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

% *Date of Decision :08.10.2024*

\+ **ITA 898/2018**

THE PR. COMMISSIONER OF INCOME TAX-3 ....Appellant

Through: Mr. Vipul Agrawal, Sr. Standing Counsel with Mr. Gibran Naushad and Ms. Sakshi Shairwal, Jr. Standing Counsels.

versus

ESYS INFORMATION TECHNOLOGIES LTD .....Respondent

Through: Ms. Prem Lata Bansal, Sr. Advocate with Mr. Sumit Batra and Mr. Shivang Bansal, Advocates

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (*ORAL*)

1. The Revenue has filed the present appeal impugning an order dated 09.03.2018 (hereafter *the impugned order*) passed by the learned Income Tax Appellate Tribunal (hereafter *the Tribunal)* in ITA No. 3378/Del/2010, captioned *DCIT, Circle-11(1), New Delhi v. eSys Information Technologies Ltd.* in respect of assessment year (hereafter *AY*) 2004-05. It is relevant to note that the impugned order is a common order passed by the Tribunal in two appeals (ITA No. 3378/Del/2010 and ITA No. 3514/Del/2010) in respect of AYs 2004-05 and 2005-06. The present appeal relates to the

Revenue's appeal in respect of AY 2004-05.

2. The controversy in the present appeal is twofold. The first relates to the disallowance of the amount of ₹34,63,450/- on account of goodwill that was written off by the assessee during the relevant previous year. And, the second is regarding the addition made on account of arm's length price (hereafter *ALP*) with related enterprises. The Revenue's grievance regarding the calculation of ALP is confined to an associated enterprise "eSys Singapore" (hereafter *the Foreign AE*), as one of the tested parties.

3. In view of the above, this Court had framed the following questions for consideration:

> "(i) Whether the Income 'Tax Appellate Tribunal ["**ITAT**"] was correct in upholding the order of Commissioner of Income Tax (Appeals) ["**CIT(A)**"] in treatment of Foreign Associate Enterprise ["**Foreign AE**"] as tested party without giving any concrete finding and without considering the fact that the financials and functions of the Foreign AE were more complex as compared to the assessee company?
>
> (ii) Whether the ITAT was correct in upholding the order of CIT(A) in treatment of excess payment over and above the purchase of goods as goodwill?"

4. As far as the first question is concerned, it is premised on the basis that the Foreign AE – which is admittedly one of the associated enterprises – was treated as one of the tested parties. According to the Revenue, it was not apposite to use the said entity as a tested party, considering that the financials and functions of the Foreign AE was more complex as compared to the assessee. However, it is conceded that the said question does not arise in the given facts. This is so because, in fact, the Foreign AE was not

included as one of the tested parties for determining the ALP. Although the assessee had proposed the same, it was rejected by the Transfer Pricing Officer and therefore, the addition made on account of the ALP adjustment was not on account of inclusion of the Foreign AE as a tested party.

5. Since, concededly, the Foreign AE was not included as one of the tested parties, the question projected by the Revenue does not arise.

6. The second question to be addressed is with regard to the disallowance of ₹34,63,450/-, which was written off by the assessee as goodwill. The undisputed facts are that the assessee had paid a sum of ₹47,00,000/- to M/s Nebula Technologies Pvt. Ltd. (hereafter *Nebula)* for purchasing certain assets, which were located in different places in India. The said assets were valued at ₹12,37,450/- and there is no dispute regarding this valuation of the said assets. Consequently, the assessee had treated the balance amount of ₹34,63,450/- paid to Nebula as goodwill. The assessee claimed that it had not acquired any benefit against the said amount and had, accordingly, written off the said goodwill in its books of accounts. The Assessing Officer (hereafter *the AO*) rejected the said claim and added a sum of ₹34,63,450/- as income chargeable to tax. He reasoned that the same was not wholly and exclusively expended for the purposes of business; therefore, was not allowable under Section 37(1) of the Income Tax Act, 1961.

7. The assessee appealed the said decision before the learned Commissioner of Income Tax (Appeals) [hereafter *the CIT(A)*]. The CIT(A) held that there was no dispute that the amount of ₹47,00,000/- was spent

towards acquisition of assets, which were acquired for business purposes. Accordingly, the CIT(A) held that the assessee was entitled to charge depreciation on the said asset for the reason that even intangible assets could be treated as depreciable assets. In the present case, since the expenditure was incurred towards depreciable assets, the CIT(A) allowed 25% of the said amount as depreciation.

8. The Tribunal declined to interfere with the decision of the CIT(A) by following the decision of the Supreme Court in ***Commissioner of Income Tax, Kolkata v. Smifs Securities Ltd.: (2012) 348 ITR 302*** whereby the Supreme Court had held that the goodwill could be considered as an intangible asset eligible for depreciation. The Revenue does not dispute the proposition that in a given case, intangible assets may also be eligible for depreciation.

9. As noted above, the AO had disallowed the amount of goodwill written off entirely, on the ground that it was not wholly and exclusively for the purposes of business. However, there is no dispute that the assessee had paid a sum of ₹47,00,000/- for acquisition of assets of Nebula as claimed. There is also no suggestion that the said amount was paid for any other consideration or purpose. It would, thus, follow that the entire amount of ₹47,00,000/- is required to be treated as expenditure for acquisition of assets or attendant to the said acquisition. Since the assets acquired have been valued at ₹12,37,450/-, there is no infirmity in treating the balance amount as pan intangible asset, and the decision of the CIT(A) to allow deprecation on such intangibles cannot be faulted.

10. In view of the above, the second question as framed, is answered against the Revenue and in favour of the assessee.

11. The present appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 08, 2024
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Click here to check corrigendum, if any