IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BENGALURU

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

I.T.A No.28/Bang/2018
(Assessment Year: 2014-15)

M/s. Aquarelle India Pvt. Ltd., No.570, New No.22, 32nd Cross, 11th Main, Jayanagar, 4th Block , Bengaluru – 560 011.	Vs.	The Dy. Commissioner of Income Tax, Circle-1(1)(1), Bengaluru.
[PAN: AAGCA 1203Q]		
(**अपीलार्थी /Appellant**)		(**प्रत्यर्थी/Respondent**)

अपीलार्थी की ओर से / Appellant by	:	Shri Padamchand Khincha, C.A
प्रत्यर्थी की ओर से/Respondent by	:	Shri M. Narasimha Raju, JDIT
सुनवाई की तारीख/ Date of hearing	:	02.12.2019
घोषणा की तारीख /Date of Pronouncement	:	20.12.2019

O R D E R

PER D.S. SUNDER SINGH, A.M:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-1, Bengaluru (hereafter referred as "CIT(A)") in ITA No.194/CIT(A)1/16-17, dated 27.09.2017 for the Assessment Year (AY) 2014-15.

2. Grounds No.1.1 and 1.20 are general in nature which does not require specific adjudication.

3. Ground No.1.2 to 1.9 are related to the addition of Rs.91,18,238/- u/s. 80JJAA of the Income Tax Act, 1961 ("the Act"). The brief facts are that the

assessee is engaged in the business of manufacturing garments. For the assessment year 2013-14, the assessee has claimed the deduction of Rs. 1,23,12,539/- u/s. 80JJAA of the Act. The deduction u/s 80JJAA of the act is allowable in respect of additional employee cost of new employees @30% of cost incurred in the regular course of business. The Assessing Officer (AO) was of the view that the deduction u/s. 80JJAA of the Act is allowable from the profits and gains derived by the assessee to the extent of 30% of the additional employee cost incurred in the course of business during the previous year relevant to the assessment year in respect of the additional wages paid to the new employees who are employed on regular basis and completed 300 days of employment in the preceding year relevant to the A.Y under consideration. The AO asked the details and from the details furnished by the assessee, the AO found that the assessee had engaged 381 employees during the year and out of which 186 employees have completed the employment of 300 days. The assessee contended before the AO that as per the provisions of the act, there was no reference OF new employees employed in the preceding years are not eligible for deduction u/s. 80JJAA of the Act in the subsequent assessment year. The assessee further submitted before the AO that interpretation of the section should be made in a manner in which it promotes the objective sought to be achieved and not to frustrate it. The Ld AR further submitted before the AO that beneficial provision must be interpreted liberally. The assessee submitted that deduction should not be restricted to the employees joined before 5th June but should be extended in respect of the employees completed 300 days on or

before filing the return. Not being convinced with the explanation of the assessee, the AO rejected the explanation observing that the definition of new workmen in section provides only for the new workmen employed for period of not less than 300 in the impugned assessment years and thus, the AO allowed the deduction u/s. 80JJAA of the Act for 24 workmen who completed 300 days of employment during the impugned assessment year amounting to Rs. 31,94,301/- and the balance amount of Rs. 91,18,238/-. was disallowed added back to the income.

3. Aggrieved by the order of the AO the assessee went on appeal before the Ld. CIT(A) and the Ld. CIT(A) dismissed the appeal of the assessee holding that the assessee is eligible for deduction u/s. 80JJAA of the Act only in respect of employees cost in respect of the employees who completed the employment not less than 300 days during the previous year under consideration, such workmen should not be casual workmen or workmen employed through contract labour. The ld. CIT(A) further viewed that if some workmen employed for a period of less than 300 days in the previous year the deduction is not allowable in respect of payments of wages to such workmen in the current year, even, if such workmen has employed in the preceding year for more than 300 days but in the present year such workmen has not completed for 300 days. For the sake of clarity and convenience, we extract the part of the Ld. CIT(A) order at para 22 to 25, which reads as under:

> *"22. In the present case, the AO held that sec.80JJAA was restricted to additional wages paid to employees who have worked for more than 300 days during the relevant period irrespective of whether they were employed on a permanent basis or otherwise.*

Accordingly, the AO ascertained the additional wages paid to those workers who had worked for less than 300 days of Rs.25,64,771/- and 30% of which worked out to Rs.7,69,431/- was disallowed by the AO. The claim of the assessee is this that if the worker is employed on permanent basis then only because in the present year, working days are less than 300 days because he was employed after 66 days from the start of the previous year then no deduction will be available under this section in respect of such workers appointed or employed after that date and therefore, this approach of the AO is not correct.

