

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 12th DAY OF APRIL, 2010

PRESENT

THE HON'BLE MR.JUSTICE K.L.MANJUNATH
AND
THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

I.T.A.NO.2775/2005

BETWEEN:

M/s. Cyber Bazar (India) (P)Ltd,
Now known as WebEx Communications
India Pvt.Ltd,
No.2, North Park Road,
Kumara park East,
Bangalore-560 001,
Rep. By its Managing Director
Sri.Kiran A Datar
Aged about 32 years,
Son of Sri.A.B.Datar

... APPELLANT

(By Sri.B.Parthasarathi, Counsel with Sri.Mallaha Rao,
counsel for Appellant)

AND:

The Asst.Commissioner of Income-tax,
Circle 11(2), BANGALORE-1 ... RESPONDENT

(By Sri.M.V.Seshachala, Adv.

This ITA is filed u/s.260-A of IT Act, praying to
allow the appeal and set aside the order of the ITAT
bearing ITA NO.3151/B/2004 dt.31.3.2005 in the
interest of justice and equity.

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THIS APPEAL COMING ON FOR HEARING THIS DAY, NAGARATHNA J, DELIVERED THE FOLLOWING:

JUDGMENT

The assessee is challenging the order of the Appellate Tribunal passed in ITA NO.3151/Bang/2004 dt.31.3.2005 by raising the following substantial question of law:

- a) Whether on the facts and in the circumstances of the case, the services provided by the appellant by way of voice mail and teleconferencing services to corporate customers would fall within the definition of "telecommunication services" and, therefore, the profit derived therefrom would be eligible for deduction U/s.80 IA(2A) of the Act?

2. The facts leading to the filing of this appeal are that the appellant-assessee is having a business of providing voice mail and tele-conferencing services to corporate bodies. According to the appellant, he has obtained licence from the Department of Telecommunications for the purpose of providing the aforesaid services. That the appellant has made use of high end networking equipment and computer software to provide tele-conferencing services to big corporates and that under section 80-IA of the Income Tax Act, a special provision giving deduction to the assessee in

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respect of any profits and gains derived by it from an undertaking or an enterprises that is carrying on such a business is provided. According to the assessee, it is having tele-communication services which is coming within the scope of the section and therefore, he is entitled to the deduction in terms of the said section. For the assessment year 2001-02, the assessee filed its return of income claiming the said deduction under section 80-IA of the Act. The Assessing Officer requested the assessee to justify its claim for deduction and after receiving the response of the assessee, declined to accept the claim of the appellant under sec.80-IA of the Act by his assessment order dt.27.2.2004.

3. Aggrieved by the said order, an appeal was preferred by the assessee before the Commissioner of Income Tax, (Appeals), Bangalore. The Commissioner also upheld the disallowance made, by holding that the service rendered by the appellant did not fall within the definition of the term telecommunication services, by his order dt.30.9.2004. On further appeal



before the Appellate Tribunal also, orders of the authorities below were upheld. Being aggrieved by the said orders, the assessee has preferred this appeal by raising the aforesaid substantial question of law:

4. We have heard the learned counsel for the assessee and the learned counsel for the revenue.

5. It is contended on behalf of the appellant that the nature of services rendered by the appellant is covered within section 80-IA (4)(ii) of the Income Tax act and therefore in terms of section 80-IA(1) read with section IA(2)and (2A), it is entitled to claim deduction and that the authorities were not correct in holding that the nature of the services rendered by the assessee did not come within the scope of 80-IA and thereby rejecting the claim made by the assessee. He has drawn our attention to various clauses of section 80-IA to contend that the said deduction is given to various services and facilities such as infrastructure facility, telecommunication services, industrial park or activities of special economic zone or enterprises or undertaking in a special economic zone, reconstruction or revival of

power generating plant and the object of the said section is to encourage these business and units. The authorities concerned including the Tribunal ought to have granted the deduction under sec.80-IA of the Act.

6. Per contra, it is contended on behalf of the revenue that the provision of section 80-IA has to be read carefully and that it is only an undertaking or an enterprises coming within the scope of section 80-IA (1) that the deduction would be available and consequently the services rendered also should come within the scope of telecommunication services and in the instant case, the assessee is rendering only voice mail service which is not coming under the definition of telecommunication services under sec.80-IA(4)(ii) of the Act and therefore the authorities under the Act as well the Tribunal were justified in not granting the deduction under sec.80-IA. He therefore submits that the appeal being devoid of merits has to be dismissed.

7. Having heard the counsel on both sides and on perusal of the material on record, the only point that arises for our consideration is as to whether the service



rendered by the assessee comes within the scope of sec.80-IA(4)(ii) of the Act. In order to answer the said question, it is necessary to extract the relevant portions of the said section:

“80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.-

- (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business, being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of profits and gains derived from such business for ten consecutive assessment years.
- (2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication

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service or develops an industrial park (or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power (or undertakes substantial renovation and modernization of the existing transmission or distribution lines);

(Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words, "fifteen years", the words, "twenty years" had been substituted)

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

(4) This section applies to-

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(ii) any undertaking which has started or starts providing telecommunication services whether basic or cellular including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April 1995, but on or before the 31st day of March, 2005;

Explanation.- For the purposes of this clause, "domestic statellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

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8. On a reading of the said provision, it becomes clear that only if the assessee is an "undertaking", that section 80-IA(4)(ii) would be applicable and not if it is an enterprise, as the telecommunication service is in respect of an "undertaking" and not an "enterprise". Therefore, the authorities have not applied their mind to this aspect of the matter as to whether the appellant- assessee comes within the scope of the term, "undertaking" or within the scope of the term, "enterprises". If the assessee's business is merely an enterprise then, it would not be entitled to any deduction under the section. On the other hand, if it is

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considered to be an undertaking, then it would be eligible to such a deduction subject to other conditions of the said section being fulfilled. Therefore, the question as to whether the assessee is an undertaking or enterprise has to be determined keeping in mind section 80-IA(i), (ii), (ii)(a) and (4)(ii). In fact Section 80-IA(4)(ii) speaks of an undertaking and does not refer to an enterprise and also sub-section (ii)(a) speaks of an undertaking in so far as telecommunication service is concerned. Hence, if the assessee is an undertaking within the meaning of the said section, then only it will be eligible for claiming deduction under section 80-IA of the Act.

9. Further the question as to whether the services rendered by the assessee comes within the definition of 'telecommunication service' has also not been taken into consideration in its proper perspective and it has been answered that the assessee's service does not come within the scope of telecommunication service. Though the Income Tax Act does not define as to what telecommunication service, nevertheless, it would be



appropriate to refer to the definition of telecommunication service as contained in section 2(k) of the Telecom Regulatory Authority of India Act, 1997.

As the said Act directly deals with telecommunication and other such allied matters, the said definition can be referred to for the purpose of interpreting telecommunication service within the meaning of section 80-IA(4)(ii) of the Act. The definition of telecommunication services under the said Act, reads as follows:

“Section 2(k) “telecommunication service” means service of any description (including electronic mail, voice mail, data services, audit text services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.

Provided that the central government may notify other service to be telecommunication service including broad casting services.”

10. It is necessary to note that while the definition of telecommunication service under sec.2(k) of Telecom



Regulatory Authority of India Act, 1997 is an exhaustive definition, it expressly includes electronic voice mail, data service, audit text services video text services also. Under sec.80-IA(4)(ii) of the Income Tax Act, the definition is an inclusive definition without sepecificing the aforesaid services. Therefore on a conspectus reading of both the definition under Telecom Regulatory Authority of India Act as well as sec.80-IA(4)(ii) of the Income Tax Act, the question as to whether the service rendered by the appellant comes within the meaning of telecommunication service has to be determined by taking into consideration the nature of the service rendered by the assessee.

11. Therefore, we deem it proper to remand the matter to the Assessing Officer to consider the entire issue in the light of the aforesaid observation and give a finding as to whether the appellant-assessee is an undertaking within the meaning of section 80-IA(4)(ii) of the Act and also to decide as to whether the nature of service rendered by the assessee comes within the meaning of telecommunication service.

12. For the aforesaid reasons, we think that the substantial questions of law, does not require to be answered in this appeal.

13. Accordingly, the matter is remanded back to the Assessing officer by setting aside all orders.

Sd/-
JUDGE

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