licensed software. In other words, the decision of the Tribunal in the AY in issue was accepted by the appellant/revenue.



13.1 The fact that this is so, emerges on a perusal of the aforementioned decision rendered by a coordinate Bench (which has been noticed hereinabove by us).

14. In our opinion, the Tribunal came to a correct conclusion. There is no dispute that the respondent/assessee had purchased licensed software, of which, it did not have ownership or title. It is also not in dispute that the license had a duration that did not exceed one (1) year.

15. The respondent's/assessee's stand that the licensed software was used for business operations was also not disputed by the appellant/revenue.

16. That said, the test employed by the AO and the DRP, that is "enduring benefit" is not, in our view, a conclusive test to determine the nature of the expense [See *Empire Jute Company Limited vs. Commissioner of Income Tax*, [1980] 3 Taxman 69 (SC)].

16.1 A coordinate Bench of this court, in *Commissioner of Income Tax vs. Asahi India Safety Glass Ltd. (Delhi)*, (2012) 346 ITR 329, after noticing the aforementioned judgment of the Supreme Court, *qua a para materia* issue, concerning expenses incurred for purchasing software applications, made the following observations:

"9. The revenue in support of its stand has taken recourse to the test of enduring benefit. It is in our view, now somewhat trite to say that the test of enduring benefit is not a certain or a conclusive test which the courts can apply almost by rote. What is required to be seen is the real intent and purpose of the expenditure and whether the expenditure results in creation of fixed capital for the assessee. It is important to bear in mind that what is required to be seen is not whether the advantage obtained lasts forever but whether the expense incurred does away with a recurring expense(s) defrayed towards running a business as against an expense undertaken for the benefit of the business as a whole. In other words, the expenditure which is incurred, which enables the profit-making structure to work more efficiently leaving the source of the profit-making structure untouched, would in our view be an expense in



the nature of revenue expenditure. Fine tuning business operations to enable the management to run its business effectively, efficiently and profitably; leaving the fixed assets untouched would be an expenditure in the nature of revenue expenditure even though the advantage may last for an indefinite period. Test of enduring benefit or advantage would thus collapse in such like cases. It would in our view be only truer in cases which deal with technology and software application, which do not in any manner supplant the source of income or added to the fixed capital of the assessee. (See Alembic Chemical Works Co. Ltd. vs CIT [1989] 177 ITR 377; CIT vs J.K. Synthetics [2009] 309 ITR 371 at page 412 and CIT Vs. Indian Visit.com (supra))].

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11. Software is nothing but another word for computer programmes, i.e., instructions, that make the hardware work. Software is broadly of two types, i.e., the systems software, which is also known as the operating system which controls the working of the computer; while the other being applications such as word processing programs, spread sheets and data base which perform the tasks for which people use computers. Besides these there are two other categories of software, these being: network software and language software. The network software enables groups of computers to communicate with each other, while language software provides with tools required to write programmes. (See Microsoft Computer Dictionary, 5th Edition "Software" at page 489).

12. The aforesaid would show that what the assessee acquired through Arthur Anderson and Associates was an application software which enabled it to execute tasks in the field of accounting, purchases and inventory maintenance. The fact that the application software would have to be updated from time to time based on the requirements of the assessee in the context of the advancement of its business and/or its diversification, if any; the changes brought about due to statutory amendments by law or by professional bodies like the Institute of Chartered Accountants of India, which are given the responsibility of conceiving and formulating the accounting standards from time to time, and perhaps also, by reason of the fact that expenses may have to be incurred on account of corruption of the software due to unintended or intended ingress into the system - ought not give a colour to the expenditure incurred as one expended on capital account. Given the fact that there are myriad factors which may call for expenses to be incurred in the field of software applications, it cannot be said that either the extent of the expense or the expense being incurred in close proximity, in the subsequent years, would be conclusively determinative of its nature. The assessing officer has, in our view, erred precisely for these very reasons.”

[Emphasis is ours]



17. The ratio of the judgment rendered in the *Asahi India Safety Glass Ltd.*, in our view, would apply to the facts of this case, and therefore, no substantial question of law arises with regard to the said issue.

18. This brings us to the issue concerning the amount expended by the respondent/assessee on training its employees. The record shows that training expenses, amounting to Rs. 1,82,00,680/-, were incurred by the respondent/assessee during the period in issue towards venue cost, faculty charges, training material (which included manuals and books), equipment, and participation in seminars and conferences. Concerning this expense, as noticed hereinabove, the AO disallowed the deduction on the ground that they resulted in ‘enduring’ benefit and hence, were incurred on the ‘capital’ account.

19. The Tribunal, however, as alluded to hereinabove, has ruled in favour of the respondent/assessee.

20. The observations made by the Tribunal in this behalf are set forth hereafter:

“40. So, following the aforesaid decision rendered by Hon'ble Delhi High Court, we are of the considered view that when training imparted by the taxpayer company to its executives, though increased its profitability, is not of any enduring benefit as the trained workforce can move out any time and the taxpayer company pays tax on the enhanced income on account of enhanced efficiency of its trained staff, this has to be treated as revenue in nature. Consequently, AO is directed to treat the training expenses as revenue in nature. Accordingly, this ground is determined in favour of the taxpayer.”

21. In our view, *qua* this issue as well, the test employed, i.e., the advantage of “enduring nature” is not the correct one. Training accorded to employees, which may have a lasting impact, is not determinative of the fact



that the expenditure should be treated as one incurred on the 'capital' account.

22. In determining the treatment to be given to expenses, it has to be seen whether the profit structure of the assessee is altered. It is well established that if the profit structure is left undisturbed, such an expense is to be treated as one incurred on the revenue account. The mere fact that employees' efficiency improves with learnings acquired through seminars, conferences, and other forms of training, cannot be the reason to treat such expenses as 'capital' expenditure.

22.1 Furthermore, as noted by the Tribunal, it is not as if the employees stay with the employer (in this case, the respondent/assessee) for all times to come. It is quite possible that the employees may shift to another employer.

23. Therefore, according to us, no substantial question of law arises *vis-à-vis* this issue as well.

24. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned order, as no substantial question of law arises.

25. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

DECEMBER 7, 2023/pmc