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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
18-19.

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ITA 35/2014

COMMISSIONER OF INCOME TAX-II Appellant
Through: Mr. Kamal Sawhney, Senior Standing
counsel with Mr. Raghvendra Singh, Junior
Standing counsel and Mr. Shikhar Garg, Advocate

versus

KAJARIA CERAMICS LTD. Respondent
Through: Mr. Prakash Kumar, Advocate.

✓ **ITA 533/2014**

THE COMMISSIONER OF INCOME TAX-II Appellant
Through: Mr. Kamal Sawhney, Senior Standing
counsel with Mr. Raghvendra Singh, Junior
Standing counsel and Mr. Shikhar Garg, Advocate

versus

KAJARIA CERAMICS LTD Respondent
Through: Mr. Prakash Kumar, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **24.08.2015**

1. ITA No. 35 of 2014 is an appeal by the Revenue against the order dated 12th July 2013 passed by the ITAT in ITA No. 4879/Del/2011 for the assessment year ('AY') 2008-09. ITA No. 533 of 2014 is directed against

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the order dated 7th February 2014 passed by the ITAT in ITA No. 1142/Del/2013 for AY 2009-10.

2. The Respondent Assessee is a company engaged in the business of manufacturing and trading of ceramics glazed and unglazed tiles and financing. As regards AY 2008-09, the Assessee filed its return of income on 29th September 2008 declaring nil income. The income was assessed under Section 143 (3) of the Act. The Assessing Officer ('AO') noted that the Assessee had taken a premises on rent from group company Dua Engineering Works Pvt. Ltd. (DEWPL) in terms of an agreement executed on 28th December 2006, whereby the annual rent was fixed at Rs.48,00,000. The rent agreement also provided that the Assessee would pay an interest free security deposit of Rs.5.35 crores.

3. The AO was of the view that the interest free deposit was far in excess of the normal deposit of security and therefore was an undue favour given to Assessee's sister concern. The AO calculated the excess security deposit at Rs.5.11 crores, computed the interest thereon @12% and held the interest expenses of Rs.61,32,000 inadmissible.

4. It was further noted by the AO that the Assessee had failed to include in its tax audit report the details of payment of Rs. 89,60,273 to Kajaria Plus Ltd. ('KPL'). The AO rejected the plea of the Assessee that the payment was not for goods and services and therefore not included in para 17 (m) of the Tax Audit Report. The AO held that the Assessee was liable to deduct TDS on the aforementioned payment under Section 194C of the Act. Accordingly, the aforementioned sum was disallowed under Section 40(a)(ia) of the Act.

5. Aggrieved by the above order of the AO for AY 2008-09, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ('CIT (A)'). The appeal was allowed by the CIT (A) by holding that the making of the interest free deposit in favour of the sister concern was its business decision and it gained no undue advantage. On the second issue, it was held that the elements of income were not embedded in the reimbursement made to its sister concern and therefore the Assessee was not obliged to deduct TDS. The ITAT in appeal by the Revenue upheld the aforementioned order of the CIT (A).

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6. As far as AY 2009-10 is concerned, the Assessee filed its return on 30th September 2009 declaring the income of Rs.5,69,92,660. While assessing the said return under Section 143 (3) of the Act, the AO made an addition of Rs.11,25,000 being the expenses claimed on account of the foreign travel of dealers. The AO viewed these expenses to be in the nature of incentive/commission, which would be liable to TDS under Section 194H of the Act. Accordingly, the said amount was disallowed under Section 40(a) (ia) of the Act. The AO also disallowed the interest calculated on the excess security deposit made with DEWPL and accordingly made an addition of Rs. 81 lakhs.

7. In both the appeals one common question is common regarding the excess security deposit purportedly made by the Assessee in respect of renting of the premises from DEWPL. The Assessee had taken the premises on monthly rent of Rs.19 per sq. ft. whereas the market rent was Rs.60-80 per sq. ft. The area was 21000 sq. ft. As per Clause 2 of the rent agreement the parties had agreed that the rent would be Rs.4 lakhs per month, whereas the security deposit would keep on increasing. Viewed in this manner, there was no undue advantage to DEWPL.

8. Having heard learned counsel for the parties, the Court finds that the view taken by the CIT (A), as affirmed by the ITAT, on an interpretation of the clauses of the rent agreement and in coming to the aforementioned conclusion cannot be said to be perverse. It was a possible view to take. On this issue, therefore, the Court is not persuaded to hold that any substantial question of law arises.

9. As regards reimbursement made to KPL, as pointed out by the ITAT, it did not appear to have any element of income warranting deduction of tax at source under Section 194C of the Act. The ITAT also concurred with the view of the CIT (A) that since no element of income was embedded in the reimbursement, the Assessee was not obliged to deduct TDS. The decision entirely appears to be on factual basis.

10. Relevant to AY 2009-10, the other issue concerns the travelling expenses paid to dealers. There was no basis for AO to come to the conclusion that this payment was actually in the nature of commission to the agents. It was noticed that the entitlement to foreign travel was not proportionate to the volume of business conducted through a particular dealer/sub-dealer. Anyone who achieved the actual sale target was entitled

to visit the foreign destination. In order to characterize the payment as commission, for the purposes of Section 194H of the Act, it was essential first to establish the relationship of principal and agent, which admittedly was absent in the case of the Assessee. Consequently, the CIT (A) held that the foreign travel expenses of the dealers could not be disallowed under Section 40(a)(ia) of the Act.

11. The Court finds that both the CIT (A) as well as ITAT proceeded on facts as far as the aforementioned payment is concerned. The Court is unable to find any substantial question of law arising therefrom.

12. Consequently, the appeals are dismissed.



S.MURALIDHAR, J



VIBHU BAKHRU, J

AUGUST 24, 2015

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