

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM AND SHRI RAHUL CHAUDHARY, JM

ITA No. 1032/Mum/2021

(Assessment Year 2017-18)

M/s Arkema Chemicals India P. Ltd. D043, (1), Trans Thane Creek, MIDC industrial Areal Shirvane Village, Navi Mumbai-400 706	Vs.	The Asst. Commissioner of Income Tax, Circle 15(1)(1), Room No.470, 4 th Floor, Aayakar Bhavan, M.K. road, Mumbai-400 020
(Appellant)		(Respondent)
PAN No. AAACC6482F		

Assessee by	:	Shri Ajay R Singh, AR
Revenue by	:	Shri Vinod Bhaskaran, Sr. Dr

Date of hearing:	04.04.2022
Date of pronouncement :	22.04.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against the order passed by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre dated 8th April, 2021 confirming disallowance of depreciation on software.
02. The brief fact of the case shows that assessee is a company engaged in the business of manufacturing of fertilizer chemicals and paints. It filed its return of income on 31st October, 2017 at a loss of Rs. 1,84,26,369/- under normal provisions and at a book profit of Rs. 6,40,71,301/- under section 115JB of the Act. The return of income was selected for scrutiny and assessment order

under section 143(3) of the Act was passed on 22nd December, 2019 determining the total income of the assessee at Rs. 2,44,00,300/-.

03. Only dispute involved in this appeal is, whether the depreciation is allowable to the assessee on software ERP SAP at the rate of 60% as claimed by the assessee considering the same as computer or @ 25% as claimed by the learned assessing officer considering the software as intangible asset. The disallowance of depreciation on software ERP SAP is of Rs. 3,84,70,669/-.
04. The fact shows that the during the year assessee has installed ERP SAP software amounting to Rs. 10,99,16,199/-. The assessee claimed deprecation thereon under section 32 of the Act at the rate of 60%. The learned Assessing Officer held that deprecation at the rate of 60% is allowable only on computers and software embedded in such computers which are part and parcel and are inseparable. Therefore, according to the learned Assessing Officer assessee has acquired only the license and hence, it is eligible for depreciation at the rate of 25% applicable to intangible assets. The Assessing Officer relied on the decision of the co-ordinate bench in case of M/s Harland Clarke Holding Software India Pvt. Ltd. Vs. DCIT in ITA no. 113/Chny/2017 dated 30.10.2018.
05. The assessee preferred the appeal before the learned CIT(A). The learned CIT(A) held that depreciation at the rate of 60% is allowable only on system software which are integral part of the computer, however, the claim of

the assessee was depreciation at the rate of 60% on ERP SAP software which is nothing but a software for the automation of office working. The learned CIT(A) held that software is sold to the assessee for certain fixed period and with certain restrictions and therefore, it is in the nature of license for a certain period and after expiry of the same assessee has to pay more fees as per the terms and conditions to use those software. As per CIT(A), it is like system software. He therefore held that the software purchased by the assessee is application software and assessee holds only the license to use the same. He therefore held that software ERP SAP is not an integral part of the computer and therefore is an intangible asset license to the assessee and therefore, assessee is entitled to depreciation at the rate of 25% only. Accordingly, the disallowance of Rs. 3,84,70,669/- was confirmed.

06. The learned AR referred to the depreciation Schedule as New Appendix-I and submitted that in Part-A (tangible assets), serial no. 5 of plant and machinery, where 'computers including the computer software' are eligible for depreciation at the rate of 60%. He further referred to note No. 7 where computer softwares are defined. He submitted that there is no justification to consider the depreciation at higher rate only on systems software. He submitted that there is no such condition in the Appendix-1 is laid down. He further relied on the decision of Hon'ble Madras High Court in CIT vs. Computer Age Management Services (P.) Ltd. [2019] 109 taxmann.com 134 (Madras), wherein a software license acquired by the assessee is

allowed depreciation at the rate of 60%. He further referred to the decision of the Hon'ble Bombay High Court in case of CIT vs. I-Flex Solutions Ltd [2014] 46 taxmann.com 88 (Bombay), wherein deprecation on the software was allowed at the rate of 60% and decision of co-ordinate Bench in case of ACIT vs. Indiabulls Venture Ltd. dated 2nd July, 2020, wherein also the depreciation at the rate of 60% was allowed on software.

07. The learned Departmental Representative vehemently supported the order of the lower authorities. He submitted that under the head plant and machinery, the software included along with computer only refers to system software and not application software. He further referred that 'intangible assets' in Appendix-A part B are entitled to depreciation at the rate of 25%. He submitted that assessee has merely acquired a license to use the SAP ERP for a certain period. The right to use this software is intangible assets therefore the lower authorities have correctly allowed depreciation at the rate of 25% only. He therefore submitted that the software purchased by the assessee is not a 'system software' but 'application software' and only license to use of that software is available. The assessee has acquired only intangible asset. Therefore, the assessee is eligible for deprecation at the rate of 25%.
08. We have carefully considered the rival contentions and judicial precedents cited before us. We have also considered the decision of the lower authorities. The issue

involved in this appeal is where the assessee has purchased license of ERP SAP, assessee is entitled to the depreciation at the rate of 60 % as covered in New Appendix I of Rule 5 of ITAT Rules in heading of machinery and plant in part A of tangible assets at serial number 5 "computers including computer software (see note 7 below this table) entitled to depreciation at the rate of 60% or in Para B being licenses, intangible assets entitled to depreciation at the rate of 25%. We find that entry number 5 under Part A allows depreciation at the rate of 60% on computers including computer software. Note-7 states that computer software means any computer programme recorded on any disk, tape, perforated media or other information storage device. Apparently, it does not make any difference between application system software or application software. Further, part B of appendix-1 prescribed depreciation at the rate of 25% on certain intangible assets such as knowhow, patents, copy rights trademarks, license fee, franchise or any other business or commercial right of similar nature. Therefore, the question that arises is the license obtained by the assessee would fall in the definition of computer software so as to make it eligible as tangible asset and then depreciation rate at the rate of 60% will apply. If it is a license only then naturally it would be intangible assets eligible for depreciation at the rate of 25%. We now find that the issue is squarely covered in favour of the assessee by the decision of Hon'ble Madras High Court in the case of Computer Age

Management Services (P.) Ltd. [2019] 109 taxmann.com 134 (Madras)/ (2019 (7) TMI 1153 - MADRAS HIGH COURT), wherein depreciation held that software license acquired by the assessee was in nature of application software and is eligible for depreciation at the rate of 60%. The honourable court held as Under:-

7. As noticed above, the assessee is in the business of registrar and transfer agent as licensed by the SEBI handling large volume of market sensitive data and information, which is available only through general customized application software. The assessee acquired software licenses capitalized during the relevant years in the books of accounts and claimed depreciation at 60%. In paragraph 20 of the order passed by the Tribunal, the nature of items, on which, the assessee claimed depreciation at 60%, has been listed out and they are 17 in number, from which, we find that substantial amount of server licences, which have been obtained by the assessee are customized and some of which are single user licenses.

8. The question would be as to whether the software application, which was acquired by the assessee would fall under Entry 5 of Part A of New Appendix I, which states that computers including computer software are entitled to depreciation at 60%. Note 7 of the Appendix defines the expression '**computer software**' to mean any programs recorded on CD or disc, tape, perforated media or other information storage devices.

9. The case of the Revenue is that software are licences and that they are intangible assets and would fall under Part B of New Appendix I, which deals with knowhow, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

10. We find that Part B of New Appendix I is a general entry whereas Entry 5 of Part A of New Appendix I is a specific entry read with Note 7. In the instant case, the Tribunal, in our considered view, rightly held that the assessee is eligible to claim depreciation at 60%.

11. In the decision rendered by **a Division Bench of this Court** in the case of **CIT Vs. M/s.Cactus Imaging India Private Limited [reported in (2018) 406 ITR 406]**, to which, **one of us (TSSJ) was a party**, an identical question came up for consideration wherein the object was printer (computer printer). This Court, after taking into consideration as to how the entries would be interpreted, referred to the decision in the case of **Bimetal Bearings Ltd. Vs. State of Tamil Nadu [reported in (1991) 80 STC 167]** and held as hereunder :

"9. The Hon'ble Division Bench took note of the decision of the Hon'ble Supreme Court pointing out that the 'entry' to be interpreted is in a taxing statute; full effect should be given to all words used therein and if a particular article would fall within a description, by the force of words used, it is impermissible to ignore the

description, and denote the article under another entry, by a process of reasoning.

10. It was further pointed out that the rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous.

11. By applying the rule of interpretation, we find that the relevant entry under old appendix I Clause III (5) states computers including computer software and the Notes under the Appendix defines 'computer software' in Clause 7 to mean any computer program recorded on disc, tape, perforated media or other information storage device. Noteworthy to mention that the notes contained in the appendix, the term 'computer' has not been defined. Therefore, as pointed out by the Division Bench in *Bimetal Bearings Ltd. (supra)*, if a particular article would fall within the description by the force of words used, it is impermissible to ignore the word description. Thus, going by the usage of the equipment purchased by the petitioner, we have to take a decision."

12. As held in the above decision, if a particular article would fall within the description by the force of the words used, it is impermissible to ignore the word 'description' and going by the usage of the equipment purchased by the assessee, a decision has to be arrived at. We find that there is no error in the decision arrived at by the



Tribunal by taking note of the specific entry in contra distinction with the general entry. Therefore, the first substantial question of law has to be necessarily answered against the Revenue.”

09. Therefore, respectfully following the decision of Hon'ble Madras High court, we direct the Assessing Officer to delete the disallowance of depreciation on computer software of Rs. 3,84,70,669/-. Accordingly, the ground no. 1 of the appeal is allowed.

010. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22.04.2022.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 22.04.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai