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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.1163/Bang/2012
Assessment year : 2008-09

OnMobile Global Limited, Tower # 1, 94/1C and 94/2, Veerasandra Village, Attibele Hobli, Anekal Tq., Electronics City Phase-1, Bangalore – 560 100. **PAN: AAACO 3900E**	Vs.	The Additional Commissioner of Income Tax, Range 12, Bangalore.
APPELLANT		RESPONDENT

ITA No.1175/Bang/2012, 987 & 1513/Bang/2015
Assessment years : 2008-09, 2009-10 & 2010-11

The Deputy Commissioner of Income Tax, Circle 12(2) / 5(1)(2), Bangalore.	Vs.	OnMobile Global Limited, Bangalore – 560 100. **PAN: AAACO 3900E**
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	06.08.2021
Date of Pronouncement	:	09.08.2021

O R D E R

Per Chandra Poojari, Accountant Member

These appeals are by the assessee and revenue against the respective orders of the CIT(Appeals) for different assessment years. The appeals for the AY 2008-09 are cross appeals by both parties and for AYs 2009-10 & 2010-11 the appeals are preferred by the revenue. Having heard all the appeals together, they are disposed of by this common order for the sake of convenience and brevity.

2. The ld. counsel for the assessee submitted that the only issue involved in all these appeals is the disallowance of deduction claimed u/s. 80JJA of the Income-tax Act, 1961 [the Act].

3. He further submitted that for the AY 2008-09 cross appeals are filed. The issue of deduction u/s. 80JJA of the Act arises out of the Revenue's appeal in ITA No.1175/B/2012 and hence the assessee's appeal in ITA No.1163/Bang/202 is infructuous for the issue under consideration. Being so, the assessee's appeal in ITA No.1163/Bang/2012 for AY 2009-09 is dismissed as infructuous in the above circumstances.

4. We now take up for consideration the revenue's appeal for AY 2008-09. The cross appeals had originally come for consideration before the Tribunal. The brief facts of the case were that the assessee claimed an amount of Rs.48,30,929 as deduction u/s. 80JJA of the Act. Certificate in Form10DA was submitted. The existing no. of employees was 81 and 49 new employees. The AO disallowed this claim of assessee on the ground that the asse does not qualify as industrial undertaking and employees earning high salaries are construed as employees of managerial nature. The CIT(Appeals) deleted the additions and allowed the appeal of

assessee. The Tribunal disposed of the appeal vide order dated 21.12.2014 allowing the deduction relying on the decision of the Tribunal in the case of *Texas Instruments [2006] 115 TTJ 476*. On further appeal by the revenue, the Hon'ble jurisdictional High Court remanded back the issue to the Tribunal by judgment dated 18.01.2021 observing as follows:-

> "14. Now, we may deal with the second substantial question of law. The Assessing Officer has held that condition precedent for claim deduction under Section 80JAA of the Act is that the assessed should be a company which is engaged in the manufacture of production of article or thing. However, in the instant case, the assessee is providing telecom services and therefore, the assessee cannot be termed as an industrial undertaking. It has further been held that highly qualified persons are employed by assessee and additional wages stated to be paid to them to 49 people is shown to be Rs.1,61,03,098/- which comes to Rs.3,28,000/- per year. Therefore, any person drawing a sum of Rs.3,28,000/- and having technical qualifications would be an independent executive and cannot be treated as workman. Therefore, the claim for deduction under Section 80JJA of the Act was disallowed. However, the Tribunal by placing reliance on the decision of the Tribunal in the case of **TEXAS INSTRUMENTS (INDIA) P. LTD.**, supra allowed the claim of the assessee. It is pertinent to note that the decision of **TEXAS INSTRUMENTS (INDIA) P. LTD.** supra was challenged before this Court in ITA No.535/2007 and ITA No.537/2007 and the matter was remitted by an order dated 17.02.2014 to decide the matter afresh. However, we find that the Tribunal in paragraph 6.5.4 has rather recorded the conclusions and has failed to assign any reasons. Therefore, the matter insofar as it pertains to claim of the assessee for deduction under Section 80JAA of the Act requires reconsideration by the Tribunal. Accordingly, the second substantial question of law is answered. The impugned order dated 21.02.2014 insofar as it dismisses the appeal of the revenue to the extent of challenge of the claim of the assessee under Section 80JAA of the Act is hereby quashed."

5. Accordingly, the appeal was taken up for hearing by the Tribunal. The ld. counsel for the assessee submitted that the appeals in the case of Texas Instruments (India) P. Ltd. reached the High Court in ITA Nos.535/2007 and 537/2007 pertaining to AYs 2001-02 & 2002-03 for consideration of two issues as under:-

(i) Whether IT company / engineers are eligible for deduction u/s. 80JJA.

(ii) Whether the deduction is allowable if the employees are employed for less than 300 days in any previous year.

6. In Texas Instruments (India) P. Ltd.'s case, the Hon'ble High Court remanded the second issue back to the Tribunal for reconsideration and kept the first issue open to be raised if it goes against the revenue. In pursuance of the remand, the Tribunal passed order dated 29.12.2016 holding the second issue of 'employees employed less than 300 days' against the assessee. The first issue remained unadjudicated. Against this order of the Tribunal, the assessee therein, i.e., Texas Instruments (India) P. Ltd. moved in appeal to the High Court. During the pendency of the appeal, it appears Texas Instruments (India) P. Ltd. opted for VSV Scheme, 2020 and prayed for withdrawal of appeals. The Hon'ble High Court in ITA No.300 of 2017 by order dated 02.02.2021 dismissed these appeals as withdrawn. It is in these circumstances that the adjudication of the issue u/s. 80JJA of the Act was kept open for adjudication by the Hon'ble High Court in the case of Texas Instruments (India) P. Ltd. as far as assessment years 2001-02 & 2002-03 are concerned at the relevant point of time.

7. The ld. counsel for the assessee further submitted that the Tribunal has adjudicated the appeals of Texas Instruments (India) P. Ltd. for AY 2008-09 on the twin issues; viz., (i) whether IT Company/engineers are

eligible for deduction u/s. 80JJA, and (ii) whether deduction is allowable if employees are employed for less than 300 days in any previous year. By *order dated 06.03.2020*, the Tribunal in ITA Nos.169 & 149/Bang/2014 in *Texas Instruments (I). P. Ltd.* has held allowed the deduction u/s. 80JJA of the Act on both the counts, which was upheld by the Hon'ble High Court of Karnataka vide judgment dated 21.04.2021 in *ITA Nos.141 & 151/2020*. Hence the issue stands settled in favour of the Assessee for the AY 2008-09 and followed in AYs 2009-10 & 2010-11 by the Hon'ble High Court in the case of Texas Instruments (India) P. Ltd.

8. The ld. DR submitted that the issue of deduction u/s. 80JJA that in the present case for the AY 2008-09 the issue was not answered by the Hon'ble High Court of Karnataka in ITA No.340/2014 by judgment dated 18.1.2021 and it was remanded to the Tribunal for fresh decision.

9. We have heard both the parties and perused the material on record. In the present case before us, as submitted by the ld. DR, in pursuance of the remand by the Hon'ble High Court of Karnataka in ITA No.340/2014 by judgment dated 18.01.2021, the issue of deduction u/s. 80JJA of the Act is now taken up for adjudication for AY 2008-09 before the Tribunal. Similar issue has been considered by the Hon'ble High Court of Karnataka in ITA Nos.141/2020 and 151/2020 in the case of in *CIT v. Texas Instruments (India) P. Ltd. [2021] 127 taxmann.com 59* (for AY 2008-09) wherein, affirming the decision of the Tribunal dated 06.03.2020 [15 taxmann.com 154 (Bang. - Trib.)], the Hon'ble jurisdictional High Court held as follows:-

> "16.1. The Assessee had claimed deduction under Sect on 80E-AA of the Act on account of the payments made to the employees hired by the Assessee in the previous year even though they had not completed 300 days of service in that year since they continued on the rolls of the Assessee in the next year totalling up

to more than 300 days as required under section 80E-AA of the Act. The issue raised by the Revenue is that the employees of the Assessee would not come within the purview of the definition of workman under Section 2(2) of the industrial Disputes Act, 1947 (for short 'ID Act') and that since the employee has riot completed 300 days of employment in the previous year, no deduction could be claimed by the Assessee.

16.2. As regards the first contention of the Revenue, the same does not require much examination by this Court inasmuch as at the first instance; the Assessing Officer had held that the Assessee's employees would not come within the purview of workman under Section 2(s) of the I.D. Act and disallowed the claim, on an appeal filed by the Assessee, the Commissioner, Income-tax (Appeals) CIT(A) accepted the Assessee's contention and held that the Assessee's employee would come within the purview of Section 2(s) of the ID Act. This aspect was not challenged oy the Revenue, although the Revenue had filed an appeal against the order of the CIT(A). Having accepted the said finding of the CIT(A) and not having filed any appeal, the Revenue cannot now seek to challenge the said finding in the present appeal.

16.3. Section 2(s) or the ID Act is reproduced hereunder for easy reference:

"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison, or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

16.4. In terms of section 2(s) of the ID Act, the definition of a workman is very wide inasmuch as the said definition would cover any person who has the technical knowledge, self skilled in an industry. It cannot be disputed that the Assessee's business is an industry. It also cannot be disputed that the employees of the Assessee are technical persons skilled in software development and, as such, engaged by the Assessee to render services in the industry being run by the Assessee. Thus the software engineer would also come within the purview and ambit of workman under Section 2(s) of the ID Act so long as such a person does not take a supervisory role. The software engineer per se would be a workman; a software engineer rendering supervisory work would not be a workman. In the present case, it is not the case of the Revenue that the persons employed by the Assessee are rendering any supervisory work or assistance. Admittedly, the said persons have been engaged for the purpose of software development, and as such, they are to be regarded as a workman in terms of Section2 (s) of the ID Act.

16.5. The Apex Court has in the case of **Devinder Singh's (supra)** categorically held that when a person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work, such a person would satisfy the requirement and would fail within the definition of the 'workman'. In the present case, a software engineer is a skilled person, a technical person who is engaged by the employer for hire or reward. Therefore, all the said persons would satisfy the

requirement of being a workman in terms of Section 2(s) of the I.D. Act.

16.6. In our considered view, the concept of the workman has undergone a drastic change and is no longer restricted to a blue collared person but even extends to white-collared person. A couple of decades ago, an industry would have meant only a factory, but today industry includes software and hardware industry, popularly known as the Information technology industry. Thus the undertaking of the Assessee being an industrial undertaking, the persons employed by the Assessee on this count also would satisfy the requirement of a workman under Section 2(s) of the ID Act.

16.7. Sri. Aravind, learned Senior Panel counsel of the Revenue, has strenuously argued that the period of 300 days in a year would mean 300 days in the financial year alone, not in the calendar year or otherwise. He has submitted that if the period of 300 days is not satisfied, no such deduction could be allowed.

16.8. Admittedly, the provisions concerned, i.e. Section 80JJ-AA, comes under Chapter-VI-A of the IT Act, which deals with deductions in certain income; this deduction is issued and or permitted as an incentive to the Assessee on fulfilling certain criteria as required under the various provisions under Chapter-VI-A. The incentive of the deduction provided under Section 80JJ-AA is with an intention to encourage the Assessee to employ more and more people, provide employment and, in lieu thereof, permit the employer/assessee to deduct certain amounts from the income when the returns are filed. It is with this object, purport and intent of section 803J-AA of the Act that the present facts and circumstances would have to be considered. It is also required for the Assessing Officer, CITA, Income-tax Appellate Tribunal, as also any other officer to always interpret and or apply the provisions of the Act, taking into consideration the intent and purport of the said provision.

16.9. The meaning or interpretation now sought to be given by Sri. Aravind, learned Senior Panel counsel is that only if the employee were employed for a period of 300 days in a particular

financial year, only then deductions could be claimed, if not the deductions could not be claimed even though such employee has been employed for 300 continuous days or more.

16.10. We would disagree with the said contention. What is required is for a person to be employed for a period of 300 days continuously. There is no such criteria made out for a person to be employed in any particular year or otherwise. If such a restrictive interpretation is given, then any person employed post 5th June of a particular year would not entitle the Assessee to claim any deduction. Thus in order to claim the benefit under Section 80JJ-AA, an employer would have to hire the workmen before 5th June of that year. As a corollary, since the Assessee would riot get any benefit if the workmen were engaged post 5th June, the employer/Assessee may not even employ anyone post 5th June, which would militate against the purpose and intent of Section 8OJJ-AA, which is the encourage creation of new employment opportunities.

16.11. The Income-tax Appellate Tribunal, while considering a similar situation as in **Bosch Limited** (supra) held that so long as the workman employed for 300 days, even if the said period is split into two blocks, i.e. the assessment year or financial year, the Assessee would be entitled to the benefit of Section 80JJ-AA in the next assessment year and so on so forthwith for a period of three years. The Income-tax Appellate Tribunal, having held to that effect, in our considered opinion, it would not be open for the Revenue to now contend otherwise, more so since the said order has attained finality on account of the Revenue not having filed an appeal.

16.12. It is sought to be contended by Sri. K V Aravind, learned Senior Panel counsel that the fact that such an interpretation could not be given is established by the curative amendment carried out in the year 2018 wherein it is clarified that an assesses whose employee completes 300 days in a second year would also be entitled to a deduction for three years therefrom. Thus he submits that the amendment having been brought into force in the year 2018 the present matter relating to the year 2007-2008, the said curative or clarificatory amendment would not come to the

rescue of the Assessee and as such, the finding of the Tribunal in this regard is required to be set aside.

16.13. We are unable to agree with such a submission- the amendment of the year 2018 though claimed curative by Sri. Aravind, we are of the considered opinion that the same is more an explanatory amendment or a clarificatory amendment which clarifies the methodology of applying Section 803J-AA of the Act. If the submission of Sri. K.V.Aravind is accepted, then no employer/ assessee would be able to fulfil the requirement of employing its labour/assessee prior to 5th June of that assessment year so as to claim the benefit of Section 80JJ-AA. Such a narrow and pedantic approach is impermissible. It also being on account of the fact that Section 80JJ-AA relating to deductions under Chapter is an incentive and, therefore, has to be read liberally. In this aspect, we are also supported by the decision of the Apex Court in **Mavilayi Service co-operative Bank Ltd's case (supra)**, wherein the Apex Court has held that a benevolent provision has to be read liberally and reasonably and if there is an ambiguity in favour of the Assessee.

16.14. The Apex Court in the case **Vatika Township (P.) Ltd. (supra)** has also held similarly, in that if there is a benefit conferred by legislation, the said benefit being legislative's object, there would be a presumption that such a legislation would operate with retrospective effect by giving a purposive construction. Thus the clarificatory amendment of the year 2018 can also be said to apply retrospectively for the benefit of the Assessee even though the Revenue contends that there was no provision in the year 2007 permitting the Assessee to avail the benefit of deduction when the employee works for a period of 300 days in consecutive years.

16.15. In view thereof, the substantial question No.1 is answered by holding that the software professional/engineer is a workman within the meaning of Section 2(s) of ID Act, so long as such a software professional does not discharge supervisory functions, the benefit of Section 80JJ-AA can be claimed by an ennployer/assessee even if the employee were not to complete 300 days in a particular assessment year but in the subsequent

> year so long as there is continuity of employment, the Assessee could continue to claim further benefit in the next two years as provided in under Section 80JJ-AA of the Act.
>
> 16.16. Accordingly, we answer Question No.1 by holding that a software engineer in a software industry is a workman within the meaning of Section 2(s) of the Industrial Disputes Act so long as the Software Engineer does not discharge any supervisory role.
>
> 16.17. The period of 300 days as mentioned under Section 80JJAA of the Act could be taken into consideration both in the previous year and the succeeding year for the purpose or availing benefit under Section 80JJAA. It is not required that the workman works for entire 300 days in the previous year.
>
> 16.18. Hence, in the facts and circumstances of the case, the software engineer being workman having satisfied the period of 300 days, the assessee is entitled to claim deduction under Section 80JJAA."

10. Being so, the allowability of deduction u/s. 80JJA has already been decided in favour of assessee in the case of *Texas Instruments (India) (P.) Ltd*. by the aforesaid judgment of Hon'ble High Court of Karnataka cited *supra* for AY 2008-09. Further, following this judgment, the Hon'ble High Court has decided the impugned issue for AYs 2009-10 and 2010-11. Respectfully following the same, we hold the issue in favour of assessee for the AY 2008-09.

11. In identical facts and circumstances of the case for the AYs 2009-10 & 2010-11 also, the Hon'ble High Court of Karnataka ITA No.299 of 2016 and 2109 of 2017 vide separate judgments dated 18.01.2021 has remanded the same issue for both the years in the case of instant assessee holding as follows for AY 2009-10:-

> "2. For the reasons assigned by us in ITA No.340/2014 passed today, the impugned order dated 13.11.2015 is hereby quashed

insofar it dismisses the appeal of the revenue to the extent of challenge of the claim of the revenue to the extent of challenge of the claim under Section 80JJA of the Act is hereby quashed and the matter is remitted to the Tribunal to decide the claim of the assessee for deduction under Section 80JJA of the Act afresh in accordance with law.

Accordingly, the appeal is disposed of."

12. For the AY 2010-11 too, the Hon'ble High Court has remanded the issue back to the Tribunal with identical directions.

13. As we have already decided the impugned issue for AY 2008-09 in favour of the assessee hereinabove in the preceding paragraphs, following the same, we hold the issue in favour of assessee and against the revenue for AYs 2009-10 & 2010-11 also.

14. In the result, the appeal of the assessee is dismissed as infructuous, while all the appeals of the revenue are dismissed, insofar as the issue of deduction u/s. 80JJA is concerned.

Pronounced in the open court on this 9th day of July, 2021.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 9th August, 2021.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.