2023:DHC:4438-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 24.05.2023
% *Judgment Pronounced on: 04.07.2023*

\+ **ITA 303 /2023**

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI -04 ..... Appellant
Through: Mr Abhishek Maratha, Sr. Standing Counsel with Mr Akshat Singh, Advocate.

versus

NESTLE INDIA LTD ..... Respondent
Through: Mr Ajay Vohra, Sr Advocate with Mr Aniket D. Agarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

1. This appeal concerns Assessment Year (AY) 2009-10. *Via* the above-captioned appeal, the appellant/revenue has assailed the common order dated 22.07.2020 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] in ITA no. 2020/DEL/2014.

1.1 This order has been passed in the cross-appeals preferred by the appellant/revenue and the respondent/assessee which emerged out of the order dated 20.01.2014 passed by the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

1.2 Being dissatisfied by the impugned order passed by the Tribunal, the appellant/revenue has preferred the instant appeal, wherein, it has proposed the following questions for our consideration:

> *"..(i) Whether in the facts and circumstances of the case and law, Hon'ble ITAT is correct in deleting the addition of Rs.61,01,74,000/- made by AO, on account of disallowance of license fee?*
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> *(ii) Whether in the facts and circumstances of the case and law, Hon'ble ITAT is correct in reducing the disallowance u/s 14A of the Act to Rs.8,34,934/- from Rs.39,25,411/- made by the Assessing Office in accordance with Rule 8D and according to CBDT Circular 5/2014 dated 11/02/2014?*
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> *(iii) Whether in the facts and circumstances of the case and law, Hon'ble ITAT is correct in allowing higher depreciation @60% as against depreciation @15% allowed by the AO overlooking the functional test proving and establishing perversity in the order passed by them both on facts and in law, especially when the case of BSES Rajdhani Powers has been overruled by Hon'ble Madras High Court in the case of Dinamalar Vs ITO Ward 1(1) Madurai [(2016) 74 taxmann. com 14 (Madras)?*
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> *(iv) Whether in the facts and circumstances of the case and law, Hon'ble ITAT is correct in confirming the order of CIT(A) deleting the addition of Rs.33,90,330/- made by AO on account of disallowance of depreciation on energy saving & pollution control devices, which were not put to use by the assessee, during the year under consideration?*
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> *(v) Whether in the facts and circumstances of the case and law, Hon'ble ITAT is correct in confirming the order of CIT(A) directing that the amount of Rs.25,00,000/- received from Govt of Goa, as subsidy, be treated as capital in nature and to reduce the same from [the] block of assets on a proportionate basis, especially when a classificatory amendment has been made w.e.f. AY 2016-17?.."*

2. Mr Abhishek Maratha, who appears on behalf of the appellant/revenue, does not dispute the fact that insofar as the proposed question no. (i) is concerned, it is covered by the decision dated 11.05.2011 of the coordinate bench of this court rendered in ITA 662/2005. *Via* this

decision, appellant/revenue's appeal was dismissed.

2.1 Likewise, insofar as proposed question nos. (ii) and (iv) are concerned, they are covered by our decision dated 17.05.2023 rendered in ITA 281/2023. *Via* the aforesaid judgement, we concluded that no substantial question of law arose for consideration and thus, sustained the view taken by the Tribunal.

2.2 Therefore, what we are required to express our view on, insofar as this appeal is concerned, are the question nos. (iii) and (v), as proposed by the appellant/revenue.

3. Thus, before we proceed further, the following broad facts are required to be noticed to render a decision in this appeal:

3.1 In the AY in issue, the respondent/assessee had filed a Return of Income [in short, "ROI"], wherein, it declared its total income as Rs.728,92,72,770/-. The ROI was processed, initially, under Section 143(1) of the Income Tax Act 1961 [in short, "Act"].

3.2 The respondent/assessee was subjected to scrutiny assessment which resulted in the assessed income being pegged at Rs.798,95,13,887/- on account of the following additions being made:

(i) Rs.61,01,74,000/- towards disallowance of licence fee.

(ii) Rs.39,25,411/- on account of disallowance under Section 14A of the Act.

(iii) Rs.8,01,12,224/- on account of interest awarded under Section 244A of the Act.

(iv) Rs.1,39,152/- on account of disallowance of depreciation claimed on UPS.

(v) Rs.33,90,330/- on account of disallowance of depreciation on

energy saving and pollution control devices.

(vi) Rs.25,00,000/- on account of subsidy received from the Government of Goa.

4. This led to the respondent/assessee preferring an appeal with CIT(A). CIT(A) allowed the respondent/assessee's appeal, in part, by directing deletions of additions made on account of disallowances concerning the following: licence fee, expenses incurred to earn exempt dividend income as per the provisions of Section 14A of the Act, read with 8D of the Income Tax Rules 1962 [in short, "Rules"], depreciation claimed on UPS and energy saving and pollution control devices.

4.1 However, the CIT(A) confirmed the addition made by the AO amounting to Rs.8,01,12,224/- concerning interest awarded to the respondent/assessee under Section 244A of the Act.

4.2 Insofar as the subsidy that the respondent/assessee had received from the Government of Goa amounting to Rs.25,00,000/- is concerned, CIT(A), while agreeing that it was a capital receipt, directed reduction of the same from the block of assets, *albeit*, on a proportionate basis. In other words, CIT(A) treated the subsidy as an incentive received for purchasing assets.

5. It is in this backdrop, as noticed above, that both sides preferred appeals with the Tribunal against CIT(A)'s order dated 20.01.2014.

6. Given the fact that three out of the five issues, as noticed right at the outset, are covered against the appellant/revenue, we are required to deliberate only on the remaining two issues.

7. The first issue [i.e., proposed question no. (iii)] concerns the rate at which depreciation can be claimed by the respondent/assessee on UPS.

7.1 We may note that while proposing the question of law, which, to say the least, is ineptly framed, for it seeks to suggest that the decision of a coordinate bench of this court in ITA No.1266/2010 (Del), titled ***CIT v BSES Rajdhani Powers Ltd.*** was "overruled" by the Madras High Court, the appellant/revenue lost sight of the fact that its stand before the Tribunal was that this issue was covered against it by the decision of the coordinate bench of this court. This is evident on a plain reading of paragraph 5.1 (which is part of the submissions advanced by the departmental representative) and paragraph 7.5 (which forms part of the Tribunal's reasoning) of the impugned order:

> *"5.1 With respect to **ground No.3 of the Department's appeal, the Ld. CIT-DR again fairly accepted that the issue was covered against the Department by the order of the Hon'ble Delhi High Court as far as the depreciation on UPS was concerned**.*
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> *xxx xxx xxx*
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> *7.5 Ground No.3 of the Department's appeal challenges the action of the Ld. CIT (A) in deleting the disallowance of Rs.1,39,152/- made by the Assessing Officer by restricting the claim of depreciation in respect of UPS from 60% to 15%. **The Ld. CTR-DR as fairly accepted that this issue is covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of CIT vs. BSES Rajdhani Power Limited in ITA No.1266/2010 vide order dated 31.08.2010 and CIT vs. BSES Yamuna Power Ltd. vide order dated 31.08.2010.** It is seen that the Hon'ble Delhi High Court has held that UPS is to be considered as an integral part of the computers and depreciation is to be allowed @ 60%. Accordingly, in view of the settled legal position, we find no reason to interfere with the findings of the Ld. CIT (A) on this issue also and dismiss ground No.3 of the Department's appeal."*
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> [Emphasis is ours]

7.2 However, since Mr Maratha, despite the contrary stand taken by the appellant/revenue before the Tribunal, sought to distinguish the judgement

rendered in the ***BSES Rajdhani Power*** case, we would like to enunciate our view on the issue.

8. The relevant entry which concerns depreciation reads as follows:

"(5) Computers including computer software."

8.1 Coordinate benches of this court in several matters, have given a purposive meaning to the term computer by bringing within its sway peripherals such as printers, scanners, servers, network cables, switches, isolators etcetera, based on the rationale that they form an integral part of the computer.

8.2 It is, perhaps, for this reason, that in the judgement of the coordinate bench of this court rendered in ITA 66/2011, titled ***Commissioner of Income Tax v Orient Ceramics & Inds. Ltd.*** it was, specifically, held as follows, with respect to the rate of depreciation on UPS:

> *"13. The third issue pertaining to depreciation on UPS arises only in the Assessment Year 2005-06. The assessee had claimed depreciation on UPS @ 60% whereas the AO had allowed it @ 25% and on this basis, disallowance of `1,470 was made.* ***The issue now stands covered by the judgment of this Court in the case of Commissioner of Income Tax Vs. BSES Yamuna Powers Ltd. (in ITA No.1267 decided on 31.08.2010) wherein it was held that the depreciation @ 60% on such items shall be allowed****."*
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> [Emphasis is ours]

9. Mr Maratha, however, sought to distinguish the judgement in ***BSES Rajdhani Power*** on the ground that the UPS equipment could be used for purposes other than running a computer and, therefore, is not an integral part of the computer, unlike the peripherals mentioned in ***BSES Rajdhani Power*** and other judgements, noticed above.

10. We may note that this argument is advanced without a factual

foundation. There is nothing on record to suggest that the UPS equipment, in this case, was used for purposes other than running a computer.

10.1 UPS equipment, as the acronym goes, is a piece of equipment which ensures that there is an uninterrupted power supply, to prevent loss of data in the event of a power outage. If anything is crucial to the working of a computer, it is UPS equipment, which ensures that important data that is being handled or dealt with by the user is not lost on account of sudden power failure.

10.2 However, we may clarify that, by this, we do not intend to suggest that any and every piece of equipment which, generally, acts as a UPS contraption, say for an industrial unit, and in this context also supports a computer system would fall in this category and thus be amenable to depreciation at the rate of 60%, as against the rate provided in the residuary entry which is 15%.

11. Thus, for the foregoing reasons, we are not inclined to entertain a question of law concerning this aspect of the matter.

12. This brings us to the other issue concerning the treatment of subsidy received by the respondent/assessee from the Government of Goa [i.e., proposed question no. (v)].

12.1. As indicated above, CIT(A), while holding, for the reasons given in the order dated 20.01.2014, that money received in the form of subsidy was a capital receipt, had directed that it be reduced from the block of assets, *albeit*, on a proportionate basis. This led to, both, the appellant/revenue, as well as the respondent/assessee being aggrieved by the order passed by CIT(A).

13. The Tribunal, *qua* this aspect, has agreed with CIT(A) that the

subsidy received by the respondent/assessee was, indeed, a capital receipt and gone on to rule that it cannot be adjusted against the block of assets, for the reason that it was not a sum paid to the respondent/assessee to meet, directly or indirectly, any part of the actual cost of the subject asset(s).

13.1 The Tribunal, thus, distinguished between the measure adopted for calculating the quantum of subsidy and the purpose for which the subsidy was granted to the respondent/assessee. In reaching this conclusion, the Tribunal relied upon the judgement of the Supreme Court in ***CIT v P.J. Chemicals Ltd***, 1994 210 ITR 830 (SC).

13.2 *Qua* the first limb of the issue, i.e., of the nature of the receipt, as noticed above, the Tribunal sustained the finding of fact returned by the CIT(A), who, in support of his conclusion noted the following:

> *"…- the scheme was for promoting industrialization of notified backward districts;*
> *- it was applicable to SSI units having valid SSI registration;*
> *- the quantum of subsidy was 25% subject to a maximum of Rs.25 lakhs on the investment made on the fixed capital investment after 01.10.1998 only;*
> *- one of the major requirement[s] of the scheme was that the unit should employ at least 80% of the local employees…"*

14. Having regard to the fact that the subsidy received by the respondent/assessee was an incentive given to establish an industrial unit in a backward area and, thus, generate employment for local inhabitants, we cannot but agree with the Tribunal and CIT(A) that the subsidy, indeed, was a capital receipt.

15. Similarly, insofar as the other limb of the issue is concerned, we agree with the Tribunal that the measure for calculating the subsidy, which was

25% of the fixed capital cost, cannot determine the purpose for which the subsidy was given, and, thus, as directed by CIT(A), adjusted proportionately against the cost of the assets.

15.1 Since the subsidy in this case was not intended as a payment to meet, directly or indirectly, a part of the cost of the assets, no adjustment could have been ordered, as was directed by CIT(A). The Tribunal, on this score, in our view, reached the correct conclusion.

16. Accordingly, in our opinion, no substantial question of law arises for consideration, on this aspect as well.

17. Thus, for the foregoing reasons, the appeal preferred by the appellant/revenue is dismissed.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

JULY 4, 2023/vg