23. In our considered opinion, as per provisions of section 80JJAA as reproduced above, the deduction is allowable for three years including the year in which the employment is provided. Hence, in each of such three years it has to be seen that the workmen was employed for at least 300 days during that previous year and that such work men was not a casual workmen or workmen employed through contract labour. Therefore, if some work men were employed for a period less than 300 days in the previous year then no deduction is allowable in respect of payment of wage to such work men in the present year, even if such work men was employed in the preceding year for more than 300 days but in the present year, such work men was not employed for 300 days or more. In this view of the matter, we find no infirmity in the order of the ld.CIT(A) on this issue.

4. Now we examine the applicability of the judgment of the Hon'ble Apex Court cited by the ld. AR of the assessee. In our considered opinion, the issue in dispute in that case was entirely different and therefore, this judgment is not applicable in the present case.

25. In our considered opinion, the Board Circular No.772 also does not render any help to the assessee. Hence, this ground is rejected."

(Emphasis supplied)

Further, the Hon'ble ITAT in the case of Texas Instruments (I) (P.) Ltd. [2014] 45 taxmann.com 353 (Bangalore - Trib.), SEPTEMBER 7, 2012 have held in the context of claim under Section 80JJAA -of the Income-tax Act, 1961-relevant extract is as under:

"A similar view has been taken by the Delhi Bench of this Tribunal in the case of 'LG Electronics Indio Pvt. Ltd. (supra) in paras 12 & 13 as under:

"12. As regards the merits of the case, regarding claim u/s 80JJAA the section reads as under:-"

(I) Where the. gross total income of an assessee being an Indian Company includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of articles of things there. shall subject to the conditions specified in sub-section (2) be allowed as deduction of an amount equal to 30% of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including

the assessment year relevant to the previous year in which such employment is provided;"

13. The explanation to section defines regular workmen which does not include:-

a) Casual worker;

b) Any other workmen employed for a period of less than 300 days during theprevious year.

(c) A workmen employed through contract labour.

The definition of new workmen in section along with explanation clearly provides that deduction will be available only if the new workmen is employed for a period of 300 clays in the previous year and there is no reference to the new employees employed in the preceding year for eligibility u/s 80J.IAA. Form No.10DA which is required for making claim u/s 80JJAA also does not have. any column in respect of employee employed during the preceding year. The argument taken by Id. AR that employees employed in the preceding year who had not completed 300 days in that year should be taken in the current year when he completes 300 clays is of no force. In view of the above, we do not see any reason to interfere in the order of lcl CITCA)"

We find that the co-ordinate bench of this Tribunal in the case of Bosch Ltd. (.wpm) has also taken similar view.

9. Therefore in view of the decisions of this Tribunal on this point and to maintain the rule of consistency, we hold that the assessee has not fulfilled the condition of employing the new regular workmen in excess of 100 workmen and further an increase of 10% of the existing number or workmen employed by the assessee as on last date of preceding year. The Assessing Officer has filed the remand report and the assessee has also accepted this fact that during the previous year relevant to the Assessment Year 2001-02, the number of workmen who were employed from 300 days or more days are only 16 and similarly during the previous year relevant to the assessment year 2002-03, the number of workmen who were employed for 300 days or more Me only 8. Therefore the assessee does not satisfy the condition as prescribed under the provisions of Section 80JJAA of the Act because the workmen employed by the assessee cannot be included in the definition of regular Workmen as per explanation to his section.

