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

\+ ITA 536/2016

PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL-2) ..... Appellant

Through : Sh. Sanjay Kumar and Sh. Dileep Shivpuri, Advocates.

versus

SIS LIVE ..... Respondent

Through : Ms. Rashmi Chopra and Ms. Asiya, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

<u>O R D E R</u>

% 16.09.2016

The question of law sought to be urged is whether the Income Tax Appellate Tribunal (ITAT) acted within bounds in holding that the encashment of bank guarantee was an inadmissible expenditure as it fell within the prohibited category under Explanation to Section 37 of the Income Tax Act, 1961 [hereafter "the Act"].

The Assessing Officer (AO) disallowed it by applying Section 69C of the Act. The ITAT in its order noticed that the contract for production awarded to the assessee was sub-contracted to M/s. Zoom Communication Ltd. for ₹177 crores. The assessee followed the cash system of accounting and received ₹133.81 crores, net of Service Tax from its Principal, i.e. Prasar Bharati @ 60% of the contract price.

The assessee paid ₹101.41 crores to M/s. Zoom Communication Ltd. at 60% of the sub-contract price. It showed gross income from production and other technical services fees to be ₹109.21 crores in its income and expenditure account. This was on account of receipt of ₹133.81 crores as reduced by the bank guarantee amount of ₹24.6 crores encashed by Prasar Bharathi. The AO rejected the cash system of accounting adopted by the assessee and added back the bank guarantee amount under Section 67C on account of the encashment of the guarantee. The Dispute Resolution Panel accepted the assessee's contention with respect to the cash system of accounting and further agreed with the Transfer Pricing Officer and AO on the application of Section 69C and the encashment of the bank guarantee.

The ITAT set aside the order and held as follows:

"20. In this regard, it becomes imperative to consider the purpose for which bank guarantee was given and the circumstances that led to its encashment by Prasar Bharathi. There is no dispute on the fact, as has also been recorded in the assessment order, that the assessee furnished a performance bank guarantee equal to 10% of the contract price, which was encashed on account of variations in carrying out the contract under four different heads, namely, Issues relating to International coverage of Queen's Baton Relay; Hiring of lighting consultant; Supply of Power cables; and Equipment deviations/shortfall. Prasar Bharathi noticed the lapse on the part of the assessee on various scores inasmuch as: 'no work was done or the work done was in contravention to the mandate of contract for CWG 2010'. This reveals that the bank guarantee was encashed by Prasar Bharathi for non-performance of the contract or its performance in contravention of the agreed terms. It is further found that the amount was not recovered as a

penalty for violation of law. The assessee furnished performance guarantee for the work to be done in the production and telecast of CW Games and the amount received for the performance of the contract was credited to its Income and Expenditure account. The bank guarantee was encashed for non/improper performance in producing and telecasting the CW Games, against which there is corresponding receipt of income credited to the Income & Expenditure account. When we consider this factual matrix in a holistic manner, what turns out is that the encashment of bank guarantee was simply on account of non/inadequate performance of contract for which the gross amount received was credited by the assessee to its Income and Expenditure account. Encashment of the performance guarantee by Prasar Bharathi has a direct and immediate link with the income received on account of performance of the contract. We fail to appreciate as to how the amount of such guarantee encashed cannot be treated as a charge against the income and hence not deductible. The situation can be seen from another angle by which Prasar Bharathi has paid Rs. 133.81 crore to the assessee for the work done during the year and thereafter recovered Rs.24.60 crore for non-performance of the contract work. In our considered opinion, outcome remains same under both the circumstances, namely, the first in which the amount is first given and then a part of it is recovered by encashment of bank guarantee and the second, in which only net amount is given to the assessee. Under both the circumstances, it is the net amount of receipt which is chargeable to tax as the assessee's real income. By no standard, the encashment of performance bank guarantee can be viewed as independent of the income from production and telecasting of the CWG 2010, which is the sole source of the assessee's business income. Thus it transpires that encashment of performance guarantee is an expenditure incurred wholly and exclusively for the purpose of business. Further it is neither any expenditure *of the nature described in sections 30 to 36 nor a capital or personal expenditure. Thus it is palpable that all the necessary ingredients of section 37(1) are fully satisfied and hence the amount of encashed performance bank guarantee is a deductible expense."*

This Court is of the opinion that the view adopted by the ITAT is sound and in consonance with Section 37 as well as general principles of law. By no stretch of imagination can amounts quantified or the methods indicated in a contract towards determining the liquidated amounts fall under the exception to the residual provision, i.e. Section 37(1) on the ground that it fulfills the condition under Explanation 1 to that provision. Therefore, this Court finds no reason to interfere with the ITAT's decision. The appeal does not raise any substantial question of law. It is accordingly dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

SEPTEMBER 16, 2016
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