

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.556/Mds/2015

निर्धारण वर्ष / Assessment Year : 2010-11

The Deputy Commissioner of
Income Tax,
Corporate Circle 6(1),
Chennai - 600 034.

v. M/s Sensiple Software Solution
Pvt. Ltd.,
C/o S. Venkatram & Co.,
Chartered Accountants,
218, TTK Road, Alwarpet,
Chennai - 600 018.

(अपीलार्थी/Appellant)

PAN : AAGCS 4619 C

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.600/Mds/2015

निर्धारण वर्ष / Assessment Year : 2010-11

M/s Sensiple Software Solution
Pvt. Ltd.,
C/o S. Venkatram & Co.,
Chartered Accountants,
218, TTK Road, Alwarpet,
Chennai - 600 018.

v. The Deputy Commissioner of
Income Tax,
Corporate Circle 6(1),
Chennai - 600 034.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Shri A.B. Maurya, CIT

राजस्व की ओर से /Revenue by : Shri G. Seetharaman, CA

सुनवाई की तारीख/Date of Hearing : 30.08.2016

घोषणा की तारीख/Date of Pronouncement : 07.10.2016

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the Revenue and assessee are directed against the same order of the Assessing Officer, consequent to the directions of the Dispute Resolution Panel. Therefore, we heard both the appeals together and disposing of the same by this common order.

2. Let's first take the Revenue's appeal in I.T.A. No.556/Mds/2015. The only issue arises for consideration is exclusion of foreign currency expenses said to be incurred by the assessee towards internet expenses and foreign travel expenses.

3. Shri A.B. Maurya, the Ld. Departmental Representative, submitted that the Assessing Officer excluded foreign currency expenses from the export turnover. However, the same was not excluded from the total turnover. Therefore, the Dispute Resolution Panel, by placing reliance on the Special Bench of this Tribunal in CIT v. Sak Soft Ltd. [313 ITR (AT) 353], directed the Assessing Officer to exclude the foreign currency expenses towards internet and travel expenses from the total turnover also. According to the Ld. D.R., the Revenue has already filed an appeal before the High

Court against the decision of this Tribunal in Sak Soft Ltd. (supra). Therefore, the DRP is not justified in directing the Assessing Officer to exclude the foreign currency expenses from total turnover also.

4. We have heard Shri G. Seetharaman, the Ld. representative for the assessee also. The TPO computed eligible deduction under Section 10A of the Act by holding that the numerator and denominator should be of same figure. In other words, the export turnover and total turnover shall include the same expenditure and the receipts. No doubt, the expenditure incurred in the foreign currency towards internet and foreign travel expenses cannot form part of export turnover of the assessee. If that is so, such an expenditure in foreign currency towards internet and foreign travel expenses cannot also be part of total turnover. Therefore, the Assessing Officer is not justified in excluding such expenditure from the export turnover and including the same in total turnover. As observed earlier, both denominator and numerator should be of same figure, otherwise the computation may not result in correct profit. The only objection of the Ld. Departmental Representative is that an appeal is pending before the High Court against the order of this Tribunal in Sak Soft Ltd. (supra). This Tribunal is of the

considered opinion that mere pendency of an appeal before High Court cannot be a reason for not following the decision of this Tribunal. It is nobody's case that the Madras High Court has stayed the operation of order of this Tribunal in SAK Soft Ltd. (supra). Therefore, this Tribunal is of the considered opinion that the Dispute Resolution Panel has rightly directed the Assessing Officer to exclude the foreign currency expenses towards internet and foreign travel expenses from both total turnover and export turnover. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

5. Now coming to the assessee's appeal in I.T.A. No.600/Mds/2015. The first ground is with regard to reference made to the Transfer Pricing Officer.

6. Shri G. Seetharaman, the Ld. representative for the assessee, submitted that the turnover of the assessee admittedly was ₹7,78,58,274/-. The Central Board of Direct Taxes in its circular F.No.225/93/2009/ITA-II dated 10.09.2011 instructed its officers not to refer the matter to the Transfer Pricing Officer for the assessment year 2010-11 in case the total turnover was less than ₹15 Crores. This circular of the CBDT was brought to the notice of

the Assessing Officer as well as the DRP by way of objection. Referring to page 10 of objection said to be filed before the Assessing Officer, consequent to the draft assessment framed by the Assessing Officer, the Ld. representative submitted that inspite of the circular which was brought to the notice of the Assessing Officer as well as the DRP, no finding was recorded by any of the authorities below. According to the Ld. representative, when the CBDT instructed its officers not to refer the matter to the TPO wherever the turnover was less than ₹15 Crores, the same was binding on the Assessing Officer and he cannot make any upward adjustment either by himself or by making reference to the Transfer Pricing Officer. In spite of this specific objection raised by the assessee in the objection filed before the Assessing Officer and DRP, both the authorities below have not recorded any finding. Referring to the decision of Delhi Bench of this Tribunal in *Crystal Phosphates Ltd. v. ACIT* in I.T.A. No. 3630/Del/2009, the Ld. representative submitted that on identical factual situation, after considering the circular issued by CBDT for selection for scrutiny assessment, the Delhi Bench found that since the return was selected contrary to the instruction issued by the CBDT, the

Tribunal held that the return selected for scrutiny assessment is not valid.

7. On the contrary, Shri A.B. Maurya, the Ld. Departmental Representative, submitted that reference to Transfer Pricing Officer is discretion of the Assessing Officer. When the Assessing Officer finds that it is necessary to determine the arm's length price in relation to international transaction, he has to necessarily make a reference to Transfer Pricing Officer. Without making any reference, the Assessing Officer cannot make any upward adjustment and determine the arm's length price. Therefore, according to the Ld. D.R., it cannot be said that no reference could be made to the Transfer Pricing Officer wherever turnover was less than ₹15 Crores.

8. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that there was a circular issued by the CBDT not to refer the matter to the Transfer Pricing Officer for determination of arm's length price in relation to international transaction. We have carefully gone through the provisions of Section 92CA of the Act. If the Assessing Officer considers it necessary to determine arm's

length price in relation to international transaction, with previous approval of the Principal Commissioner or Commissioner, as the case may be, refer the matter to the Transfer Pricing Officer. Therefore, the reference to be made to the Transfer Pricing Officer is after previous approval of the Commissioner or Principal Commissioner, as the case may be. Now the CBDT vide its circular instructed its officers not to refer the matter to the Transfer Pricing Officer wherever the turnover was less than ₹ 15 Crores. In the case before us, it is not in dispute that the turnover of the assessee is less than ₹ 15 Crores. When the CBDT decided not to refer the matter to the Transfer Pricing Officer wherever the transaction of the international transaction was less than ₹ 15 Crores, this Tribunal is of the considered opinion that the reference made by the Assessing Officer is contrary to the instruction given by the CBDT. The CBDT being the administrative body to administer the direct tax laws, the instruction issued by it is binding on all the lower authorities. Therefore, the instruction issued by the CBDT to all its officers not to refer the matter to the Transfer Pricing Officer wherever the total turnover was less than ₹ 15 Crores is binding on the Assessing Officer. Hence, the Assessing Officer should not have referred the matter to the Transfer Pricing Officer. Since the reference itself was

contrary to the instruction issued by the CBDT, this Tribunal is of the considered opinion that there cannot be any adjustment towards international transaction by determining the arm's length price. In view of the above, this Tribunal is unable to uphold the order of the lower authority and accordingly the same is set aside. The adjustment made by the Assessing Officer towards international transaction is deleted.

9. In the result, the appeal filed by the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced on 7th October, 2016 at Chennai.

sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 7th October, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. Secretary, DRP, Chennai
4. आयकर आयुक्त/CIT, Chennai-VI, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.