From the above judicial pronouncements it is clear that as per provisions of Section 80JJAA of the Act, the deduction is allowable for three years including the year in which the employment is provided. Hence, in each of such three years it has to be seen that the workmen was employed for at least 300 days during that previous year and that such work men was not a casual workmen or workmen employed through contract labour. Therefore, if some work men were employed for a period less than 300 days in the previous year then no deduction is allowable in respect of payment of wage to such work men in the present year even if such work men was employed in the preceding year for more than 300 days but in the present year, such work men was not employed for 300

> *days or more. In view of the above, I am of the view that the AO is justified in restricting the claim of the appellant under the special provisions of Section 80JJAA of the Act, and accordingly, the grounds of appeal 2-10 are rejected."*

4. Against the order of the ld. CIT(A) , the assessee filed appeal before this Tribunal and the Ld.AR argued that the assessee has satisfied all the conditions specified u/s. 80JJAA of the Act being entitled for the deduction. The ld. CIT(A) erred in confirming the order of the AO stating that the deduction u/s. 80JJAA of the Act would be available, if new workmen is employed for 300 days in the previous year relevant to the assessment year. Against the identification of 186 workmen out of 381 workmen, the AO allowed the deduction only in respect of 24 workmen which is grossly unjustified. Referring to page number 174 of the paper book, the ld. AR submitted that the total eligible employees added up to 884, consisting of269 during 2011-12, 234 in 2012 -13 and 381 in 2013-14 and argued that the assessee is eligible for deduction for three years as provided u/s. 80JJAA of the Act on the wages paid to 884 employees. The assessee furnished details of new employees employed during the Financial year 2011-12 to 2013-14 mentioned in page number 174 of paper book. Referring page number 182, the assessee submitted that the assessee is entitled for deduction under section 80JJAA of the Act to the extent of Rs1,23,12,539/- being 30% of additional cost on new the workmen employed in the factory for more than 300 days. Therefore argued that section 80JJAA of the Act provides for deduction, if, the workmen is employed for more than 300 days in a year, even if it is not the year in which it was admitted. The ld. AR relied on the order of this tribunal in

the assessee's own case for the assessment year 2013-14 in I.T.A. No.2737/Bang/2017 dated 03.04.2019.

5. On the other hand, the ld. DR supported the orders of the lower authorities and requested to confirm the order of the Ld. CIT(A).

6. We heard the rival submissions and perused the material placed on record. In the instant case, the assessee submitted that the assessee is eligible for deduction under section 80JJAA of the Act, if the workmen has employed for more than 300 days irrespective of the year in which they were recruited for three consecutive years, whereas the AO disallowed deduction under section 80JJAA of the Act relating to the workmen who have not completed 300 days in the year under consideration. The identical issue has been considered by the ITAT in the assessee's own case for the assessment year 2013-14, and held that the assessee is eligible for deduction under section 80JJAA of the Act.,on additional wages paid to the new regular workmen employed in the financial year relevant to the assessment year 2012-13 provided they continue to be qualified under the regulation of regular workmen. We extract the relevant part of the tribunal order in the assessee's own case for the sake of clarity, which reads as under:

> *8. We heard the parties and perused the record. We notice that the deduction u/s 80JJAA is allowed for three years. Accordingly, during the year under consideration, the assessee shall be eligible for deduction in respect of wages paid to new regular workmen employed in the financial year relevant to assessment year 2011-12, as the present assessment year is the third year. Similarly, the assessee shall be eligible for deduction in respect of wages paid to new regular workmen employed in the financial year relevant to assessment year 2012-13, as the present assessment year is the second year. Hence the assessee should be eligible for deduction u/s 80JJAA of the Act in respect of eligible regular*

workmen employed in Financial years relevant to AY 2011-12, 2012-13 and 2013-14, provided they continue to qualify under the definition of "regular workman" during this year also.

6.1 Therefore, we consider it is deem it fit to remit the matter back to the file of AO to examine the issue in the light of the decision of this Tribunal and direct the AO to allow the deduction as per the direction given in the order supra. The assessee has to furnish the details of new workmen employed and the additional wages incurred before the AO. Accordingly, the order of the lower authorities are set aside and the issue is remitted back to the file of the AO to decide the issue afresh on merits and the assessee is free to make all the claims before the AO. Accordingly, the appeal of the assessee on this ground is allowed for statistical purpose.

7. Ground Nos.1.10 to 1.18 are related to the disallowance of commission amounting to Rs. 4,76,55,888/- which was disallowed by the AO u/s. 40(a)(ia) of the Act as well as colourable device to inflate the expenses. The brief facts are that during the previous year relevant to the assessment year, the assessee has debited the commission of Rs. 4,76,55,888/- commission to its holding company Aquarelle International Ltd., on account of marketing commission. The AO asked the assessee to explain as to why the deduction should not be disallowed u/s. 40(a)(ia) of the Act, since, the assessee failed to deduct the tax at source. The assessee explained before the AO that the payment made by the company is not chargeable to tax in India therefore; the question of deduction of tax at source u/s 195 of the Act does not arise. The assessee further explained that it has no business connection as defined u/s. 9(1)(vii) of the Act and the marketing

commission is not in the nature of fee for technical services and Indo maritius treaty does not contain any provision regarding the taxability of Fee for technical services and the taxability of impugned commission is governed by the provisions related to the business income and in the absence permanent establishment in India the payment of commission is not liable to taxed in India. Thus, argued that TDS provisions are not applicable in assessee's case. On receipt of reply objecting the disallowance u/s 40(a)(i), the AO issued notice under section 142(1) calling for the details of invoices for marketing commission paid and the details of marketing services rendered by the holding company. The assessee company also furnished the agreement evidencing that the holding company was appointed as marketing representative for promotion of readymade garments manufactured by the assessee company for sale in overseas market. From the details submitted by the assessee the AO observed that the assessee has not submitted any details to establish that the M/s. Aquarelle International Ltd (AIL) has rendered the marketing services, thus held that the payment made to M/s. Aquarelle International Ltd. is a colourable device to inflate the expenses of the assessee company to reduce its tax liability therefore the genuineness of the commission to M/s. Aquarelle International Ltd. was held to be not proved hence, disallowed the expenditure under section 37 (1) of the Act.

7.1. Without prejudice to the finding of the AO that the payment was not genuine the AO also disallowed the expenditure alternately under section 40(a)(ia) of the Act, holding that the commission paid was in the nature of fee for technical

services and the assessee required to deduct the tax at source u/s 195 of the Act. Since the assessee failed to deduct the tax at sources the AO made the addition u/s 40(a)(i) of the Act.

8. Against the order of the AO, the assessee went on appeal before the Ld. CIT(A). Before the Ld. CIT(A) the assessee filed additional evidence which was rejected by Ld. CIT(A). However, the Ld.CIT(A) viewed that the additional evidence filed by the assessee was relevant and held that the additional evidences did not establish the role of the M/s. Aquarelle International Ltd., in rendering the marketing services warranting the payment of commission. At most the documents indicate that the M/s. Aquarelle International Ltd. is an associated concern. For justifying the payment of commission the marketing support services has to be much more organized and result oriented and the sustainable basis. On the basis of evidences produced by the assessee the Ld. CIT(A) accepted the view of the AO and confirmed the order of the AO.

8.1. With regard to the disallowance under section 40(a)(ia) of the Act, the Ld. CIT(A) confirmed the order of the AO. Against which the assessee filed this appeal before this Tribunal.

9. During the appeal hearing, the Ld. AR submitted that the Ld. CIT(A) has rejected the additional evidences filed by the assessee. Having rejected the additional evidence filed by the assessee, the Ld. CIT(A) ought not to have acted upon the additional evidences placed by the assessee to reach the conclusion that payment made to the holding company was not genuine. Further, the Ld.

CIT(A) did not give any opportunity to the assessee before rejecting the additional evidences and even not referred the matter to the AO for remand. Therefore, argued that the Ld. CIT(A) erred in rejecting the application filed by the assessee for admission of additional evidence. Therefore, the order of Ld. CIT(A) is bad in law and the Ld. CIT(A) ought to have examined the entire additional evidence before rejecting. The ld. AR further submitted that the AO was given a notice for making the addition under section 40(a)(ia) of the Act for non deduction of tax at source and on explanation submitted by the assessee objecting for the disallowance, the AO called for the details of the commission payment by notices under section 142(1) of the Act and given a finding with regard to genuineness of the payments of commission and the services rendered by the M/s. Aquarelle International Ltd., Mauritius, which is apparently contradicting to the issues raised for and conclusions drawn by the AO.

