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

+ **ITA 362/2017**

COMMISSIONER OF INCOME TAX (LTU) Appellant

Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel.

Versus

GAIL (INDIA) LTD. Respondent

Through: Mr. Udit Naresh and Ms. Kavita Jha,
Advs.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

% **03.07.2017**

CM No. 17092/2017 (delay in re-filing)

1. For the reasons stated therein, this application is allowed. The delay in re-filing the appeal is condoned.

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2. This is an appeal by the Revenue against an order dated 29th July, 2016 passed in ITA No. 1784/Del./2012 for the Assessment Year ('AY') 2007-08.

3. The question of law sought to be raised by the Revenue is whether the ITAT's decision in quashing the order dated 24th February, 2012 passed by the Commissioner of Income Tax [CIT] under Section 263 of the Act was justified in law and on facts.

4. The background facts are that the Respondent/Assessee filed its income tax return for the AY 2007-08 on 30th October, 2007. The return was picked

for scrutiny by the Assessing Officer ('AO'). By the assessment order dated 31st December, 2009 the AO made certain additions to the taxable income.

5. Subsequently, proceedings were initiated by the CIT/Delhi-IV under Section 263 of the Act by issuing a notice dated 4th February, 2011. The CIT was of the view that the assessment order dated 31st December, 2009 was erroneous and prejudicial to the interest of the Revenue on account of following:

(i) Allowability of advertisement and publicity expenditure of Rs. 11,72,80,000;

(ii) Corporate Social Responsibility (CSR) expenses of Rs. 8,53,14,703; and

(iii) Applicable rate of depreciation on computer software amounting to Rs. 11,33,77,787/-

6. The Revenue has come before this Court only on the deletion of the additions under (i) and (ii) above.

7. As far as the issue at (i) above is concerned, expenditure on advertisement and publicity is essentially for business purposes. It is not of an enduring nature and cannot possibly be characterised as capital expenditure. The finding of the ITAT as regards (i) above does not give rise to any substantial question of law.

8. As regards the expenditure on CSR, the ITAT in the impugned order has noticed that a questionnaire was issued by the AO to the Assessee during the assessment proceedings. The Assessee's reply on this aspect in its reply dated 10th November, 2009 mentioned that the CSR expenses were to the

tune of Rs. 8.53 crores. The ITAT accepted the contention of the Assessee that the expenditure in the CSR activity was for the purpose of business and, therefore, allowable under Section 37 of the Act.

9. Mr Rahul Chaudhary, learned Senior Standing Counsel for the Revenue drew the attention of the Court to Explanation 2 below the Section 37 of the Act which was inserted with effect from 1st April 2015 and reads as under:

"Explanation 2.-For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an Assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the Assessee for the purposes of the business or profession."

10. Mr. Chaudhary submitted that although the above amendment was prospective in nature, it was in fact clarificatory of the existing legal position that the initial onus of showing that the CSR expenses were for the purposes of business was on the Assessee. He submitted that in this case apart from merely placing the figures of the CSR expenditure before the AO, the Assessee failed to justify that the CSR expenses were indeed for the purposes of business.

11. The Court is unable to accept the above submission. Explanation 2 only states that CSR expenses shall not be deemed to be an expenditure for the business of Assessee. This, however, does not mean that the claim of CSR expenses as a deduction is not allowable *per se*. It only places the initial onus on the Assessee to show that the CSR expenses were for business purposes.

12. As far as the present case is concerned, when a questionnaire was issued by the AO raising a specific query as regards the CSR expenses that was answered by the Assessee. The AO could have made further enquiries on this explanation but chose not to do so. That by itself does not make the AO's order erroneous.

13. In fact in the order of the CIT itself in para 6 the explanation offered by the Assessee is noted. According to the Assessee the expenses on account of CSR comprised of expenses on helping the poor children in their study, providing medical care to the poor and downtrodden section of society, rehabilitation of mentally handicapped children, providing basic amenities like water etc to the poor and other CSR related activities. It was sought to be explained by the Assessee that being a public sector undertaking its objective was not only earning profit but also serving the society.

14. One of the essential components to justify the invocation of Section 263 of the Act is that the order of the AO must be erroneous. In this case the said requirement cannot be said to be fulfilled. Consequently, the impugned order of the ITAT setting aside the order of CIT under Section 263 of the Act cannot also be said to be suffering from any legal infirmity giving rise to any substantial question of law.

15. The appeal is dismissed.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 03, 2017/dk