

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY ( JUDICIAL MEMBER)**

**AND**

**SHRI MANOJ KUMAR AGGARWAL (ACCOUNTANT MEMBER)**

I.T.A. No.789 /Mum/2019  
(Assessment Year : 2006-07)

M/s Simto Property Developers Ltd 34/1003, NRI Complex Sea Woods Estate, Palm Beach Road, Navi Mumbai-400 706 PAN : AAACS5299L	vs	ACIT-10, Mumbai
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	Shri C.V. Jain, AR
Respondent by	Smt. Smita Verma, DR

Date of hearing	17/03/2021
Date of Pronouncement	07/06/2021

**ORDER**

**Per Saktijit Dey, JM**

This is an appeal by the assessee against order dated 21-12-2018 of learned Commissioner of Income Tax (Appeals)-10, Mumbai for the assessment year 2006-07.

2. The assessee has raised the following effective grounds:—

*“1. On the facts, in the circumstances of the case & in law the Learned Assessing Officer (Ld. A.O.) and the Commissioner of Income Tax (Appeals) [CIT(A)] has erred in not following the directions given by the Hon'ble ITAT.*

*2. On the facts, in the circumstances of the case & in law, the Learned CIT(A) has erred in upholding the disallowance of depreciation of Rs. 2,74,85 8/- made by learned Assessing Officer (A.O.) in respect of Fixed Assets on the pretext of there being no business during the year under appeal, whereas the said fixed assets were already put to use in business in the preceding previous year so the same formed a part of the block and they were used in the current year as well.*

*3. The learned C I T (A) has further erred in upholding the disallowance made by the Ld. A O of total business expenses amounting to Rs. 1,95,6077-, merely on the basis of doubt, surmises and conjectures.*

*4. Without prejudice to other grounds, in view of the facts and circumstances of the case and in law, the Learned CIT (A) has further erred in upholding the amount of Rs.7,80,1797-received towards Software development Fees (exports), as Unexplained Cash Credits merely on the basis of doubt, surmises and conjectures.*

*5. On the facts, in the circumstances of the case & in law, the Ld. A.O. and Ld. CIT(A) have erred in not allowing the brought forward Business Losses and Unabsorbed Depreciation of earlier years.”*

3. Grounds 6 and 7 being general grounds are dismissed.

4. In ground 1 assessee has raised the issue of non compliance with the directions of the Tribunal. Whereas, in grounds 2 to 5 assessee has challenged disallowance of depreciation, business expenses, non grant of set off of brought forward business loss and unabsorbed depreciation and treating the income shown from business as unexplained cash credit under section 68 of the Act. Since, all these issues are inter-connected; we proceed to dispose of them together.

5. Briefly the facts are, the assessee is a resident company and is stated to be engaged in the business of software development. For the assessment year under dispute, assessee filed its return of income on 09-11-2006 declaring nil income.

Assessment in case of the assessee was completed under section 143(3) of the Act vide order dated 26-12-2006 determining the total income at Rs.8,30,680/- by holding the receipt from business as unexplained credit under section 68 of the Act on the reasoning that the assessee has not carried out any business activity during the year. While doing so, the assessing officer also disallowed various expenditure/deduction claimed against the business income. Assessee challenged the aforesaid decision of the assessing officer before the first appellate authority and thereafter before the Tribunal. Vide order dated 08-05-2013, the Tribunal restored the matter back to the assessing officer for fresh adjudication with certain directions. In pursuance to the directions of the Tribunal, the assessing officer framed a fresh assessment and while doing so he again treated the receipt shown from business as unexplained cash credit under section 68 of the Act and further disallowed the expenditure/deduction claimed by the assessee primarily on the reasoning that the assessee has not carried out any business activity. While deciding assessee's appeal, learned Commissioner of Income Tax (Appeals) also concurred with the view expressed by the assessing officer.

6. Reiterating the stand taken before the departmental authorities, the learned counsel for the assessee submitted, without making proper enquiry and verifying facts on record, the assessing officer has again proceeded in the same manner as was done by him in the original assessment proceedings. He submitted, in the process, the assessing officer has not complied with the directions of the Tribunal. Further, he submitted, the assessee has brought supporting evidence on record to demonstrate that in the year under consideration assessee had carried on business activity of software development and has earned income from such activity. Drawing our attention to the software

development agreement, purportedly entered with a US based entity viz. M/s Sparkling Carpets, USA, copy of which is placed at page 84 of the paper book, learned counsel submitted, in pursuance to the agreement the assessee has developed a software for the foreign client and has also received fees from the said client for the services rendered. He submitted, the fee was received through banking channel with the permission of Reserve Bank of India (RBI). Further, he submitted, the salary paid to technical persons for developing software and payment of electricity bill clearly demonstrates that the assessee was carrying on business activity. He submitted, being completely swayed away by the report submitted by the Ward Inspector of the department and without making proper enquiry, the assessing officer has repeated the same addition. He submitted, since the assessee has furnished all supporting evidence to demonstrate carrying on business activity, the income shown under the head 'business' has to be accepted and the deduction claimed on account of depreciation, the expenses has to be allowed. Further, he submitted, assessee's claim of set off of brought forward business loss and unabsorbed depreciation should also be allowed.

7. The learned departmental representative, strongly relying upon the observations of the assessing officer and learned Commissioner of Income Tax (Appeals) submitted, the assessee having miserably failed to prove with supporting evidence that it has carried out any business activity has claimed, the assessing officer has rightly treated the receipts shown from business as unexplained cash credit under section 68 of the Act and has also disallowed various deductions claimed. He submitted, the facts brought on record through enquiry clearly establish that the assessee had carried on any business activity.

8. We have considered rival submissions and perused materials on record. Undisputedly, this is the second visit of the assessee to the Tribunal. While disposing of assessee's earlier appeal in the order referred to above, the Tribunal had restored the matter back to the assessing officer directing that the issue may be decided afresh after confronting the Inspector's report to the assessee. On perusal of materials available on record, more particularly, the observations of learned Commissioner of Income Tax (Appeals), it is noticed that in the fresh assessment proceedings, in pursuance of directions of the Tribunal, the assessing officer had confronted the inspector's report to the assessee. Pertinently, to ascertain the correctness of assessee's claim that it had carried on activity of software development, the assessing officer had deputed the Inspector to conduct a field enquiry. In the report submitted, the Inspector has specifically stated that on a visit to assessee's business premises, he found that no business activity was carried on inside the premises and only some black and white television sets and electronic components were kept. Further, from local enquiry, he found that no business activity is being carried on from the said premises for last five to six years.

9. Refuting the allegations made by the Inspector in his report, the assessee had furnished submission dated 03-07-2013 before the assessing officer stating that portion of the said premises and for carrying out such activity, the assessee has employed two persons. The assessee has also referred to the software development agreement with the foreign client and has submitted that as per the requirement of the client, software was developed and delivered and the assessee received the fee. As could be seen, the assessing officer has disbelieved the aforesaid claim of the assessee for various reasons. He had observed that

there was no evidence of any software development activity carried out from the business premises. Even, the concerned employees, who according to the assessee were developing the software, could not convince the assessing officer that they are technically qualified to develop the software. Further, he has observed that the assessee did not even have the required computers and internet connection for developing software.

10. On a perusal of the submissions of the assessee before the departmental authorities and other facts and materials on record, we find various inconsistencies. The assessee has stated that the premises from where the assessee was carrying out software development activity earlier, belonged to Crystal Software Solutions Ltd (formerly, Crystal Audio Ltd) engaged in manufacturing black and white television during the period 1993-1999. Assessee has stated that in October, 1999, the assessee purchased the premises along-with various items like electronic component, black and white TV sets, etc. which were stored in the said premises. Whereas, thereafter the assessee has again submitted that a part of the premises was given to, the erstwhile owner for storage of its material. It is not understood, when the assessee has purchased the premises along with all the items like electronic components, TV sets, etc. where is the question of again allowing the erstwhile owner to store its materials. Further, the assessee has submitted that a part of the premises was let out to Crystal Software Solutions Ltd. Thus, the assessee has not come out clear on facts.

11. Further, we find various doubts raised by the assessing officer with regard to the technical capability of the concerned employees for developing software, lack of infrastructure, etc. have not been properly addressed by the assessee. At

the same time, it is a fact on record that in course of assessment proceedings, the assessee has furnished a software development agreement with a US based company, who allegedly entrusted the assessee with developing software. It also appears, before the departmental authorities the assessee has furnished certain documentary evidence including copies of export invoices raised to the foreign buyer, proof of payment received through bank, banker's certificate, bank statement showing payment received towards export of software, etc. However, neither the bank certificate nor the bank statement have been filed in the paper book or separately furnished before us for enabling us to record a conclusive finding on these evidences.

12. Be that as it may, the aforesaid documentary evidences stated to have been filed before the departmental authorities needs to be thoroughly examined in the context of assessee's submission regarding development of software for a foreign buyer. As it appears, the departmental authorities have not properly enquired into these aspects by conducting necessary enquiries with the concerned bank or other regulatory authorities, including RBI, since it involves transactions with a foreign party involving repatriation of money from foreign country. One more aspect which has not been examined is, whether the assessee has carried on such software development activity, either with the same client or any other client, in the subsequent assessment years or it is a standalone transaction. If the assessee has continued with such business activity in subsequent years, then assessee's claim can be accepted. However, all these aspects need to be properly enquired into by the departmental authorities, which appear to have not been done.

13. In view of the aforesaid, we are inclined to restore the issue to the learned Commissioner of Income Tax (Appeals) for fresh adjudication after due opportunity of being heard to the assessee. The assessee is also permitted to bring fresh evidence on record to establish its claim of carrying on the business activity of software development. Learned Commissioner of Income Tax (Appeals) would be free to conduct proper enquiry either by himself or get it done through the assessing officer in terms of our observations hereinabove. Assessee's claim of deduction towards expenses, depreciation as well as set off of brought forward loss and unabsorbed depreciation would ultimately depend upon the outcome of the issue as to whether the assessee has carried out any business activity or not. In view of the aforesaid, we set aside the impugned order of learned Commissioner of Income Tax (Appeals) and restore the issues back to his file for fresh adjudication in terms of our discussion above and only after providing due opportunity of being heard to the assessee. Grounds are allowed for statistical purposes.

9. In the result, appeal is allowed for statistical purposes.

Order pronounced in the Open Court on this 07/06/2021.

Sd/-

sd/-

<b>(MANOJ KUMAR AGGARWAL)</b>	<b>(SAKTIJIT DEY)</b>
<b>ACCOUNTANT MEMBER</b>	<b>JUDICIAL MEMBER</b>

Mumbai, Dated : 07/06/2021.

Pavanan, Sr.P.S (on contract)



Copy of the order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)
4. 4. The CIT
5. D.R., ITAT, Mumbai.
6. Guard File.

//True Copy//

By order

Asst. Registrar, I.T.A.T., Mumbai.