आयकर अपीलीय अधिकरण, मुंबई " जी" खंडपीठ

Income-tax Appellate Tribunal -"G"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, शक्तिजीत डे, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Saktijit Dey,Judicial Member

आयकर अपील सं/ ITA No.3629/Mum/2015&7668/Mum/13:

निर्धारण वर्ष/Assessment Year:2006-07 & 2007-08

DCIT-5(3)(2) Room No.573, Aayakar Bhavan,5th Floor Mumbai-400 020.	Vs.	M/s. Trigent Software Ltd. 201, Vastushilp annex, 11 Floor Above HDFC Bank, Gamadia Colony Rd. Tardeo, Mumbai-400 020. PAN:AABCT 2852 P

CO.sNo./13&14/Mum/2017

(**Arising out of आयकर अपील सं/** ITA No.3629/Mum/2015&7668/Mum/13: **निर्धारण वर्ष/Assessment Year:2006-07 & 2007-08**)

M/s. Trigent Software Ltd. Tardeo, Mumbai-400 020.	Vs.	DCIT-5(3)(2) Mumbai-400 020.

Revenue by: Shri Dharam Veer Singh-DR

Assessee by: D.V. Lakhani-AR

सुनवाई की तारीख / **Date of Hearing: 06.06.2017**

घोषणा की तारीख / **Date of Pronouncement: 06.06.2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.

Challenging the orders dated 22.10.2013 and 31.03.2015 of the CIT(A),the Assessing Officer (AO)and the Assesse have filed appeals/cross objections for the above mentioned two years. Assessee-company is engaged in the business of development of software.

ITA/7668/Mum/2013,AY-2007-08:

Effective Ground of appeal raised by the AO,is about deleting the disallowance of Rs 7.10 crores claimed by the assessee as revenue expenditure.In this matter return of income was filed on 31/10/2007,declaring total income at Rs.(-)3.31 crore. The AO completed the original assessment u/s. 143(3) of the Act on a total loss of Rs.3, 31,29,870/-. Later on a notice u/s. 148 was issued to the assessee,as the AO was of the opinion that taxable income had escaped assessment.

2.While completing the assessment u/s.143(3) read with section 147 of the Act, the AO observed that the assessee had debited to the profit and loss account and amount of Rs. 7.09 crores under the head exceptional items, that as per the notes on account the amount in question pertained to cost towards development of software products,solutions and management. He asked the

assessee to show cause as to why the exceptional items should not be disallowed and to file any evidence to support the claim with regard to allowability of the expenditure as revenue expenses. After considering the submission of the assessee dated 26.12 .2012 and 30/07/2013, the AO held that expenses incurred for the purpose of business of an assessee could be allowed u/s. 37, that the onus was on the assessee to prove that expenses were incurred wholly and exclusively for the purpose of business. He referred to the case of Rambahdur Thakur (261 ITR 390)and held that the expenditure was incurred in connection with the development of a new product, that same was being treated as part of capital work in progress, that when the new product was not viable the expenditure was claimed as revenue expenditure, if the new product would have been successful the assessee would have claimed the same as capital expenditure, that the expenses incurred in connection with the development of the new product were treated as part of capital work in progress for the assessment years 2004 – 05 to 2007 – 08, that assessee had to establish that expenses were not in the nature of expenses described in section 30 – 36 of the Act, that the assessee had failed to discharge its onus. Finally,he made an addition of Rs.7.09 crore to the income of the assessee.

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA)and made elaborate submissions. In its appeal the assessee challenged the reopening of the assessment also. The FAA held that the AO was justified in reopening the assessment.In that regard he referred to the case of Consolidated Photo and Finvest (281 ITR 394)and dismissed the ground raised by the assessee about reopening.On merits he held that the assessee had emphasised that expenditure in question was for development of a new product, that the new product was a product in the assessees existing business line. He referred to the case of IL & FS Education and Technology Services Private Ltd. (ITA/765/Mum/2009,AY.2004-05, dated 10/04/2013)and to the judgment of Hon’ble Delhi High Court in the case of Indoram Synthetics India Private Ltd.(333 ITR 18)and held that facts of the case under consideration were identical to the above referred two cases, that in those cases the assessee had abandoned a new project linked with their existing businesses, that the expenditure,shown under the head capital work in progress in the earlier years, was allowed as a deduction in the year when the project in question was abandoned.

4.During the course of hearing before us, the Departmental Representative (DR) argued that the assessee itself had shown the expenditure under the head work in progress, that it was capital expenditure. He relied upon the case of EID Perry India Ltd. (257 ITR 253), delivered by the Hon'ble Madras High Court. The Authorised Representative (AR) supported the order of the FAA and stated that expenditure was incurred for development of new product in the same line of business,that it was a revenue expenditure. He referred to the cases of Magnetic Meter System India Ltd (13 ITR 43), Essar Steel Ltd (53 SOT 40), IL & FS Education and Technology Services Private Ltd (supra) and Indoram Synthetic India Private Ltd. (supra).

5.We have heard the rival submissions and perused the material before us. We find assessee is engaged in the business of developing software,that it had debited an amount of Rs.7.09 crore as exceptional item in its books of accounts under the head developing a new item, that the expenditure of the product pertained to the AY.2004-05 to AY.2007-08, that in the year under consideration it abandoned the development of the software, that it claimed the expenditure as revenue expenditure,that the AO disallowed the same. Expenditure incurred on development of a product of the same line of business, in our opinion, held to be allowed as revenue expenditure. It is possible that the assessee,may due to certain reasons, abandoned the product but that would not make the expenditure of capital nature. Entries in the books of accounts are important to a certain extent only. What is to be seen is the real nature of the expenditure. In the case under consideration the incurring of expenditure is not in doubt, the AO has not held that expenditure was not incurred for development of software i.e. for the existing business of the assessee. We find that the FAA has relied upon the cases of IL & FS Education and Technology Services Private Ltd(supra)and Indoram Synthetic India Private Ltd. (supra).We find that facts of these cases are almost similar to the facts of the case under consideration.

5.1. Facts of Indoram Synthetic India Private Ltd(supra)were that the assessee was in the business of manufacture of yarn and polyester. According to the assessee, for several years prior to the previous year relevant to the AY.2000-01 it had been generating substantial surplus cash from its existing business of manufacture of yarn and polyester. With a view to utilising the cash surplus available and with a view to expanding its existing operations,it commenced the setting up of a spinning and weaving unit for the manufacture of fabric and textile during the financial year

1995-96 in the State of Karnataka. The unit was in line with the assessee's strategy to expand its business operations in the same line of business through vertical integration, by utilising as raw materials for the proposed new unit,the products such as yarn and polyester, manufactured by the existing units.For setting up the new unit, the assessee identified manpower from the existing pool of resources of the assessee. Furthermore, the unit was proposed to be established under the common control of the board of directors of the assessee and out of the surplus funds generated by the existing business operations. In relation to the setting up of the weaving and spinning unit, the assessee,from time to time,incurred expenditure.The proposal of the assessee, however, could not see the light of the day since the assessee,could not procure the allotment of requisite land from the Government of Karnataka.Since the setting up of the proposed unit was abandoned during the previous year relevant to the AY.2000-01,related project expenses amounting to Rs. 64,47,855 were written off and claimed as a deduction in computation of income for the AY. 2000-01 u/s. 37(1) of the Income-tax Act, 1961 The claim was rejected by the AO and this was confirmed by the Tribunal.The Hon'ble Delhi High Court allowing the appeal of the assessee held that the expenditure incurred was in the nature of salary, wages, repairs, maintenance, design and engineering fee, travelling and other expenses of administrative nature,that in the normal course,these expenses would be treated as revenue expenditure,that the unit, which the assessee proposed to set up had inextricable linkage with the existing business of the assessee. that the proposed business was not an individual business but vertical expansion of the existing business,that the test of existing business with common administration and common fund was met. Since the project was abandoned, no new asset also came to be created. The expenditure was deductible.

5.2. We would also like to refer to the matter of IL& FS (supra).We are reproducing the facts of the case and the operative part of the order and same read as under:

> *"3. Ground No 1 relates to the disallowance/addition of Rs.83,20,841/- made by the AO and the same was confirmed by the Ld.CIT(A) treating the expenditure for 'development of contents' as the capital expenditure as against the the assessee claiming it as revenue expenditure.*
> *3.1 Briefly stated, during the year under consideration, the assessee, a company engaged in the business of development of education software had debited a sum of Rs.83,20,841/- under the head 'details of exceptional items' i.e being infructuous capital projects and claimed deduction of the same. In the assessment framed u/s 143(3), the AO disallowed the amount treating the same as the expenditure was capital in nature. On appeal, the Ld.CIT(A) confirmed the disallowance*

made by the AO. Aggrieved by the impugned decision, the assessee has raised this ground in the appeal before us.

3.2 Before us, the Ld.AR has stated that the expenditure relates to acquisition of rights, license, expenses for development of educational software and other related expenses. In keeping with the company's policy, these expenses are to be capitalized as intellectual property rights (IPR) upon completion of the project. After capitalization, they are amortized over a period of five years. However, during the current year, it is realized that some of these projects are not likely to result in any economic benefits and hence the capital work in progress of these projects is written off and the projects have been abandoned. The capital work in progress written off pertains to certain software under development for educational programs. However, these software are not ready for marketing and hence the same were written off. In support of the contention that the expenses are revenue in nature, the Ld.AR has relied on the decisions of the ITAT in the cases of DCIT Vs. Magnetic Meter System India Ltd. [2012, 13 ITR (Trib) 43 Chennai] and ACIT, Surat Vs. Essar Steel Ltd [(2012) 53 SOT 40]. However, the Ld.DR has relied on the orders of the AO and the Ld.CIT(A) in support of the Revenue's case.

3.3 We have heard both the parties on this ground and perused the material on record. It is pertinent to note that in the case of DCIT Vs. Magnetic Meter System India Ltd. [2012, 13 ITR (Trib) 43 Chennai], the ITAT, in similar set of facts and circumstances, has held that the expenditure for development of a new product in the same line of business is a revenue expenditure. It is also relevant to extract the head note of the decision of the Mumbai ITAT in the case of ACIT, Surat Vs. Essar Steel Ltd [(2012) 53 SOT 40] which reads as under:

> "Section 37(1) of Income-tax Act, 1961 - Business expenditure - Allowability of - AY.1998-99 - Assessee-company was engaged in business of manufacturing of steel - It started a new project for production of Hot Rolled Coil (HRC) - Assessing Officer noticed that while preparing balance sheet and Profit and loss account, assessee had taken income and expense of HRC project to work-inprogress because commercial production of HRC started after 31-3-1996 - However, while filing return of income assessee had claimed same as revenue expenditure - According to assessee, it had started trial production during previous year and made substantial sales and, thus, it was entitled to claim expenses in question as deduction - Assessing Officer disallowed expenses on ground that business of HRC project had not started commercial production - Whether since HRC project was an extension of existing business, revenue expenditure incurred even prior to commercial production had to be allowed as deduction - Held, yes - Whether, further, assessee's claim in respect of interest on capital borrowed and lease rent relating to said business was also to be allowed - Held, yes."

4 Following the ratios in the said decisions of the co-ordinate benches of the ITAT, we are of the view that the expenditure incurred by the assessee on infructuous capital projects in the instant case is in the nature of revenue expenditure and the assessee is entitled for deduction of the same. Accordingly, we set aside the orders of the lower authorities on this count and thus delete the impugned addition of Rs.83,20,841/-. Ground No 1 is thereby allowed."

Here,we would also like to refer to the case of Binani Cement Ltd.(380 ITR 116)of the Hon'ble Calcutta High Court.Facts of the case are that the FAA found that the assessee claimed deduction of the expenditure on a project which had been abandoned when it was found to be unviable, that the expenditure was not claimed or allowed earlier as business expenditure because it was of capital nature entitled to depreciation after completion and on commencement of its use for business,that since that stage was not reached no asset having come into existence the capital-

work-in-progress it had to be written off.He held that when construction/acquisition of a new facility was abandoned at the work-in-progress stage,the expenditure did not result in an enduring advantage and such expenditure,when written off,had to be allowed u/s. 37 of the Act. The Tribunal reversed the order of the FAA holding that the expenditure incurred in the earlier years could not be deducted in the year 2003-04. On appeal Hon'ble High Court held

> *"…there was no challenge on the finding of the Commissioner (Appeals) on the facts before the Tribunal or even the appeal. There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. Thus, the expenditure arose in the relevant year."*

Considering the above and respectfully following the three cases referred to in the earlier part of the order,we hold that the order of the FAA does not suffer from any legal or factual infirmity.As far as case of EID Perry is concerned,we would like to state that in that matter the Hon'ble Madras High Court had held that it was clear from the assessee's own case that the expenditure was incurred for the purpose of setting up a new project.The case before us,is not of 'setting up of new project'.In that matter the assessee,a manufacturer of sugar,wanted to set up a new project for the manufacture of methanol.Thus,the case is of no help to decide the issue.Effective ground of appeal against the AO.

ITA/3629/Mum/2015-AY.2006-07:

6.Facts of the case for the year under appeal are similar to the facts of AY.2007-08.Following our order for that year,we dismiss the effective ground raised by the AO for this year also.

CO./ 14/Mum/2017/ AY: 2007-08:

7.In its CO,the assesse has raised the issue of validity of re-opening.It was found that the CO was filed on .Thus,there was delay of 1056 days.In its application the assessee has mentioned that in the CO it had raised a legal issue and regarding the validity of the issue of notice u/s. 148 and passing of order u/s.143(3) r.w.s. 147 of the Act,that being a legal issue, it had a right to raise the same anytime before the disposal of the appeal.

7.1. During the course of hearing before us,the AR stated that the assessee was under bonafide belief that CO can be filed any time if only a legal issue was to be contested,that it could be treated as a prayer made under Rule 27 of the ITAT,Rules,1963(Rules).He referred to the matter of Achieve Reality Developers & Ors. (ITA/6104/Mum/2012 dt. 18.11.2016).He stated that re-

opening was void and illegal,that it was a case of change of opinion.The DR argued that no reasonable cause was advanced by the assessee for the inordinate delay.

7.2. We find that there was delay of about three years in filing of the CO for the year under appeal and the assessee has stated that it was under bonafide belief that for filing CO,involving a legal issue,there is no time limit.In our opinion,reason given by the assessee for filing belated CO does not fall under the category of a reasonable cause.Law of limitation is integral part of tax-litigation and it cannot be and should not be taken lightly.Act provides filing of cross appeal or cross objections against the order of the CIT(A).AO.s/assessees have to decide as to which remedy they want to resort to for challenging the order of the FAA.There is third option and that is raising an issue as per the provisions of Rule 27.If the AO/assessee opts for first two options he has to adhere to the time schedule prescribed by the statute.In case of delay,it is his responsibi -lity to explain as to why he could not approach the Tribunal within the stipulated time period.It is said that in tax appeals delay of each day has to be explained and the explanation should be such that even a common person finds it a possible explanation.The reason given by the assessee for the delay in filing the CO for the year under appeal is not at all convincing.Therefore,we dismiss the belated cross objections filed by it.In the earlier paragraphs of our order,we have already dismissed the appeal filed by the AO.Thus,the CO becomes academic,as the relief given by the FAA to the assessee has not been disturbed. No new relief has been requested for by the assessee in the CO-except the validity of reassessment proceedings.In short,belated CO filed by the assessee stands dismissed.

CO/13/Mum/2017 AY.2006-07:

8.Following our order for the AY.2007-08,we dismiss the CO for this year also.In this case delay is of 188 days.

As a result,appeals filed by the AO and the CO.s of the assessee stand dismissed.
फलतःनिर्धारिती अधिकारी द्वारा दाखिल की गई अपीलें और निर्धारिती के प्रत्याक्षेप नामंजूर किए जाते हैं.
Order pronounced in the open court on 6th,June, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 6,जून, 2017 को की गई ।

Sd/-	Sd/-
(**शक्तिजीत डे / Saktijit Dey**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated :06.06.2017.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " G " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**