

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 186 of 2013**

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COMMISSIONER OF INCOME TAX I....Appellant(s)

Versus

N J INDIA INVEST PVT LTD....Opponent(s)

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Appearance:

MR MANAV A MEHTA, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**  
and  
**HONOURABLE MS JUSTICE SONIA GOKANI**

**Date : 01/04/2013**

**ORAL ORDER**

**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short) dated 21.9.2012. Following question has been presented for reconsideration:-

"Whether on the facts and circumstances of the case and law, the Hon'ble Tribunal erred in not considering the expenditure of software support and maintenance charges as capital expenditure?"

2. Issue pertains to expenditure of Rs.1.02 crores ( rounded off) expended by the assessee and whether the same should be treated as capital or revenue expenditure. For the

assessment year 2008-09 the Assessing Officer noticed that the assessee had debited in the profit and loss account, amount of Rs.1.02 crores (rounded off) towards software support and maintenance charges. Out of which, a sum of R. 97.75 lakhs pertained to software development and upgradation charges. The Assessing Officer was of the opinion that software development and upgradation would give the assessee an enduring benefit and such expenditure, therefore, should be treated as capital in nature. After hearing the assessee on the issue, he disallowed such expenditure and treated the same as capital in nature making following observations:-

“ On verification of the case records, it was noticed that the assessee has debited in the Profit & Loss Account an amount of Rs.1,02,83,705/- towards Software support & Maintenance charges. Further, on perusal of the details furnished, it was noticed that an amount of Rs.97,75,000/- shown to be pertains to software development and upgradation charges. As the software development gives an enduring benefit to any organization and so to the assessee company as well, vides notice u/s142(1) of the I.T. Act dated 25.10.2010 the assessee was asked to justify the allowability of software support and maintenance charges with supporting proof and evidences. In response to the same, the assessee has filed ledger account of Software development and upgradation charges wherein total expenditure under this head was mentioned at Rs.97,75,000/- as against Rs.1,02,83,705/- debited in the

Profit & Loss Account under the head Software Support & maintenance charges. However, no explanation/justification were filed by the assessee regarding allowability of such expenditure. Software development is a capital expenditure and, therefore, it will not find place in the Profit & Loss Account. It gives an enduring benefit to the assessee and, therefore, the same comes very well within the meaning of capital expenditure. As stated above, since the software development and maintenance charges of Rs.1,02,83,705/- is capital expenditure in nature and is not allowable as revenue expenditure, the same is disallowed and added to the total income of the assessee. However, the depreciation as applicable shall be allowed on the said amount. Penalty proceedings under Section 271(1)(c) of the I.T. Act are being initiated for furnishing inaccurate particulars and concealment of income.”

3. Issue was carried in appeal by the assessee. CIT(Appeals) reversed the decision of the Assessing Officer accepting the assessee’s contention that the expenditure was revenue in nature.

4. Revenue, thereupon, approached the Tribunal. The Tribunal by impugned judgment rejected the Revenue’s appeal making following observations:-

“ In the present case also, the services as provided by the service provider of such nature which are necessary of data administration and relating to I management of software etc. In all such services which are enumerated clause (1) of the agreement there is always scope of change in technology. Therefore, the ratio as laid by the Hon’ble

Punjab & Haryana High Court rendered in the case of Varinder Agro Chemicals Limited, (supra) is applicable on the facts of the present case also. Moreover, the Assessing Officer has disallowed the expenditure on software treating it as capital expenditure and therefore it will not find place in the profit and loss account. Since, it gives enduring benefit to the assessee. The Hon'ble Delhi High Court judgment rendered in the case of Asahi India Safety Glass Ltd. (supra) has held that the test of enduring benefit is not a certain or conclusive test which the courts can apply almost by rote- what is required to be seen is the real intent and purpose of the expenditure and whether the expenditure results in creation of fixed capital for the assessee. In the case in hand, from the services as provided by the service provider no fixed capital for the assessee is created. Moreover, the software developed during the course of providing services would remain under control and ownership of the service provider. The assessee would not have any right on the same. In this view of the matter, we do not find any infirmity into the order passed by Ld. CIT(A). This ground of Revenue's appeal is dismissed."

5. Having heard learned counsel Mr. Manav Mehta for the appellant and having perused the document on record, we notice that the assessee had expended the said sum, towards software support and maintenance charges. The assessee had entered into contract with one Finlogic Technologies (India) Pvt. Ltd., which had agreed to provide certain services of the following type:-

" i) Data administration services, for example

maintenance of huge data base of the company, fine tuning of the data, avoiding the crashing of system, logical segregation of data, back up services, monitoring of data etc. etc.

ii) Data centre management services, for example management of server, management of virtual private network, security of data, fire walling of data, etc.

Information and technology support services, for example providing of technical support to all the employees of the company, maintenance of efficient working of the I.T system, maintenance of computers, laptops etc.

iv) Information technology infrastructure management and asset management services like making assessment of requirements/ replacement of the servers, hardware, EPX servers, routers, etc.

v) Software asset management services like management of all the software, management and renewal of licenses for software, sourcing and installation of software, checking of access by unauthorized persons to the software of the company etc.

vi) System administration services like providing of services in connection with the selection and use of data software, etc.

vii) Information technology security services. For example controlling the data theft, monitoring of data; providing checks' on unauthorized access to the data etc.

viii) Services provided in connection with the facilitating and assisting communication through technology like providing software support for conferencing, maintaining EPBX systems for smooth communication with the branches situated all over India of the company, services provided for sharing of data with the branches as per the direction of the company, maintenance of websites for the clients, etc.



ix) Web hosting services, for example services provided for domain management and management of space, internet and internet Protocol address management etc.”

6. These services, thus essentially were in the nature of maintenance and support services providing essentially backup to the assessee, who had procured software for its purpose. These services, thus essentially did not give any fresh or new benefit in the nature of a software to be used by the assessee in the course of the business but were more in the nature of technical support and maintenance of the existing software and hardware. For example service provider had to provide technical support to the employees of the company and to maintain the computers and the laptop, had to supply security service for controlling the data theft and providing checks on access by unauthorized persons to the data etc.

7. In essence, these services, therefore, were in the nature of maintenance, back up and support service to the existing hardware and software already installed by the company for the purpose of its business. The Tribunal, in our opinion, therefore, rightly held that the expenditure was revenue in nature. The Tribunal observed that even the test of enduring

benefit, may, in given set of circumstances, break down as held by Delhi High Court in the case of ***Commissioner of Income Tax vs. Asahi India Safety Glass Limited*** reported in **(2011) 245 CTR Reports 529** in which it was observed, *inter alia*, that the expenditure which is incurred enables the profit-making structure to work more efficiently leaving the source of the profit- making structure untouched would be an expenditure in the nature of revenue.

8. In our opinion, thus, no question of law arises. Tax Appeal is, therefore, dismissed.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

SUDHIR