8.2 The Ld. AR further brought to our notice that, AO in his order though made the disallowance under section 37(1) of the Act given a finding that the payment was given to the non-resident by the assessee to promote the assessee's product in the overseas market as per the agreement and the agent rendered services abroad and have solicited orders but the right to receive the commission arose in India when the orders were executed by the assessee in India. From the order of the AO, the Ld. AR argued that though the AO disallowed the commission disbelieving the genuineness of the services rendered by the foreign entity, in the subsequent paragraphs, the AO himself had acknowledged the genuineness of the payment of commission and also the

services rendered by the foreign agent in marketing the products of the assessee company. Thus, argued that the reasons for making disallowance under section 37(1) of the Act and the finding given by the AO for disallowance u/s 40(a)(i) are apparently contradictory. Referring page No.208 of the paper book, the Ld. AR submitted that M/s. Levi Strauss SA (Pty) Ltd. Co. has addressed a letter to the M/s. Aquarelle International Ltd., acknowledging services rendered by the Indian company on introduction by the M/s. Aquarelle International Ltd. In page Nos.210 to 214, the Ld. AR submitted the mails and invoices etc. support the services rendered by the company to the assessee and furnished the copy of application made before the Ld. CIT(A) requesting for admission of additional evidence under rule 46A of the Income Tax Rules, 1962. As per the application made before the Ld. CIT(A), the AO passed the order without giving sufficient opportunity to the assessee, therefore requested the Ld.CIT(A) to admit the additional evidence. Accordingly, argued that the Ld. CIT(A) ought to have considered the additional evidence and details of filed by the assessee and allowed the appeal of the assessee.

8.3 On the other hand, the Ld. DR argued that the AO has given sufficient opportunities and the Ld. CIT(A) has considered the issues in detail, hence, requested to uphold the order of the Ld. CIT(A).

9. We have heard the rival submissions and perused the material placed on the record. From the order of AO we find that the AO has made the addition of Rs. 4,76,55,888/- under section 37(1) of the Act and also invoked the provisions

of section 40(a)(ia) of the Act. With regard to the disallowance made under section 37(1) of the Act, the AO issued the notice under section 142(1) of the Act directing the assessee to establish the marketing services rendered by the assessee and made the addition holding that the assessee did not establish the marketing services rendered by the holding company M/s. Aquarelle International Ltd. However in subsequent paragraphs though without prejudice, the AO made the addition under section 40(a)(ia) of the Act. While making the disallowance under section 40(a)(ia) of the Act the AO made the observation that payment was genuine and the agents have rendered the services. Therefore, as rightly argued by the Ld. AR there was a contradictory finding in respect of the services rendered by the foreign agent to the assessee. The Ld. CIT(A) rejected the application of the assessee for admission of additional evidence, however, the Ld. CIT(A) reached conclusions on the basis of additional evidence produced by the assessee, without even calling for the remand report. Having rejected the application for admission of additional evidence the Ld. CIT(A) ought not to have placed reliance on the same additional evidence for concluding that the M/s. Aquarelle International Ltd., has not rendered the marketing services to the assessee. The Ld. CIT(A) also ought to have called for the remand report and made verification of the facts submitted in the additional evidence before taking the additional evidence as basis for coming to conclusions. Therefore, we are of the considered view that the entire issue needs to be re-examined by the AO to establish whether the M/s. Aquarelle International Ltd. has rendered the services for receipt of commission or not and whether the payment is in the

nature of technical services or not. Hence we remit the matter back to the file of the AO to examine the entire issue and decide the issue afresh on merits. Accordingly, we set aside the order of the AO for denovo consideration. Accordingly, the appeal of the assessee is allowed for statistical purposes.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 20th December, 2019.

Sd/- **Sd/-**

(N.V. VASUDEVAN)
VICE PRESIDENT

(D.S. SUNDER SINGH)
ACCOUNTANT MEMBER

Bengaluru, Dated: 20.12.2019
EDN

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore.