IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N V VASUDEVAN, VICE PRESIDENT
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.150/Bang/2019
Assessment year : 2012-13

Manhattan Associates (India) Development Centre Pvt. Ltd., Brigade Tech Gardens, 5th & 6th Floor, Kundanahalli, Whitefield, Bangalore – 560 037. **PAN: AADCM 0727A**	Vs.	The Deputy Commissioner of Income Tax, Circle 4(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Advocate
Respondent by	:	Shri C.H. Sundar Rao, CIT(DR-I)(ITAT), Bengaluru.

Date of hearing	:	22.10.2019
Date of Pronouncement	:	23.10.2019

O R D E R

Per N V Vasudevan, Vice President

This is an appeal by the assessee against the order dated 29.10.2018 of the CIT(Appeals)-4, Bengaluru, relating to assessment year 2012-13.

2. The only issue that arises for consideration in this appeal is as to whether the Assessee is entitled to claim deduction u/s.80JJAA of the Income Tax Act, 1961 (the Act). Sec.80JJA of the Act, as it stood for the relevant AY 2012-13 reads thus:-

"**Deduction in respect of employment of new workmen**.

80JJAA. (1) Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

(2) No deduction under sub-section (1) shall be allowed—

(a) if the industrial undertaking is formed by splitting up or reconstruction of an existing undertaking or amalgamation with another industrial undertaking;

(b) unless the assessee furnishes along with the return of income the report of the accountant, as defined in the Explanation below sub-section (2) of section 288 giving such particulars in the report as may be prescribed.

Explanation.—For the purposes of this section, the expressions,—

(i) "additional wages" means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year :

Provided that in the case of an existing 56a[undertaking], the additional wages shall be nil if the increase in the number of regular workmen employed during the year is less than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year;

(ii) "regular workman", does not include—

(a) a casual workman; or

(b) a workman employed through contract labour; or

(c) any other workman employed for a period of less than three hundred days during the previous year;

(iii) "workman" shall have the meaning assigned to it in clause (s) of section 257 of the Industrial Disputes Act, 1947 (14 of 1947).]

3. The Assessee is an Indian company. It is engaged in the business of rendering software development services. The Assessee claimed deduction of a sum of Rs.2,38,66,624/- as deduction. According to the Assessee it had paid additional wages to new regular workmen employed by the Assessee in the relevant previous year and that it satisfies all the other conditions laid down in the provisions of Sec.80JJA of the Act to claim deduction.

4. The AO examined the claim of the Assessee by framing the following questions:

> "5.3 The main questions that requires to be satisfied for claiming 80JJAA deduction are
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> a. Whether assessee qualifies as an industrial undertaking
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> b. Whether development of computer software tantamount to manufacture or production of an article or thing under section 80JJAA
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> c. The definition of workmen, and whether the employees of the company with respect to whom the said deduction has been claimed, qualify as workmen under section 80JJAA of the IT Act
>
> d. Whether payments made by assessee to employees is in the nature of salary or wages."

5. On the question whether the Assessee qualifies as an industrial undertaking, the AO firstly noticed that the term "Industrial Undertaking" has not been defined for the purpose of Sec.80JJA of the Act. The said term has however been defined for the purpose of Sec.10(15) of the Act

and Sec.72A of the Act as an industrial undertaking engaged in the manufacture of computer software. Under Sec.10B of the Act deduction from profits and gains of a 100% Export Oriented undertaking engaged in manufacture of articles or things or computer software is available. According to the AO in normal parlance manufacture of computer software is not akin to manufacture of an article or thing and that is the reason why a specific provision has been made in Sec.10B, Sec.10(15) and 72A of the Act. According to the AO, Industrial undertaking has been defined under The Industries (Development & Regulation) Act, 1951 as a scheduled industry carried on in one or more factories. The term "Factory" has been defined in the Factories Act, 1948 as any premises where ten or more workmen work where "manufacturing process" is carried on. The term manufacturing process as defined under the Factories Act, 1948 does not include manufacture of computer software and therefore the Assessee was not an Industrial Undertaking for the purpose of Sec.80JJAA of the Act.

6. On the question whether manufacture of computer software tantamount to manufacture of an article or thing, the AO held that the said activity is not subject to Value Added Tax but only Service tax and therefore the manufacture of computer software is not manufacture of an article or thing. The AO also made a reference to the fact that w.e.f.1.4.2014 Sec.80JJAA of the Act was amended to make it clear that the said provisions applies only to profits and gains derived from the manufacture of goods in a factory. According to the AO the aforesaid amendment is clarificatory and hence applicable even for AY 2012-13.

7. On the question whether persons working in software industry can be said to be "Workmen" for the purpose of Sec.80JJAA of the Act, the definition of workmen for the purpose of Sec.80JJAA was the definition of the term as per Sec.2(s) of the Industrial Disputes Act, 1947 and that definition lays down that "Any person employed in any industry to do any

manual, unskilled, skilled, technical, operational, clerical and supervisory work for hire or reward, but does not include employees employed mainly in a managerial or administrative capacity. According to the AO Software professionals are highly skilled workers and the nature of work performed by them were highly skilled whereas the skilled work contemplated by the definition of workmen in the Industrial Disputes Act, 1947 is ordinary skill and therefore the workmen of the Assessee cannot be considered as "Workmen" for the purpose of Sec.80JJAA of the Act.

8. On the question whether the sums paid to employees employed in software industry can be said to be in the nature of wages, the AO held that the software professionals perform blue-color jobs and the salary paid to them cannot be said to be Wages paid for the purpose of Sec.80JJAA of the Act. The AO also made a reference to the amended provisions of Sec.80JJAA of the Act w.e.f. 1.4.2016 whereby a ceiling limit of Rs.25,000/- per month as salary to employee is prescribed. According to the AO the intention of the legislature has always been not to regard employees employed in software service industry as workmen for the purpose of Sec.80JJAA of the Act.

9. For all the above reasons, the AO denied the claim of the Assessee for deduction u/s.80JJAA of the Act. The CIT(A) confirmed the order of the AO and hence this appeal by the Assessee before the Tribunal.

10. The learned counsel for the Assessee while reiterating submissions made before the revenue authorities, further submitted that the issue whether deduction u/s.80JJAA of the Act is available to Assessee's rendering software development services has been decided by ITAT Bangalore Bench in the case of *ACIT Vs. Texas Instruments (I) Pvt.Ltd. (2009) 27 SOT 72 (Bang-URO); Onmobile Global Ltd. Vs. ACIT (2014) 45 taxmann.com 346(Bang-Trib) and M/S.SAP Labs India Pvt.Ltd. Vs. ACIT*

IT(TP)A.No.1006/Bang/2011 order dated 30.6.2016. He also relied on the decision of the Hon'ble Bombay High Court in the case of *ESI Vs. Reliable Software Systems Pvt.Ltd. (2012) 5 AIR Bom R 795* wherein the question was whether employees employed in software development service industry could be said to be engaged in the process of manufacture and hence the provisions of the employees State Insurance Act, 1948 are applicable to them. The Hon'ble Bombay High Court held that computer software development falls within the definition of manufacturing process as defined in Sec.2(k) of the Factories Act, 1948. The learned DR relied on the order of the revenue authorities.

11. We have given a careful consideration to the rival submissions. The question to be decided is as to whether the Assessee can be said to be "Industrial Undertaking engaged in the manufacture or production of article or thing". The revenue authorities have proceeded to deny the claim of the deduction only on the ground that the Assessee is not an "Industrial Undertaking engaged in the manufacture or production of article or thing". No other reasons have been assigned for denying the claim of the Assessee for deduction.

12. The first aspect to be examined is as to whether the Assessee can be said to be Industrial Undertaking engaged in the manufacture of article or thing. The term "Industrial undertaking" has not been defined for the purposes of Sec.80JJAA of the Act. The term has however been defined for the purpose of Sec.10(15) of the Act and Sec.72A of the Act as an industrial undertaking engaged in the manufacture of computer software. Under Sec.10B of the Act deduction from profits and gains of a 100% Export Oriented undertaking engaged in manufacture of articles or things or computer software is available. According to the AO in normal parlance manufacture of computer software is not akin to manufacture of an article or thing and that is the reason why a specific provision has been made in

Sec.10B, Sec.10(15) and 72A of the Act. According to the AO, Industrial undertaking has been defined under The Industries (Development & Regulation) Act, 1951 as a scheduled industry carried on in one or more factories. The term “Factory “ has been defined in the Factories Act, 1948 as any premises where ten or more workmen work where “manufacturing process” is carried on. The term manufacturing process as defined under the Factories Act, 1948 does not include manufacture of computer software and therefore the Assessee was not an Industrial Undertaking for the purpose of Sec.80JJAA of the Act. This reasoning of the AO will not hold good in the light of the decision of the Hon’ble Bombay High Court in the case of *ESI Corporation Vs. Reliable Software Systems Pvt.Ltd. (supra)* wherein the Hon’ble Bombay High Court held as follows:-

> “18. As stated in the beginning, the meaning of the term "manufacturing process" under Section 14AA of the E.S.I. Act shall have the meaning assigned to it in the Factories Act, 1948 i.e. 2(k). While reading Explanation-II of Section 2(m) of the factories Act, the phrase "if no manufacturing process is carried on" is to be read necessarily in respect of the substance manufactured in the premises by any means or any method including the computer. The language of Explanation-II is to be read in a literal sense by applying rule of literal interpretation. No additional words can be read between the lines by referring to the purpose and object of the amendment. Therefore, the clause "no manufacturing process is carried on" is to be understood as it is covering any type of manufacturing process including related to the computer. It is erroneous to read the clause as no other manufacturing process is carried out (excluding the computers). The purpose of the Explanation is to clarify that merely because a computer or computers are installed, the place will not be treated as a factory if otherwise no manufacturing process is carried on.
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> 19. Significantly, the definition of "factory" in Factories Act and E.S.I. Act are not the same. Explanation II of Section 2(m) of the Factories Act is inserted in the Factories Act and <u>not</u> in the E.S.I. Act. It marks difference in its interpretation and application. In the definition of "factory" under Factories Act the

words "worker working" are used, while in the E.S.I. Act, in the section defining "factory", the term "person employed for wages" are used. A difference in these two definition of one word "factory" can be explained by example. A clerk or staff in the premises is not- covered under the definition of "worker" under the Factories Act, however, under the ESI Act, the word "worker" is not used but the legislature chose the word "person" and for "working", the word "employed" is used. Thus, the premises where person is employed for a clerical work is covered under the definition "factory" under the E.S.I. Act. Therefore, definition of "factory" has wider meaning under the ESI Act than the Factories Act. I rely on the decision in the case of Quzi Noorul, H.H.H. Petrol Pump v. Deputy Director, Employees' State Insurance Corporation, reported in (2009) 15 SCC 30 wherein the Supreme Court held in para 6 of the Judgment as follows:-

> "6. In this connection, it may be stated that the words "nonfracturing process" in different statutes have different meanings. For instance, in the Central Excise Act, 1944, the word "manufacture" means bringing into existence a different commodity, though this is not the definition of "manufacturing process" in the Factories Act, 1948. We cannot apply the definition of "manufacturing process" in one statute to another statute".

20. Let me now examine the meaning of "manufacturing process" as defined under Section 2(k) of the Factories Act. Many verbs describing different activities are mentioned in the said definition. It is true that each activity and verb has its own connotation. The Factories Act was enacted in 1948 and at the relevant time, use of computer and software was alien to the Legislature. Naturally, the words which are more appropriate, precisely describing the activities carried out with the help of the computers i.e. development of software, programming of data, application etc. were neither known nor in practice at the relevant time when the Act was enacted. Albeit, the absence of these words, the manufacturing of the substance with the help of computers can be covered generally under the activities which are mentioned in the definition of manufacturing process as making, altering, treating, adapting etc. Thus, the Section defining manufacturing process allows a wide interpretation. This can be substantiated by giving example that some other activities like

> turning, milling, fitting welding, drilling, ironing, cooking, painting etc. are not specifically mentioned in the definition of manufacturing activities though these are considered as manufacturing process at various work places and covered under different 'verbs' used in the definition of manufacturing process. Therefore, though computer related activities like development, programming, application are not mentioned in the definition and to that effect there is no amendment in the section; the definition takes care of activities like development and application.
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> 21. In my considered view, if manufacturing process is carried out as contemplated under Section 2(12) of the E.S.I. Act, then that particular unit cannot be made an exception to the application of the E.S.I. Act. To borrow the meaning from the provision of Explanation II of Section 2(m) of the Factories Act, will be a mayopic view defeating the object and spirit of the E.S.I. Act. The meaning of the term "factory" for the purpose of E.S.I. Act is not to be understood in the context of Explanation II of Section 2(m) of the Factories Act. This is not a harmonious construction of the Statute. Application of E.S.I. Act is not a regressive but a progressive step and to think that if E.S.L Act is made applicable then it will affect LT. industry adversely is a futile fear."

13. Therefore, the Assessee has to be regarded as an Industrial Undertaking engaged in manufacture of article or thing, even going by the reasoning given by the AO. We are also of the view that the term "Industrial Undertaking" having been defined in the Act, though for a different statutory provision, can be a guiding factor to the intention of the legislature to apply that definition to statutory provision in which the said term has not been defined. In the absence of any contrary intention emanating from attending circumstances or for any other reasons, adopting the definition given in the Act, would be more appropriate.

14. On the question whether the employees employed in software industry can be said to be "Workmen", the Bangalore Bench of ITAT has already settled this issue in the case of *Texas Instruments (India) Pvt.Ltd.*

(supra). The Tribunal held that Software Industry has also been notified as Industry for the purpose of Industrial Disputes Act, 1947 by the State of Karnataka and that the employees employed in software development industry render technical services and not services in the nature of supervisory or management character. The following were the relevant observations of the Tribunal:-

> "6. We have heard the rival submissions and carefully perused the records. Considering the factual position after referring to the various documents filed by the assessee, the learned CIT(A) held as under :
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> > "According to the Assessing Officer if an employee or workman is getting a salary of more than Rs. 1,600 per month he is not covered by the definition of workman. However as per clause (iv) of section 2(s) of the Industrial. Disputes Act a worker, employed in supervisory capacity and getting a salary of more than Rs. 1,600 per month only be excluded from the definition of workman. In appellant's case the software engineers in respect of whom deduction under section 80JJAA has been claimed have not been employed in a supervisory capacity even though they may be getting a salary of more than Rs. 1,600 per month. As the software engineers were not employed in supervisory capacity they cannot be excluded from the definition of workman. Further as per the notification of the Karnataka Government, the appellant company engaged in the development of software is covered by the Industrial Disputes Act. As such, I am of the considered opinion that the appellant has satisfied all the conditions for claiming relief under section 80JJAA. However, I find that the appellant has claimed deduction of Rs. 2,55,81,220 with reference to the additional wages of Rs. 8,52,70,736 which included the wages of Rs. 4,87,64,029 in respect of the new workmen employed during the year ended 31-3-2000 relevant to the assessment year 2000-01. As there was no claim for relief under section 80JJAA for the assessment year 2000-01, the relief in respect of the workers employed in assessment year 2000-01 cannot be considered for relief under section 80JJAA in the assessment year 2001-02. As such the appellant will be entitled for relief under section 80JJAA of Rs. 1,09,52,012

being 30 per cent of the additional wages of Rs. 3,65,06,707 (Rs. 8,52,70,736 - Rs. 4,87,64,029) in respect of the new workmen employed during the previous year relevant to the assessment year 2001-02. Similarly, for assessment year 2002-03 the appellant has claimed deduction of Rs. 4,78,05,176 being 30 per cent of the wages of Rs. 1,59,30,588 which also included the wages of Rs. 4,38,68,182 pertaining to the new workers employed in the previous year 1999-2000. For the reasons mentioned above the appellant is not entitled for relief under section 80JJAA in respect of the wages pertaining to the workers employed in the previous year 1999-2000. As such the appellant would be eligible for relief of Rs. 3,46,44,722 being 30 per cent of the additional wages of Rs. 11,54,82,406 (Rs. 15,93,50,588 - Rs. 4,38,68,182) in respect of the workmen employed in previous years 2000-01 and 2001-02. The learned Authorised Representatives of the appellant vide order-sheet noting dated 24-8-2004 agreed that the relief under section 80JJAA in respect of the employees who joined in the previous year relevant to the assessment year 2001-02 onwards only may be considered and in respect of the employees who joined in earlier years the appellant is not pressing for relief under section 80JJAA. In the circumstances, the Assessing Officer is directed to allow the relief under section 80JJAA of Rs. 1,09,52,012 and Rs. 3,46,44,722 for assessment years 2001-02 and 2002-03 respectively."

7. As stated earlier the assessee had filed the details of the software engineers employed during the years under consideration containing the names of the employees, designation and date of joining. Further, in the same list the details of total number of employees joined during both the assessment years, number of employees without supervisory roles, workmen joined, number of supervisors joined and workmen joined and relieved during the years under consideration. A cursory perusal of this list shows that the assessee had claimed deduction in respect of employees, who had joined as engineers in their respective field such as systems engineer, test engineer, software design engineer, IC design engineer, lead engineer etc. A cursory perusal of those lists establishes that the assessee had claimed deduction in respect of the engineers employed not in the category of supervisory control. All these details were filed before the Assessing Officer

> during assessment proceedings. These facts were not properly considered by the Assessing Officer. Further, from the order of the CIT(A), it is seen that he had taken note of the notification issued by the Government of Karnataka and concluded that as per the notification issued, the assessee company engaged in the development of software is covered by the Industrial Disputes Act, 1947. Further it is not the case of the revenue that the assessee did not fulfil the conditions extracted elsewhere in this order. Considering all those factual matters we do not find any infirmity in the order of CIT(A) according relief to the assessee. In fact he had clarified the relevant portions related to Industrial Disputes Act, 1947 and Income-tax Act while granting relief to the asssessee which are extracted at pp. 5 and 6 of this order. After carefully considering the same, we are inclined to accept the reasons shown by the learned CIT(A). The learned CIT-Departmental Representative could not assail the finding reached by the learned CIT(A) by bringing in any valid materials. The order of the CIT(A) is confirmed. It is ordered accordingly."

15. The only other aspect that remains to be considered is whether there is any distinction between salary and wages and whether monies paid to a person working in software industry cannot be termed as "Wages". In our view there is no distinction sought to be made in the provisions of Sec.80JJAA of the Act and the reason assigned by the AO for considering remuneration received by a person employed in software industry as "Salary" and not "Wages", is without any basis. In our view such distinction sought to be made by the revenue authorities for denying the claim of the Assessee for deduction u/s.80JJAA of the Act is unsustainable.

16. We are of the view that in the given facts and circumstances of the case, the Assessee should be allowed deduction u/s.80JJAA of the Act, subject to quantification of the sum to be allowed as deduction by the AO after due opportunity to the Assessee. We hold and direct accordingly.

17. In the result, the appeal by the Assessee is allowed.

Pronounced in the open court on this 23rd day of October, 2019.

Sd/-	Sd/-
(G MANJUNATHA)	(N V VASUDEVAN)
ACCOUNTANT MEMBER	VICE PRESIDENT

Bangalore,
Dated, the 23rd October, 2019.

/ Desai Smurthy /

Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.