

(2012) 04 KAR CK 0210
In the Karnataka High Court
Case No : IT Appeal No. 633 of 2006

Commissioner of Income Tax, Central Circle

APPELLANT

Vs

Lucent Technologies Hindustan Ltd.

RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Income Tax Act, 1961 — Section 260 A

Citation : (2012) 22 TAXMAN 244 : (2012) 208 TAXMAN 89

Hon'ble Judges : K. Govindarajulu, J; D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : E.R. Indra Kumar and E.I. Sanmathi, for the Appellant; Dinesh and S. Parthasarathi, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—Appeal by the Revenue u/s 260A of the Act directed against the order dated 27.10.2005 in ITA. No. 723/Bang/2003 passed by the income tax Appellate Tribunal, Bangalore. The appeal was admitted by this Court to examine the following two questions of law:

3. Whether the Tribunal was correct in reversing the findings of the Assessing Officer that a sum of Rs. 4,91,22,842/-, loss on reinstatement of Foreign Currency Liability as on the last date of the accounting year is an allowable deduction, despite the same having not accrued for payment, nor was payment made?

4. Whether the Tribunal was correct in reversing the findings of the Assessing Officer that in respect of the expenditure incurred over the office premises for renovation and paying compensation to the lessor which was taken on lease by the assessee. Section 32 Explanation 1 of the Act cannot be invoked and the claim of revenue expenditure should be allowed?

2. The assessee is represented by M/s. S. Parthasarathy and Dinesh, Advocates and the Revenue is represented by Shri Indra Kumar, learned Senior Counsel.

3. We have heard the learned Counsel for the appellant and the learned Counsel

for the respondent-assessee.

4. We have been taken through the orders of the Assessing Authority, First Appellate Authority and of the Tribunal. The submission of Mr. Indra Kumar, learned Senior Counsel for the appellant - Revenue is that while Assessing Officer simply followed the view of Commissioner of Income Tax taken in exercise of revisional jurisdiction for the earlier assessment years for the purposes of disallowing the claim of Rs. 4,99,22,862/- which had been claimed as foreign exchange loss by the assessee, insofar as the other question of expenditure claimed towards renovation of office premises etc., the Assessing Officer had rightly disallowed the amount of Rs. 28,98,119/- as it was not in the nature of revenue expenditure but in the nature of a capital investment as the assessee was getting an enduring benefit and the expenditure was more in the nature of an investment etc.

5. Insofar as the first question is concerned, Mr. Indra Kumar while drawing out attention to the judgment of the Apex Court in Commissioner of Income Tax, Delhi Vs. Woodward Governor India P. Ltd., , particularly by drawing our attention to para 21 of the judgment of the Supreme Court reading as under:

21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) Whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide : (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrued to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted Accounting Standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation".

submitted that the view of the Assessing Officer which had been affirmed by the Commissioner of Income Tax (Appeals) has been reversed by the Tribunal but the Tribunal having not kept in mind nor having examined the question of allowing the foreign exchange loss on the guidelines as indicated by the Supreme Court in this judgment, and as the view taken by the Tribunal is at variance with the guidelines issued by the Supreme Court, the order of the Tribunal cannot be sustained.

6. Second submission is that the assessee while can claim depreciation u/s 31(1) in terms of the Explanation 1 in respect of the very type of expenditure cannot be claimed as a allowable deduction u/s 37 of the Act and therefore, submits that

the view taken by the Tribunal in respect of this claim of the assessee is also required to be reversed etc.

7. On the other hand, Shri Dinesh learned Counsel appearing for the assessee submits that the Supreme Court having now concluded the matter to the effect that foreign exchange loss can be independently determined and debited to the profit and loss account, the disallowance by the Assessing Officer is incorrect, that the Assessing Officer having not exhibited his awareness as to whether the denial of the claim of the assessee towards foreign exchange loss on account of fluctuation in the exchange rate particularly in respect of outstanding payments required to be made by the assessee in favour, of foreign suppliers of goods and services, located in a foreign country and payment to be made in foreign currency and having regard to the value of the rupee having varied and the assessee required to incur more expenditure in terms of rupees, the amount had been claimed as a loss and therefore, the Tribunal is fully justified in allowing the loss as claimed. The judgment of the Supreme Court supports the same and therefore, no need to disturb the finding of the Tribunal on this aspect.

8. Insofar as the other question is concerned, submission of Shri Dinesh is that the Assessing Officer though had noticed that out of the total extent of Rs. 28,98,119/- incurred by the assessee towards renovation and putting up of new office premises for the benefit of the assessee, the Assessing Officer has not made a distinction at all between the expenses incurred by the assessee for renovating its office and amount paid to the lessor for getting the structure altered to the requirement of the assessee and disallowing the entire amount was not justified but even assuming for argument sake but without conceding that the amount paid to the lessor does not qualify as revenue expenditure, the amount spent for renovation of the office premises is definitely a revenue expenditure and to that extent the Assessing Officer should have allowed it as a deductible expenditure and therefore submits that even if the order of the Tribunal is required to be interfered, it cannot be for the entire amount but by allowing deduction upto the amount of Rs. 6,79,119/- towards expenses for renovation of the office premises etc.

9. We have bestowed our attention to the submissions made at the bar. We have also perused the judgment of the Supreme Court in the ease of Woodward Governor India (P.) Ltd. (supra). In fact, the Supreme Court has followed this decision in subsequent case of OIL & Natural Gas Corporation Ltd. v. CIT [2010] 189 Taxman 292. The view now taken is that fluctuation in exchange rate can result in loss or profit namely on the last day of the accounting year the day on which the accounts are normally made up and should be factored into determination of loss or profit etc.

10. However, it is also true that the Supreme Court has made the claim for foreign exchange loss to be allowed subject to verification and scrutiny by the Assessing Officer, in the light of the guidelines referred to in para 21 of the judgment in Woodward Governor India (P.) Ltd.'s case (supra) has extracted in

the earlier part of the judgment.

11. When the Assessing Officer passed the assessment order, this judgment was not available and therefore, it could not be noticed by the Assessing Authority. Even when the matter was before the Tribunal and Tribunal also disposed of the matter, the judgment of the Supreme Court neither was not available before any one amongst the lower authorities. But the judgment is now available and it is the duty of this Court to apply the law in all pending matters.

12. We have also noticed that there is a glaring factual error that has crept in, in the assessment order as the Assessing Authority who had in the body of the order indicated towards the end of para 3 of the assessment order that a sum of Rs. 4,99,22,862/- which was claimed as foreign exchange loss by the assessee is disallowed, we notice in the computation part of the order, the actual amount of foreign exchange loss disallowed is only Rs. 49,12,284/-. But when the Tribunal allowed the appeal of the assessee, the Tribunal has directed the admission of foreign exchange loss to the entire extent of Rs. 99,22,862/- on the premise this was the amount which had been disallowed by the Assessing Officer which is a mistake of fact.

13. Therefore, on this aspect of the matter, we set aside the order of the Tribunal and deem it proper to remand the matter to the Assessing Authority to re-determine the income of the assessee by taking note of the claim of the assessee towards foreign exchange loss of Rs. 4,99,22,862/- in the wake of guidelines contained in para 21 of the judgment of the Supreme Court in Woodward Governor India (P.) Ltd."s case (supra).

14. Insofar as the second question is concerned, we find that the Tribunal proceeded on the premise that the entire expenditure is a revenue expenditure and therefore, the stand that Explanation 1 to Section 32 is not attracted to the assessee.

15. We find this view of the Tribunal is not at all tenable either on the language of the Explanation 1 to Section 32 reading as under

32. Explanation 1. Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purpose of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee".

or on the fact situation of the case particularly as the assessee himself had claimed that out of the total expenditure of Rs. 28,98,119 claimed in respect of building etc., an amount of Rs. 6,79,119/- had been claimed as expenses incurred by the assessee for the renovation of the office whereas Rs. 22,19,000/- was the amount paid to the lessor as compensation, to put up a structure or alter

the structure to suit the requirements of the assessee.

16. We find that while at the best, the amount actually spent by the assessee as a revenue expenditure could have been allowed as a deduction the other amount of Rs. 22,19,000/- admittedly paid by the assessee to its lessor can never partake the character of a revenue expenditure. But whether the assessee could claim the benefit of depreciation in respect of this amount, we find it is also not admissible, as even as per the assessee's own version it is not the assessee who has put up the construction and has spent this amount for construction but this is an amount paid to the lessor.

17. As we are remanding the matter to the Assessing Officer on the first question, we direct the Assessing Officer to redo the computation of deductible expenditure on this account keeping in mind our order here indicating that a sum of Rs. 6,73,119/- should be taken as a revenue expenditure incurred by the assessee qualifying for deduction, whereas the sum of Rs. 22,19,000/- cannot be considered as a revenue expenditure incurred by the assessee and not even as a capital expenditure as the assessee has not constructed the building part but the amount is paid to the lessor.

18. In the result, we answer the first question partly in favour of the revenue, the second question partly in favour of both the revenue and the assessee.

19. Therefore, the order of the Tribunal is set aside to this extent and on these two aspects, the matter is remanded to the Assessing Authority. The appeal is allowed in part.