

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री धुव्वुरु आर.एल रेड्डी ,न्यायिक सदस्य एवं श्री जीमंजुनाथ ., लेखा सदस्य के समक्ष
BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: **1184/CHNY/2018**

निर्धारण वर्ष / Assessment Year: 2010-11

**M/s. FIH India Private
Limited,**

(formerly Foxconn India
Private Limited)

SIPCIT Hi-Tech SEZ, SIPCOT
Industrial Park, Phase-II, (NH-4)
Sunguvarchatram – 602 106
Sriperumbudur Taluk,
Kanchipuram District.

The DCIT,
v. Company Circle – 2(1),
Chennai.

PAN: AAACF9390F

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri S.P. Chidambaram, Advocate
: Shri Suresh Periasamy, JCIT

सुनवाई की तारीख/Date of Hearing

: 20.01.2021

घोषणा की तारीख/Date of Pronouncement

: 08.02.2021

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-13, Chennai, dated 17.11.2017 and pertains to assessment year 2010-11.

2. The assessee has raised the following grounds of appeal:-

The order of the Commissioner of Income Tax (Appeals) [“CIT (A)”] is contrary to law, facts and circumstances of the case.

2. Disallowance of service tax written off

2.1 The CIT (A) erred in confirming the disallowance made by the AO for the refund of input service tax written off amounting to Rs.51,65,869.

2.2 The CIT (A) failed to appreciate that the Appellant is operating in Special Economic Zone (SEZ) and as such it is exempt from service tax.

2.3 The CIT (A) ought to have appreciated that since the Appellant is not liable to service tax, the Appellant is eligible to claim the input service tax charged by the suppliers as refund from the Service Tax department.

2.4 The CIT (A) failed to consider the fact that the Service Tax department rejected the refund claim of the eligible input credit and as such the Appellant has written off the same in the Profit & Loss Account.

2.5 The CIT (A) failed to consider that the service tax written off is an allowable expenditure under section 37 of the Act.

2.6 The - CIT (A) erred in arriving at the conclusion that service tax was never treated as income at any point in time to be written off in the P&L account without appreciating the facts of the Appellant in proper perspective.

2.7 Without prejudice to the above, the CIT (A) erred in confirming the service tax written off disallowed by the AO as a prior period item without appreciating the fact that same was written off only during the year when the claim was rejected by the service tax department.

3. The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing, assembling and trading of parts and accessories for mobile phones. The company operates from two units, one unit located in the Nokia Special Economic Zone (SEZ) and the other unit located in the Foxconn SEZ. The assessee has filed its return of income for assessment year 2010-11 on 12.10.2010 declaring 'nil' income after setting off brought forward business losses and unabsorbed depreciation under normal provisions of the Income Tax Act, 1961 (hereinafter the 'Act') and book profit of Rs.80,25,61,835/- under the provisions of Section 115JB of the Act. The case was taken up for scrutiny and during the course of assessment proceedings, the AO noticed that the assessee has debited an amount of Rs.51,65,869/- towards Service Tax written off account. Therefore, called upon the assessee to explain as to why Service Tax written off cannot be disallowed u/s.37(1) of the Act. In response, the assessee submitted that the assessee has availed various input services during the financial year relevant to assessment years 2008-09 & 2009-10 and has followed an accounting method whereby expenses have been debited to profit & loss account excluding Service Tax. The assessee further submitted that Service Tax component paid

against services has been accounted as input tax credit adjustable against output service tax payable on services rendered by the assessee. But, because output services rendered by the assessee are exempt from tax on account of SEZ benefits, the assessee has carried forward unutilized input tax credit to subsequent years and made a claim before the Service Tax Department for refund. Further, when the Service Tax Department has rejected refund claim made by the assessee for reasons best known to them, the assessee has reversed input tax credit and debited into profit & loss account and claimed as expenditure deductible u/s.37(1) of the Act.

4. The AO, however was not convinced with the explanation furnished by the assessee. According to him, Service Tax credit being rejected, cannot impact the profit & loss account. The AO further was of the opinion that even it is to be treated as a profit & loss account item, it was never treated as income at any point in time for it to be written off. The AO further was of the opinion that, if the same is treated as claim of deferred expenditure, the same pertains to earlier years and is therefore a prior period item which is not eligible to be claimed as an item of expenditure. Therefore, rejected the claim of the assessee and

made addition towards Service Tax written off amounting to Rs.51,65,869/-.

5. Being aggrieved by the assessment order, assessee preferred an appeal before CIT(A). Before the CIT(A), the assessee has filed detailed written submissions along with certain judicial precedents which has been reproduced at page 3 to 7 of Id.CIT(A) order. The sum and substance arguments of assessee before the CIT(A) are that Service Tax paid on input services and kept as input tax credit pending adjustment against output service tax payable as an item of expenditure, deductible u/s.37(1) of the Act, when such input tax credit is written off and debited to profit & loss account. The Id.CIT(A) after considering relevant submissions of the assessee rejected the arguments taken by the assessee and confirmed addition made by the AO towards disallowance of Service Tax written off account on the ground that the same is not allowable as deduction u/s.37(1) of the Act. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

6. The Id.AR for the assessee submitted that the Id.CIT(A) has erred in confirming the addition made by the AO towards Service

Tax written off account without appreciating the fact that Service Tax input credit available with the assessee is an item of expenditure deductible u/s.37(1) of the Act, when such input tax credit is reversed and debited to profit & loss account, because of rejection of refund claim made by the assessee by the Service Tax Department. The Id.AR further submitted that the Id.CIT(A) has also failed to appreciate the fact that although part of input tax credit pertains to earlier financial year, but fact remains that expenditure has been crystallized during the present financial year when the refund application was rejected by the Service Tax Department and written off by the assessee in the books of account.

7. The Id.DR, on the other hand strongly supporting order of Id.CIT(A) submitted that, it is not an item of expenditure deductible u/s.37(1) of the Act, because the assessee has never rooted Service Tax paid against input services in to the profit & loss account. The Id.DR further submitted that even if it is deductible, but such expenditure is relatable to previous financial year and hence partakes the nature of prior period expenditure, which cannot be allowable as deduction u/s.37(1) of the Act.

8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. There is no dispute with regard to the fact that the assessee has written off input Service Tax during the impugned financial year relevant to assessment year 2010-11. But, the dispute is with regard to deductibility of input service tax. The AO has disputed deduction claimed by the assessee on three grounds. The first and foremost objection of the AO was that input service tax written off was not an item of expenditure deductible u/s.37(1) of the Act, because the assessee has not rooted said expenditure through profit & loss account. The second observation of the Id.AO is even it is to be treated as profit & loss account item, it was never treated as income at any point in time. The third observation of the AO was that said expenditure relatable to previous financial year and hence, partakes the nature of prior period item which is not eligible to be claimed as an expenditure for the current financial year. We have gone through the reasons given by the AO for denying the deduction claimed towards Service Tax written off account and find that none of the reasons given by the AO is in accordance with law, because service tax paid on input services is an item of expenditure deductible u/s.37(1) of the Act. But, if assessee

claims input tax credit on said Service Tax, then the same cannot be claimed as deduction in the profit & loss account once again. In this case, the AO has not disputed the fact that the assessee has not debited Service Tax component paid on input services into the profit & loss account. Therefore, we are of the considered view that there is no merit in the observation of the AO that it is not an item of profit & loss account. In so far as second observation of the AO that the assessee has never treated said service tax as an item of income, we find that the assessee has paid service tax on input services and hence the question of treating said service taxes as an item of income does not arise because any taxes paid on purchase of goods or services is part of cost of goods or services which can be either debited to profit & loss account when the assessee has not availed input tax credit or if assessee avails input tax credit then the Service Tax component is taken out from the profit & loss account and treated as current assets pending adjustment against output taxes payable on goods or services. In this case, the assessee has accounted input services exclusive of service tax and treated service tax component as input tax credit pending adjustment. Further, when the application filed by the assessee for refund was rejected by the Department, the

assessee has written off said input tax credit and debited in to profit & loss account. Therefore, the second observation of the AO would also fails. Coming to the third observation of the AO, the AO observed that even if it is deductible as expenditure but said expenditure is relatable to earlier financial year and partakes the nature of prior period item which cannot be allowed as deduction. We do not find any merit in the observation of the AO for the reason that although part of input tax credit pertains to earlier financial year but the same has been carried forward to subsequent financial year as per the provisions of law. Further, the same has been claimed as refund with respective department during the current financial year. Therefore, when the input service tax credit is carried forward from earlier financial year to the current financial year, it partakes the nature of taxes paid for the current financial year and hence deductible as and when the assessee has debited into the profit & loss account. Therefore, on this count also the observation made by the AO fails. Further, it is well settled principle of law by the decision of various courts and Tribunals that input tax credit / CENVAT is deductible u/s.37(1) of the Act, when such input tax credit is reversed or written off in the books of account. The Hon'ble Gujarat High Court in the case of CIT vs. Kaypee Mechanical

India (P) Ltd., (2014) 223 taxmann 346 has held that Service Tax paid out of pocket is an item of expenses deductible u/s.37(1) of the Act. The ITAT, Ahmedabad in the case of Girdhar Fibres P. Ltd vs. ACIT in ITA No.2027/Ahd/2009 has held that input CENVAT incurred but not adjusted against output CENVAT is deductible as item of expenditure when such input credit is written off in the books of account.

9. In this view of matter and considering facts and circumstances of this case and also by following the ratios laid down by various Courts and Tribunals, we are of the considered view that input service tax credit is deductible u/s.37(1) of the Act when such input tax credit is written off in the books of account. But, facts with regard to refund claim made by the assessee and rejection of such refund claim by the concerned authorities for the impugned assessment year was not on record. Therefore, to ascertain the fact with regard to the claim of the assessee with regard to rejection of refund claimed, we set aside the issue to the file of the AO for the limited purpose of verification of claim of the assessee regarding rejection of refund claim. In case, the assessee is able to substantiate its claim with necessary evidence before the AO, then the AO is directed to

delete addition made towards disallowance of Service Tax written off account.

10. In the result, appeal filed by the assessee is treated as allowed for statistical purpose.

Order pronounced on 8th February, 2021 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)
(Duvvuru RL Reddy)

न्यायिक सदस्य/Judicial Member

Sd/-

(जी. मंजुनाथ)
(G. Manjunatha)

लेखा सदस्य /Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 8th February, 2021.

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |