In the Income-Tax Appellate Tribunal,
Delhi Bench 'C', New Delhi

Before : Shri H.S. Sidhu, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 6836/Del./2014
Assessment Year: 2010-11

D.C.I.T., Circle 10(1), New Delhi. **(Appellant)**	vs.	G.E. Capital Business Process Management Services Pvt. Ltd., 401, & 402, 4th Floor, Aggarwal Millennium Tower, E-1, 2, 3, Netaji Subhash Place, Wazirpr, New Delhi.(PAN-AABCG0222E) **(Respondent)**

Appellant by	Sh. Naveen Chandra, CIT/DR
Respondent by	Sh. Tushar Jarwal, Advocate & Sh. Rahul Satija, Advocate

Date of Hearing	14.09.2017
Date of Pronouncement	05.10.2017

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the Revenue against the order of the CIT(A)-XV, New Delhi dated 19.09.2014 for the assessment year 2010-11 on the following grounds :

> *"1. Whether on the facts and circumstances of the case and law, the Ld. CIT(A) erred in deleting the addition of Rs. 9,98,65,912/- made on account of less receipts disclosed representing to TDS claimed despite the fact that the assessee Company did not disclose the receipt in the books of accounts and netted off the same in their ledgers.*

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the aggregate disallowance of Rs. 3,69,40,306/- on account of License fee, Connectivity charges and co-ordination charges paid to a US based company M/s GE Capital Corporation for use of 'Vision Plus' software holding the same as revenue in nature and allowable u/s 37 of the Act.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not following the decision of his predecessor CIT(A) for the assessment year 2007-08, who had held the same as capital expenditure.

2. The brief facts of the case are that the assessee company is engaged in carrying out back end operations of this activity, i.e, transaction processing on cards, billing, updating of collections, statements of account, resolving card-members queries etc. The case was referred to TPO 1(5) for determining Arm's Length Price u/s. 92CA(3) in respect of international transactions entered into by the assessee during the financial year 2009-10. The TPO, after examining the records, did not record any adverse inference and accordingly, the Assessing Officer completed the assessment. During the course of hearing the Assessing Officer observed that the assessee had shown total receipts of Rs.193,95,54,582/- on which total TDS was made of Rs.5,67,76,413/-. The Assessee had shown in its profit and loss account as revenue receipts of Rs.110,67,56,397/-. The Assessing Officer referred to section 198 of the IT Act and accordingly observed that all sums on which TDS have been deducted in accordance with the provisions of TDS, shall, for the purpose of computing the

income of the assessee, be deemed to be the income. Accordingly, the assessee company should have disclosed in their profit & loss account all receipts, on which TDS have been deducted. Accordingly, the AO observed that the assessee has less disclosed the receipts by Rs.86,58,13,253/- in spite of claiming TDS on this amount. From the submissions of the assessee, the AO was satisfied on the payment service of Rs.31,54,82,407/- on account of re-imbursement of personal cost of SBI Cards and on account of operating and other expenses of Rs.45,04,64,924/- aggregating to total expenses of Rs.76,59,47,341/-, as the same were reduced from the profit and loss account as per schedule 10 & 11. Regarding balance of Rs.9,98,65,912/-, the assessee submitted written reply which is as under :

> *"That the expenses on account of reimbursement of personnel cost from SB/ cards and payment services Rs. 31,54,82,407/- and on account of operating and other expense of Rs. 45,04,64,934/- aggregating to total expenses at Rs. 76,59,47,341/- has been reduced from the expenses as evident from the P&L Account wherein both the amounts has been reduced as per schedule 10 & 11 of the P&L account. Therefore this amount of Rs. 76,59,47,341/- is clearly appearing in the P&L account and tantamount to receipts disclosed in the P&L account Regarding balance amount of Rs, 9,98,65,912/- the AR of the assessee filed written reply detailed below:*
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> *During the subject year, the assessee had entered into certain cost sharing arrangement with other companies. In terms of the said arrangement assesses incurs costs on behalf of these companies and subsequently recovers the costs allocated on one to one basis from these companies. The assessee complies with the provisions of Chapter XVIU-B wherever applicable while making payments to various vendors for the portion of expenditure pertaining to those companies as well. (Refer details filed vie*

submission dated January 30,2014 wherein, we have provided entity wise break-up of these expenses allocated)"

3. From the above submissions, the AO was not satisfied and observed that the above amount has not been disclosed in the profit and loss account as per section 198 of the IT Act and added to the income of the assessee.

4. Further, the ld. Assessing Officer observed that the assessee has paid Rs.3,69,40,306/- to GE capital Corporation USA for use of Vision Plus Software as per end user license agreement dated 07.07.2000. the AO was of the view that the license to the software provides enduring benefit to the assessee and therefore, held the payments in pursuance of the end user license agreement as capital in nature and therefore, disallowed the license fee and data service management charges paid to GE Capital Corporation, USA for use of software aggregating to Rs.3,69,40,306/- and completed the assessment. Aggrieved by the above two additions, the assessee appealed before the first appellate authority who after considering the submissions of the assessee and remand report called from the Assessing Officer, deleted both the additions. Aggrieved by the order of ld. CIT(A), the Revenue is in appeal before the ITAT.

5. The learned DR relied on the order of the Assessing Officer and submitted that the assessee has disclosed less amount in his revenue account

whereas as per section 198 of the IT Act, all the receipts on which TDS has been made, should have been reflected in the profit and loss account.

6. On the other hand, the ld. AR relied on the order of the CIT(A). In respect of ground No. 2 & 3, he submitted that the issue is covered in favour of the assessee by the order of ITAT dated 01.09.2017 in assessee's own case (ITA No. 4975/Del./2015) for the assessment year 2011-12.

7. After hearing both the sides and perusing the materials available on record, we find that the ld. First appellate authority has deleted the addition of Rs.9.98 crores and odd, made by the Assessing Officer. After going through the impugned order, we find that the first appellate authority has decided the issue involved in ground No. 1, at para 8.3 of the impugned order. For the sake of convenience, the same is reproduced as under :

> *"8.3 Ground II - I have carefully consideration the facts, based on perusal of the submissions dated July 21, 2014 and September 4, 2014 in response to the remand report furnished by the Ld. AO and submissions made before during the course of appellate proceedings, I find that the Ld. AO has failed to appreciate the accounting treatment given by the appellant.*
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> *Based on this, I hold that the receipts under consideration for which addition has been made by the Ld. AO cannot be held as undisclosed receipt by the Appellant as these receipts represent the service tax charged on the receipts, which do not form part of the profit & loss*

account of the Appellant as the same has been shown as a balance sheet item. I find that the Appellant Company has duly disclosed the cost allocated by it to other companies in its books of account by netting off the same in the respective expense ledger, in accordance with accounting policy of the company consistently followed by it and as verified by the auditors of the company and has been duly disclosed in the Significant Accounting Policies and Notes to Accounts forming part of the signed financial statements of the company.

8.3.2 The Appellant has provided complete details on the reconciliation of service tax liability payable to the Government Treasury on which the customers had deducted TDS thereby leading to a mismatch in the Income/ credit as per Form 26AS and the Financial Statements. The service tax returns and the reconciliation submitted on record substantiate that all taxes have been duly paid to the credit of the Government Treasury and that all income has been duly offered to tax in the return of income e-filed by the Appellant. There is, therefore, no under-reporting of income by the Appellant in the books of accounts and the contention of the Ld. AO in this regard is misplaced.

8.3.3. As regards the contentions of the Ld. AO that the receipts on account of cost allocation are not reflected in the financial statements of the Appellant Company, the Ld. AO disregarded the fact that in terms of the cost sharing arrangements entered into by the Appellant with other companies, Appellant incurred costs on behalf of these companies and subsequently recovered the costs allocated on cost to cost basis from these companies without any margin, since this was a convenient arrangement and the appellant is not engaged in such a business. Such receipts have been duly accounted for by the Appellant Company in the ledger and the same have been netted off against the recoveries being not pertaining to the appellant company as income or an expense as per Note 2(d) of Schedule 12 of the financial statements, which were duly audited by statutory auditors. Therefore, on careful consideration, I do not find merit in the findings of the Ld. AO. In view of this, I hold that the additions made by him on this ground were not justified."

8. Keeping in view of the aforesaid findings given by the ld. First appellate authority on the issue involved in appeal filed by the department, we are of

the considered view that the ld. First appellate authority has rightly deleted the addition of Rs.9.98 crores and odds made by the Assessing Officer because these receipts cannot be held as undisclosed receipts by the appellant, as it represents the service charged on the receipts which do not form part of the profit and loss account of the assessee and the same has been shown it as a balance sheet items. The assessee has provided reconciliation statement of service tax liability and it has been reconciled with Form No. 26AS. The assessee has also submitted service tax return before the ld. CIT(A) on which due service tax has been paid to the Government. Therefore, there is no under reporting in the profit and loss account of the assessee of Rs.9.98 crores and odds. After going through the impugned order, we find that the ld. First appellate authority has rightly deleted the addition made by the AO and therefore, we decide the issue involved in ground No. 1 against the revenue and in favour of the assessee by upholding the impugned order on this ground.

9. As regards the issue involved in grounds Nos. 2 & 3 regarding addition of Rs.3.69 crores and odds on account of license fee connectivity charges and coordination charges paid to US based company, M/s. GE Capital Corporation for use of Vision Plus Software, we find that the issue is covered in favour of

the assessee by the decision of co-ordinate Bench in the case of assessee itself for assessment year 2011-12 (supra), wherein the ITAT has rendered the following decision on the issue :

> "6. We have heard both the parties and perused the relevant records, especially the impugned order. For the sake of convenience, we are reproducing herewith the relevant portion of the impugned order passed by the Ld. CIT(A):-
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> > *"6.3 Regarding Ground II of the appeal relating to treatment of license fee paid to GECC as capital in nature, I find that the same issue have been discussed in detail in the appellate order passed by me in the Appellant's case for AY 2008- 09 and AY 2010-11. While deciding on the appeals for these years, on careful examination of the EULA between the Appellant and GECC, I had observed that GECC holds a global license for the software which is widely used and is available 'off the shelf' pursuant to its agreement with Pay Sys. This software enables carrying out of accounting and processing -of credit card transactions. Vision plus is an 'Application Software' which manages aspects of credit cards right from the time of the application for credit card is made, evaluated, account is created, transactions are authorized, raising disputes, sending statements, customer services and online payments processing. The software is mainly for credit card transactions processing by multinational banks and transaction processing companies. Various banks and financial institutions use this application software to store and process credit card, debit card, prepaid closed end loan accounts and process financial transactions which is available off the shelf. I also find that GECC itself has received the right to use the software internationally including its group entities for its business. It does not have any right to commercially exploit the software. The Appellant makes the payment to GECC only to use the licensed programs.*
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> > *6.3.1 Further, on careful consideration of the contents of the EULA, I had observed as under:*
> >
> > *(i) The Appellant has been vested with only the limited right to use the license by GECC during the period the agreement is in existence and the EULA does not provide any exclusive use to the Appellant.*
> >
> > *(ii). GECC is a global license holder of the vision plus software and the Appellant is one of the users of such software license which in*

itself implies that there is no 'exclusivity that the Appellant is entitled to.

(iii) The EULA allows GECC to receive license fee from the Appellant on quarterly basis (refer in this regard clause 3.1 of the EULA). The agreement provides for periodic payment for use of software to GECC which has been subject matter of renewal and revision-every calendar year.

iv) The Appellant is specifically forbidden from making the copies of the software and make it available to any other person or use the license for any purpose other than the purposes defined at clause 2.2 of the EULA, or sell it or alienate in any other manner, or duplicate, market license or compete with the licensed program commercially, in any manner. (Refer in this regard clause 2.3 of the EULA).

(v) The agreement is subject to termination where there is any "breach in material terms including on the periodical payments for user", i.e., if there is a default in payment, then the agreement and consequentially, the right of the Appellant to use the software stands terminated forthwith. (Refer in this regard clause 5.1 (a) of the EULA).

(vi) Upon termination, the right to use the licensed program shall end and the Appellant is required to with immediate effect deliver the licensed program to GECC and the Appellant is required to remove the software from its systems. (Refer in this regard clause 5.1 (a) of the EULA).

6.3.2 Keeping in view the above, in the said order for AY 2008-09, I had held that what is transferred to the Appellant through EULA is only a limited right to use the license for a limited period in a prescribed manner and subject to the specific conditions put by the licensor. In view of the above, it is undisputed that the EULA did not have the effect of vesting in the Appellant any enduring benefit or any irrevocable transfer of bundle of rights on it. On the other hand, the Appellant is bound by various conditions in respect of the manner of use of the license. Keeping in view the same, the Appellant Company's case gets squarely covered by the Hon'ble SC in the case of MIs Empire Jute Co. Ltd. (supra) and other cases cited by the Appellant in its defence, since no enduring benefit has been acquired by the Appellant through the payment of license fee for the limited use of the license. The reliance of the AO on various judicial pronouncements has been distinguished by the-Appellant on facts.

3.3 As the facts for AY 2011-12 are similar to the facts of AY 2008-09 and AY 2010-11, I thereby hold that my findings in the order passed for AY 2008-09 would stand equally applicable here.

3.4 In view on the same, hold that the impugned payment of Rs. 3,70,98,989/- on account of license fee and data management service charges for use of the 'Vision Plus' software Was revenue in nature and allowable u/s 37 of the Act. Accordingly, this ground is allowed in favour of the Appellant. The alternative plea of the Appellant thus, become infructuous."

6.1. We further find that ITAT, 'C' Bench, New Delhi vide its order dated 16.10.2015 passed in ITA No. 2806/Del/2011 (AY 2007-08) in the matter of assessee i.e. GE Capital Business Process Management Services Pvt. Ltd. and in ITA No. 2124/Del/2013 (AY 2008-09) in the case of ACIT vs. GE Capital Business Process Management Services Pvt. Ltd. has dealt the similar and identical issues. For the sake of convenience, we are reproducing the relevant portion of the order of ITAT, 'C' Bench, New Delhi as under:-

"7.We have considered the rival submissions, perused the orders of the authorities below, material available on record and gone through the case laws cited by both the parties. From the above narration of facts, we find that the arguments advanced by both the parties rest on the vital question whether under the facts and circumstances of the case, the payment of license fee, connectivity charges and co-ordination charges amounting to Rs.2,19,60,467/- made by the assessee to GECC(USA) under the end-user agreement shall fall within the category of capital expenditure or revenue expenditure? The stand of the assessee is that it is in the nature of revenue expenditure and deductible u/s. 37(1) of the Act whereas the ld. Authorities below have put it in the category of capital expenditure and disallowed the claim of assessee. The basic reasons of Assessing Officer for giving the license fee a treatment of capital expenditure are that the agreement provides exclusive right to use vision plus software which provides enduring benefits to the assessee; that the consideration is in respect of grant of license and that the information was not only in relation to use of license, but co-ordination and connectivity services were also provided by GECC(USA). He, therefore, held that the acquisition of license granted by the licensor in itself is a capita asset, being "intangible asset", which having long validity is capital in nature. We have gone through the End-User license agreement dated 07.07.2000 and we do not find substance in the conclusion arrived at by the ld. Authorities below. It is notable that in terms of clause 2.2 and 2.3, the assessee company is specifically restricted to make copies of the software and make it available to any other period. There is also a bar on the

assessee for use of software for the purpose other than that mentioned in clause 2.2 of the agreement. In terms of clause 2.3, the assessee does possess no right either to sell it or alienate in any other manner. The relevant clauses No. 2.2 and 2.3 of the license agreement are reproduced as under :

"2.2. GECC shall provide the Licensed Program, any revisions to the Licensed Program and any updates to the Licensed Program to GECBPMS for its business use only in accordance with this agreement."
2.3. GECBPMS undertakes that it shall not;

(a) make the licensed program or any part thereof available to any period other than its employees on a "need to know" basis;

(b). copy the Licensed Program or any part thereof, other than for archival backup purposes;

(c). use the Licensed Program for any purpose other than as permitted by clause 2.2 of license, sell or otherwise alienate the Licensed Program in any manner whatsoever; or

(d). Duplicate, market, license or develop software programs that compete with the Licensed Program and/or exploit commercially the Licensed Program in any manner whatsoever."

Similarly, clause 5 and its sub-clauses give the right of termination of license agreement to either parties under various circumstances. It is worthwhile to note that in case of default, if any, committed by the assessee, the rights of assessee to use the software would stand terminated forthwith. Under clause 5.5, the assessee is required to deliver the licensed program back immediately to GECC(USA) after removing the same from its systems on termination of agreement. Clause 5.5 of the agreement reads as under :

"5.5. Upon termination of this Agreement the right to use the Licensed Program shall end and GECBPMS shall, with immediate effect :

(a) deliver to GECC the Licensed Program; and

(b) purge all copies of the licensed program stored in any CPU or other storage medium or facility, which for any reason cannot be delivered to GECC. In addition, an officer of GECBPMS shall certify in writing to GECC that all proprietary material relating to the Licensed Program has been delivered to GECC or purged and that the use of the Licensed Program and any portion thereof has been discontinued."
Under clause 3.1, the license agreement allows GECC to receive license fee from assessee on quarterly basis as mutually agreed upon. The

agreement provides for periodic payment for use of software to GECC, which is subject matter of renewal and revision every calendar year. No case is made out by the department to assume that the periodic payments made by the assessee were the installments for acquisition of such software and the payment was not for mere usage of software. It is a matter of fact on record that M/s. GECC (USA) itself has received the right to use the software internally including its group entities for its business and it does not have any right to commercially exploit the software. The assessee is vested with limited right to use the licensed program during the currency of license agreement. The agreement nowhere provides any exclusive right to the assessee, but the assessee was vested with the right to use the licensed program for facilitating its business operations enabling the assessee day-to-day management of business and to work with more efficiency. In view of all these terms of agreement and the facts & circumstances attending to the case, we are of the considered opinion that end user license agreement in the instance case does not have the effect of any enduring benefit for holding the same as capital in nature. The ld. DR has failed to rebut the contention of the assessee that the impugned software is an application software and is being used for accounting purposes. Such software are used by various banks and financial institutions. Moreover, the ld. CIT(A) in succeeding assessment years 2008-09, 2010-11 and 2011-12 has categorically gave finding of fact that the software is a application software which is routine in nature and used for accounting purposes. Therefore, in view of decisions in the case of CIT vs. Asahi India Safety Glass Ltd (supra) and CIT vs. Amway India Enterprises (supra), we are of the considered opinion that the right to use the vision plus software program does not have any effect of providing enduring benefit and the payment made to GECC(USA) is only the license fees and not the price for acquisition of capital asset. The assessee did not acquire any ownership on the software and after termination of license agreement, all the rights and title remained with GECC (USA). The ld. DR failed to dislodge the findings of the ld. CIT(A) given in the orders passed for subsequent years after considering the same license agreement and various decisions of Hon'ble High courts and Supreme Court. It is also a matter of record that the assessee has returned its income for the relevant previous year at Rs.152.88 crores whereas the amount expended towards use of routine application software is Rs.2.19 croes which is 1.43%. This shows that implies that this software only is not the soul of assessee's business as argued by the ld. DR. In the case of southern Switchgear Ltd. (supra), the technical knowledge and information remained with the assessee even after termination of agreement which constituted enduring benefit to the assessee whereas in the present case, the software in question is an application software and after termination of license agreement, said software was to be delivered back to the licensor and the same cannot be made to use by the assessee in any

manner. Similarly in the case of Jones Woodhead and Sons (India) (supra) relied on by the Assessing Officer is also distinguishable on facts inasmuch as in that case the agreement between the assessee and the foreign collaborator was in relation to setting up of a new business and the foreign collaborator besides furnishing information and technical know-how, rendered valuable assistance in setting up of the factory itself. No such situation arises in the present case. In view of this discussion and relying on various decisions cited by assessee, we are of the considered opinion that the license fee etc. paid by the assessee to M/s. GECC(USA) is revenue expenditure deductible u/s. 37 of the Act. The appeal of the assessee is accordingly allowed.

ITA No. 2124/Del./2013 (By Revenue):

8. *The vital issue involved in this appeal is deletion of disallowance of Rs.2,42,58,933/- made by the Assessing Officer on account of license fee, connectivity charges and co-ordination charges paid to US based company M/s. GE Capital Corporation for use of vision plus software holding the same as capital expenditure. This issue has been decided in favour of the assessee while deciding the appeal of the assessee for the assessment year 2007-08 in the foregoing part of this order. There being no change in the facts and circumstances of the case and the disallowance being based on the same license agreement, we decide the issue in favour of the assessee in this appeal also after following our conclusions given in appeal of assessee for the year 2007-08. Accordingly, the appeal of the Revenue is liable to be dismissed on this count."*

6.2 After perusing the aforesaid finding of the Tribunal, we are of the considered view that the issue in dispute in the present appeal, relating to deletion of addition of Rs. 3,70,98,989/- made on account of license fee is squarely covered by the aforesaid decision of the ITAT, hence, we respectfully follow the aforesaid decision of the ITAT and decide the issue against the Revenue. Even otherwise, we also note that Ld. CIT(A) has held that as the facts for AY 2011-12 are similar to the facts of AY 2008-09 and AY 2010-11, therefore, he held that his findings in the order passed for AY 2008-09 would stand equally applicable here and accordingly, in view of the same, the impugned paymentof Rs.3,70,98,989/- on account of license fee and data management service charges for use of the 'Vision Plus' software was rightly held as revenue in nature and allowable u/s 37 of the Act. We further note that the factual finding of the Ld. CIT(A) on the issue in dispute also could not be controverted by the department during the proceedings before us and we, therefore, find no reason to interfere with the findings of the Ld. CIT(A) on this issue as well and while upholding the same."

10. Respectfully following the above decision of co-ordinate bench, grounds Nos. 2 & 3 of the Revenue's appeal are liable to be dismissed.

11. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 05.10.2017.

Sd/-	**Sd/-**
(H.S. Sidhu)	**(L.P. Sahu)**
Judicial member	**Accountant Member**

Dated: 05.10.2017
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Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi