IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF JANUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.340 OF 2014

BETWEEN:

1. COMMISSIONER OF INCOME
TAX-III, C.R. BUILDING
QUEENS ROAD BANGALORE-
560001.

2. DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE 12(2), BANGALORE.

.... APPELLANTS

(BY MR. E.I. SANMATHI, ADVOCATE)

AND:

M/S. ONMOBILE GLOBAL LTD.,
NO.26, BANNERGHATTA ROAD
J.P. NAGAR, III PHASE
BANGALORE.

... RESPONDENT

(BY MR. K.R. VASUDEVAN, ADVOCATE)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 21.02.2014 PASSED IN ITA NO.1163/BANG/2012 AND ITA NO.1175/BANG/2012 FOR THE ASSESSMENT YEAR 2008-09, PRAYING TO:

(i) DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT.

(ii) SET ASIDE THE APPELLATE ORDER DATED 21.02.2014 PASSED BY THE ITAT, 'B' BENCH, BANGALORE IN APPEAL PROCEEDINGS NO. ITA NO.1163/BANG/2012 AND ITA NO.1175/BANG/2012 FOR ASSESSMENT YEAR 2008-09.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, ALOK ARADHE J., DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) has been filed by the revenue. The subject matter of the appeal pertains to the Assessment Year 2008-09. The appeal was admitted by a Bench of this Court vide order dated 20.04.2015 on the following substantial questions of law:

> "1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the expenditure incurred in connection with the issue of IPO inter alia stamp duty is an allowable expenditure under section 35D of the I.T. Act despite the ruling of Apex Court in the case of General Insurance Corporation V/s. CIT (reported in 286 ITR page 232)?

2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is eligible for claim of deduction under section 80JJAA despite it neither being involved in the activities envisaged in the section 80JJA nor the employees for which the deduction is claimed can be classified as "workmen" as noted by the assessing authority?

3. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is eligible for claim of deduction under section 10A despite it being involved in activity of mobile value added service which is not an IT enabled service by wrongly interpreting the CBDT Notification No.11521?

4. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is eligible for claim of "Legal and Professional Charges" of Rs.1,96,32,131/- and Rs.24,08,000/- as revenue expenditure whereas the same have been incurred for enduring benefit to the business and should

be treated only as capital expenditure as rightly held by first appellate authority?

5. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is eligible for depreciation of 60% on the Media Resource Boards by classifying the same as "Computers" whereas all the technical systems linked to computer cannot be tweaked and termed as "Computers" eligible for higher deduction and the same are to be treated only as "plant and machinery" as held by the Commissioner of Income Tax (Appeals)?".

2. Facts leading to filing of this appeal briefly stated are that the assessee is engaged in the business of providing mobile value added services and products. The assessee filed return of income for the Assessment Year 2008-09, in which it declared the income of Rs.58,96,36,736/- and claimed a refund of Rs.9,63,42,390/-. The aforesaid return was processed by the Assessing Officer under Section 143(1) of the Act and subsequently, regular assessment was taken up. Thereafter, on 30.12.2010, an order of assessment

under Section 143(3) of the Act was passed by the Assessing Authority, by which the assessing authority disallowed the deduction claimed in respect of stamp duty charges, professional and legal charges, depreciation on computers as well as claims made under Section 80JJAA of the Act as well as Section 10A of the Act.

3. The assessee thereupon filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals), by an order dated 27.06.2012,

inter alia allowed the claim of the assessee in respect of disallowance of stamp duty expenditure as well as under Section 80JJAA and under Section 10A of the Act and rejected the claim of the assessee in respect of disallowance of legal and professional charges. Thus, the appeal preferred by the assessee was partly allowed. Being aggrieved, the assessee as well as the revenue filed appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal' for short). The Tribunal, by an order dated 21.02.2014, allowed the appeal preferred by the assessee whereas the appeal preferred by the revenue was dismissed.

In the aforesaid factual background, the revenue has approached this Court.

