$~11

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

% *Decision delivered on: 24.03.2021*

\+ **ITA 81/2021**

PR. COMMISSIONER OF INCOME TAX – 4, New Delhi
....Appellant

Through: Mr. Raghvendra Kishore Singh, Sr. Standing Counsel for Revenue.

versus

HCL COMNET SYSTEMS & SERVICES LTD ..... Respondent

Through: Mr. Ajay Vohra, Sr. Advocate. with Mr. Aditya Vohra, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the order dated 16.10.2019 passed by the Income Tax Appellate Tribunal [hereafter referred to as the 'Tribunal'] rendered in ITA 4808/Del/2016 concerning the assessment year [in short 'AY'] 2010-2011.

2. The appeal is preferred under Section 260A of the Income Tax Act, 1961 [in short 'the Act']. In this appeal, which is, instituted by the revenue, the following substantial questions of law have been suggested for being framed and adjudicated upon by this Court:

> "*a) Whether in the facts and circumstances of the case and in law, ITAT misinterpreted the scope of Section 14A(1) of the Act and errored in holding that Section 14(A) can only be invoked if the Respondent has earned exempted income during the assessment year ignoring the fact that Section 14A doesn't lay down such requirement and the only precondition for invoking Section 14A is that there*

must be "expenditure incurred in relation to such income which does not form part of the total income under this Act"?

b) *Whether in the facts and circumstances of the case and in law, ITAT errored in interpreting the Circular No. 5 of 2014 of the CBDT which clarifies the true scope and meaning of Section 14A of the Act?*

c) *Whether in the facts and circumstances of the case and in law, ITAT failed to appreciate that the AO, having regard to the accounts of the Respondent, was not justified with the correctness of such claim of the Respondent in respect of such expenditure in relation to income which does not form part of the total income under this Act?*

d) *Whether in the facts and circumstances of the case and in law, ITA'T errored in deciding upon the true nature of the license fee paid to the Department of telecommunication by the assessee, which clearly established that the expenditure was a capital expenditure and wrongly relied upon the decision in CIT V Bharti Hexacom Limited 221 Taxman 323(Delhi)?*

e) *Whether in the facts and circumstances of the case and in law, ITAT errored in holding that the exemption under section 10A of the Act should not be computed after excluding telecommunication expenses and foreign currency expenditure from the export turnover?*

f) *Whether in the facts and circumstances of the case and in law, ITAT erred in deleting the disallowance of unrealized foreign exchange loss on account of reinstatement of assets and liabilities of Rs.15,97,25,873/- ignoring the fact that this is a notional loss and not allowable to be set off against the taxable income in view of the CBDT's instruction no. 3 of 2010 dated 23.03.2010?"*

3. Insofar as the first three questions of law i.e. (a), (b) and (c), as suggested by the revenue, are concerned, Mr. Raghvendra Kishore Singh, who appears for the revenue, fairly submits that they are

covered by the judgement of the coordinate Bench of this Court rendered in ***Joint Investments (P.) Ltd. vs. Commissioner of Income-tax, [2015] 372 ITR 694 (Delhi).***

4. As regards the fourth question of law, that is set out in clause (d) above, as suggested by the revenue, is concerned, once again, Mr. Singh submits that the same is covered by the judgement of the coordinate Bench of this Court in ***Commissioner of Income-tax vs. Bharti Hexacom Ltd., [2014] 221 Taxman 323 (Delhi).***

5. We may also indicate that the Tribunal in its order has referred to the view taken in the assessee's case in respect of an earlier AY (i.e. AY 2007-2008).

5.1. The Tribunal rendered its order in respect of the said assessment year on 15.01.2015. This order was passed in ITA 4546/Del./ 2013.The order passed was in favour of the assessee.

6. Likewise, insofar as the fifth question of law, that is set out in clause (e) above, as suggested by the revenue, is concerned, the same, according to Mr. Singh, is covered by the judgement of the Supreme Court rendered in ***Commissioner of Income-tax, Central - III vs. HCL Technologies Ltd., [2018] 404 ITR 719 (SC).***

7. Insofar as the sixth question of law, that is set out in clause (f) above is concerned, as would be evident upon a perusal of the question of law suggested by the revenue, it appears to be the revenue's contention that the disallowance of loss on account foreign fluctuation should not have been deleted by the Tribunal in view of CBDT's instruction no. 3 of 2010, dated 23.03.2010.

8. Besides this, Mr. Singh submits that although, the principle enunciated by the Supreme Court in ***Commissioner of Income-tax,***

Delhi vs. Woodward Governor India (P.) Ltd., [2009] 312 ITR 254 (SC) would apply, what ought to have been considered by the authorities below was whether or not the six conditions adverted to in the said judgement were, in fact, fulfilled.

8.1 In support of this view, Mr. Singh has relied upon the judgement of the Division Bench of the Karnataka High Court in ***Commissioner of Income-tax, Central Circle vs. Wipro Finance Ltd., [2013] 351 ITR 153 (Karnataka).***

8.2. Mr. Singh says that two out of the six conditions have not been fulfilled by the assessee. These being:

> *"(ii) Whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide;*
>
> *(iv) Whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains."*

9. Mr. Ajay Vohra, learned senior counsel, who appears on advance notice on behalf of the assessee, emphatically states that all the conditions stipulated in ***Woodward Governor India (P.) Ltd. (supra)*** by the Supreme Court stand fulfilled.

9.1 In support of his contention, Mr. Vohra has drawn our attention to the relevant paragraphs of the order passed by the Commissioner of Income Tax (Appeals). In particular, he has drawn our attention to the contentions raised by the assessee before the CIT(A) concerning this issue and the discussion qua the same by the CIT(A).

9.2 Mr. Vohra goes on to say that the Tribunal has noticed the findings of fact returned by the CIT(A), and thereafter concluded that both on principle and on facts, the judgment of the Supreme Court rendered in ***Woodward***

Governor India (P.) Ltd. (supra) would apply.

10. Having heard the counsel for the parties and perused the record, we find that the assessing officer has raised no concern as to the non-fulfilment of the conditions stipulated in the judgment of the Supreme Court rendered in ***Woodward Governor India (P.) Ltd. (supra).***

10.1. As a matter of fact, the argument made before us by Mr. Singh does not find mention in the proceedings preferred either before the CIT(A) or the Tribunal. The record shows that the CIT(A) after perusing the record and hearing the contentions raised before him has made the following observations:

> *"(i) The additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes was allowable as deduction u/s 37(1) in the year of fluctuation in the rate of exchange and not in the year of repayment of such loans; and*
>
> *(a) The term "expenditure" in s.37 covers an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. The "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure u/s 37(1);*
>
> *(b) Profits and gains are required to be computed in accordance with commercial principles and accounting standards (AS-11);*
>
> *(c) Accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits;*
>
> *(d) The fact that the department taxed the gains on fluctuation on the basis of accrual in appellant's own case for AY 2009-10,*

while disallowing the loss is important shall amount to the double standards adopted by the Department;

(e) U/s 43A (pre-amendment), the change in the rate of exchange subsequent to the acquisition of asset triggers the adjustment in the actual cost of the assets. Actual payment of the liability as a consequence of the exchange variation is not required. The amendment of s.43A by the FA 2002 w.e.f. 1.4.2003 is not clarificatory.

Note: The judgement of the ITAT Special Bench in ONGC vs. ITO 83 ITD 151 has been approved by the Hon. Supreme Court in the case of CIT vs Woodward Governor India Pvt Ltd 312 ITR 254.

Respectfully, following the order of the Hon. Supreme Court in 312 ITR 254 the decided in favour of the appellant. The AO is directed to allow the consequential relief"

10.2. We may also add that in the appeal filed before us, no such ground has been taken as is articulated across the bar by Mr. Singh.

10.3. What is important is that in the AY 2009-2010, on account of fluctuation in the currency, the gain, which accrued to the assessee, was, concededly, offered to tax. As a matter of fact, the judgment of the Karnataka High Court relied upon by Mr. Singh uses this indicia almost as a litmus test to ascertain as to whether conditions stipulated in ***Woodward Governor India P. Ltd. (supra)*** stand fulfilled. For the sake of convenience, the relevant observations made by the Karnataka High Court in ***Wipro Finance Ltd. (supra)*** are extracted hereafter:

"4. The view taken by the Supreme Court in this judgment is to the effect that while even a notional loss can be claimed by way of a business loss and as a deductible item in computing the income of the assessee for the year, as it is a computation on notional basis, it is made dependent on the manner of conduct of the assessee in respect of the earlier assessment period and particularly as to the assessee has been following this uniformly over a period of years ***and the test being when there was a notional gain as to whether it had been offered for tax***

etc. *The Supreme Court took the view that such claim can be entertained subject to fulfillment of the following six conditions:*

> *(i) whether the system of accounting followed by the assessee is the mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received;*
>
> *(ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide;*
>
> *(iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;*
> *(iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains;*
>
> *(v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards;*
>
> *(vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.*"

11. Given these circumstances, we have to remind ourselves that the power invested in this Court under Section 260A of the Act is to adjudicate upon the substantial question(s) of law. The revenue, having not laid an edifice concerning the purported non-fulfilment of any of the conditions, stipulated by the Supreme Court in ***Woodward Governor India P. Ltd. (supra),*** cannot, for the first time, without even taking a ground in the instant appeal, argue before us that the loss which accrued to the assessee on account of the foreign currency fluctuation cannot be claimed by it as a

business loss.

11.1. Therefore, for the reasons stated hereinabove, we are not inclined to admit the question of law set out either in clause (f) or any of the other clauses, i.e., (a) to (e). As noticed hereinabove questions of law, as suggested in clause (a) to (e) are no longer *res integra* insofar as this Court is concerned.

12. Given the aforesaid position, we are not inclined to entertain the appeal. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

TALWANT SINGH, J

MARCH 24, 2021/pmc

Click here to check corrigendum, if any