4. Learned counsel for the revenue submitted that the Assessing Officer had disallowed the portion of stamp duty relating to issue of fresh share capital through IPO amounting to Rs.6,87,770/- as the same was capital in nature and was not a revenue expenditure. It is further submitted that the Commissioner of Income Tax (Appeals) had accepted the aforesaid view of the Assessing Authority, but allowed the alternate claim of the assessee made under Section 35D(3)(c) of the Act. It is also pointed out that the Tribunal has upheld the aforesaid view taken by the Commissioner of Income Tax (Appeals). It is submitted that Section 35D(2)C(iv), the words 'stamp duty' is not mentioned and only expressions namely underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus are mentioned and therefore, the expressions used in Section 35D(2)C are restrictive and not illustrative in nature.

5. With regard to the claim of the assessee for deduction under Section 80JJAA of the Act, it is submitted that the Assessing Officer rightly did not allow the assessee, the deduction claimed by it on the ground that the assessee is not an industrial undertaking engaged in the manufacture of an article or thing but is engaged in providing telecom services. However, the Tribunal, by placing reliance on its previous decision in TEXAS INSTRUMENTS INDIA P. LTD., has allowed the claim of the assessee. It is pointed out that against the aforesaid decision, the appeal was preferred namely ITA No.535/2007 along with ITA No.537/2007 which was decided by an order dated 17.02.2004 and the matter has been remitted to consider the same afresh and therefore, the issue involved in this appeal with regard to the claim of the assessee for deduction under Section 80JJAA of the Act also deserves to be remitted. It is also urged that the Commissioner of Income Tax (Appeals) as well as the Tribunal has erred in granting the assessee, the benefit of deduction of Section 80JJAA of the Act and ignoring the fact that the assessee was engaged in providing telecom services and was not engaged in manufacture of any article and

activities of assessee may not be termed as IT enabled services.

6. Learned counsel for the revenue, with regard to claim of the assessee for deduction under Section 10A of the Act has submitted that the assessee is not engaged in export and is neither engaged in computer software and the sale proceeds of such exports have not been brought into India in convertible foreign exchange. Therefore, the provisions of Section 10A of the Act are not attracted as conditions mentioned therein are not fulfilled. It is also submitted that reliance placed by the assessee on the notification dated 26.09.2000 issued by the Central Board of Direct Taxes is misconceived and the case of the assessee does not fall within the expression content development or animation used in the aforesaid notification. It is also submitted that the Tribunal has not examined the contents of the agreement which discloses the nature of activities and the notification which was relied upon by the assessee dated 26.09.2000 only pertains to information technology enabled products or services. Sofar as the claim of the assessee with regard to

disallowance of professional charges, it is submitted that the Assessing Officer has rightly held that the payments were made in regard to acquisition of a foreign company and therefore, some are in the nature of capital expenditure. It is also pointed out that the Assessing Officer has rightly held that the expenses incurred for patent registration is also capital in nature since patent is capital asset of the company. However, the Tribunal has failed to appreciate the aforesaid aspect of the matter. It is also pointed out that the Assessing Officer has rightly denied the claim with regard to adjustment in depreciation and has re-classified media resource board as plant and machinery but not as computers by holding them to be telecom equipment and has allowed depreciation at 15% as applicable to plant and machinery. However, the Tribunal failed to appreciate that under explanation (a) to Section 36(1)(xi) of the Act, it is evident that the media resource board cannot be considered as equivalent to computer. It is also pointed out that the media resource board is a device to support a combination of functions, performed in conjunction with the computer and servers and the media resource board cannot be called as

computers. It is argued that the boards are connected to computer servers which assist in receiving calls and would function only when attached to computers and boards increase the working capacity of the computers to the extent the computers receive calls and convert them into digital form. In support of aforesaid submission, reliance has been placed on the decision rendered by the Constitution Bench of the Supreme Court in **'COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI Vs. DILIP KUMAR & CO. (2018) 68**

GST 239 as well as **'ABDUL KAYOOM Vs. CIT' 44 ITR 689 (SC)** and **'ALEMBIC CHEMICAL WORKS CO. LTD. Vs. CIT' 177 ITR 377 (SC).**

7. On the other hand, learned counsel for the assessee submitted that the findings recorded by the Commissioner of Income Tax (Appeals) as well as the Tribunal are based on meticulous appreciation of evidence on record which do not call for interference. It is further submitted that Section 35D(3)(c) was considered by the High Court of Bombay in

'CIT Vs. MAHINDRA UGINE AND STEEL CO. LTD.'

(2002) 120 TAXMAN 250 (BOMBAY) and the Division

Bench of Bombay High Court held that the stamp duty paid on debenture issue was an allowable item of deduction under Section 35D of the Act. Therefore, in the light of aforesaid decision of Bombay High Court, the conclusion of the Tribunal with regard to allowance of deduction of stamp duty does not call for any interference. While inviting our attention to paragraph 6.5.4 of the order passed by the Tribunal, it is submitted that the Tribunal has specifically recorded a finding that the business of the assessee falls within the definition of the term industrial undertaking and the assessee is engaged in providing information technology enabled services i.e. computer software and the assessee has claimed deduction only on those payments which were made to workmen who were not employed in supervisory capacity. Therefore, the finding on this issue has been recorded on merits. Therefore, in the fact situation of the case, there is no need to remand the matter. Sofar as the claim of the assessee with regard to deduction under Section 10A of the Act is concerned, learned counsel for the assessee has submitted that the aforesaid issue has been dealt with in paragraph 7.4.4 by the Tribunal, where the Tribunal has examined the activities of the

assessee in detail and has held that the nature of the activity of the assessee would amount to development content and conversion of procured content into mobile readable format. Therefore, the assessee is entitled to the benefit of notification dated 26.09.2000. In support of aforesaid submission, reliance has been placed on the decision of the Delhi High Court in **'CIT-II, NEW DELHI Vs. MLOUTSOURCING SERVICES (P) LTD.' (2015) 228 TAXMAN 54, (DELHI) AND 'CIT-II Vs. McKINSEY KNOWLEDGE CETNRE INDIA PVT. LTD.' DATED 27.03.2015 IN ITA NO.217/2014** and our attention has been invited to paragraphs 9 and 10, respectively.

8. With regard to the legal and professional charges, it is submitted that the Tribunal by assigning valid and cogent reasons which have been recorded in paragraph 9.7 of the order, has rightly allowed the claim for deduction. It is also urged that the adjustment in depreciation has rightly been allowed. In this connection, our attention has been invited to findings recorded by the Tribunal in paragraph 10.6.2 and has been submitted that the Tribunal has taken note of the

functions of the media source board and by placing reliance in the case of 'DCIT Vs. MICROSOFT CORPORATION INDIA P. LTD.' 139 TTJ 40, which deal with the case of routers, has rightly recorded the conclusion that the media resource board is a necessary accessory to be called a computer component. It is further submitted that the order passed by the Tribunal does not call for any interference.

9. We have considered the submissions made on both sides and have perused the record. We propose to deal with the substantial questions of law ad seriatum. The first substantial question of law pertains to the claim of the assessee with regard to stamp duty for an amount of Rs.6,87,770/-. The Assessing Officer has disallowed the aforesaid claim on the ground that the expenditure is capital in nature and not revenue expenditure. Even the Commissioner of Income Tax (Appeals) has accepted the aforesaid finding of the Assessing Officer. However, the benefit of deduction of stamp duty has been granted in view of Section 35D(3)(c) of the Act. The Tribunal has affirmed

the aforesaid finding. The relevant extract of Section 35D(3)(c) reads as under:

> "(c) where the assessee is a company, also expenditure
>
> …
>
> (iv) in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus"

10. The expression 'in connection with issue for public subscription of shares in or debentures of the company' is an expression of wide import. The Supreme Court in 'INDIA CEMENTS LTD. Vs. CIT' 60 ITR 52 has held that expenditure on account of stamp duty even after introduction of 35D, is an admissible expenditure in connection with issue of public subscription. The aforesaid decision was relied upon by High Court of Bombay in MAHINDRA UGINE AND STEEL CO. LTD, supra, and it was held that the aforesaid expression would improve stamp duty payable by the assessee on the debenture issue. In view of aforesaid enunciation of law, the expenses incurred by the assessee

towards stamp duty in connection with issue for public subscription of shares in or debentures of the company is an allowable expenditure under Section 35D of the Act. Therefore, the first substantial question of law is answered against the revenue and in favour of the assessee.

11. Sofar as claim for deduction of the assessee under Section 10A of the Act is concerned, before proceeding further, it is apposite to take note of relevant extract of Section 10A(1) of the Act which reads as under:

> "10A (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the Assessment Year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee."

Thus, from perusal of the relevant extract of Section 10A(1), it is evident that the deduction under Section 10A of the Act

is available to an undertaking if sale proceeds of articles of things of computer software exported out of India or received in or brought into in India in convertible foreign exchange, within a period of six months from the end of previous year or within such further period that the competent authority may allow in this behalf. The Tribunal, in paragraph 7.4.4 has taken note of the activities of the assessee and has held that the assessee is engaged in the business of mobile added value services, which involve content development in its STP unit. It has further been held that the assessee has a dedicated studio in this STP unit where music related content is developed. The assessee procures music and other contents on the third parties. The assessee also uses its studios for content development. It has further been held that assessee is engaged in the activity of developing content and conversion of procured content into mobile readable format and the same would qualify to be classified as content development or data processing and the same would be covered under the notification dated 26.09.2000 issued by the Central Board of Direct Taxes. The High Court of Delhi in ML OUTSOURCING P. LTD., supra and MCKINSEY, supra,

has interpreted the notification and has held that intention of the legislature is not to constrain or restrict but to enable the Board to include several services of products of similar nature in the ambit of Section 10A of the Act. It has further been held that the notification covers within its ambit even the services which cannot be sent abroad. Thus, the Tribunal has rightly held that the assessee is entitled to benefit of deduction under Section 10A of the Act. Thus, the third substantial question of law is also answered against the revenue and in favour of the assessee.

12. The assessee has claimed an amount of Rs.6,68,98,726/- as expenditure incurred as legal and professional charges in its profit and loss account. Out of the aforesaid amount, the Assessing Officer has disallowed an amount of Rs.2,20,40,131/- that is the amount incurred on account of legal and professional charges incurred in connection with acquisition of the Company in France and legal and professional charges to file patent application for a sum of Rs.24,08,000/-. The Assessing Officer has held the same to be in the nature of capital expenditure. The

Tribunal, by following the decision of its co-ordinate Benches, has held that expenditure incurred by the assessee for conducting due diligence in report of a company which was to be acquired by the assessee is revenue in nature and has treated the same to be deductible expenditure under Section 37(1) of the Act. The aforesaid finding of the Tribunal is based on meticulous appreciation of material on record and does not call for any interference. In the result, the fourth substantial question of law is also answered against the revenue and in favour of the assessee.

13. Now we may deal with the claim of the assessee with regard to depreciation on block of assets and has claimed depreciation thereon at the rate of 60%. The Assessing Officer has held that the media resource board is plant and machinery but is not a computer by holding it to be a telecom equipment and allowed depreciation at 15% as applicable to plant and machinery. The expression 'computer system' has been defined in explanation (a) to Section 36(1)(xi) of the Act which reads as under:

"(a) "computer system" means a device or collection of devices including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, or more of which contain computer programmes, electronic instructions, input data and output data, that performs functions including, but not limited to, logic arithmetic, data storage and retrieval, communication and control."

The Tribunal, in paragraphs 10.6.2 to 10.6.4, has discussed the aforesaid issue and has held that function of media resource board is to support a combination of functions performed in conjunction with computers and servers and media resource boards are the boards which are connected to computer servers which assist in receiving calls and would function only when attached to computers. The media resource boards increase the working capacity of computers to the extent that computers receive calls and convert them into digital form. Thus, the media resource boards work in conjunction and as part of computer servers and cannot be served as telecom equipment. In support of aforesaid finding, the Tribunal has relied the decision of

special bench of Mumbai Tribunal in DCIT Vs. DATA CRAFT INDIA LTD. (2010) 40 SOT 295 (MUM). Therefore, the Tribunal has rightly held that media resource boards cannot be treated as plant and machinery. The aforesaid finding cannot be termed as perverse. Thus, the fifth substantial question of law is also answered against the revenue and in favour of the assessee.

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 80JJAA of the Act is that the assessee 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 80JJAA 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 80JJAA 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 80JJAA of the Act is hereby quashed.

In the result, the matter is remitted to the Tribunal to decide the claim of the assessee for deduction under Section 80JJAA of the Act afresh in accordance with law.

In the result, the appeal is disposed of.

Sd/-
JUDGE

Sd/-
JUDGE

RV