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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17.05.2023

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ITA 281/2023 & CM APPL. 25640/2023**PRINCIPAL COMMISSIONER OF INCOME TAX****DELHI -4**

..... Appellant

Through: Mr Abhishek Maratha, Sr. Standing
Counsel with Mr Akshat Singh,
Advocate.

versus

NESTLE INDIA LTD

..... Respondent

Through: Mr Aniket D. Agarwal, Advocate.

CORAM:**HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J.: (ORAL)**

1. This appeal concerns AY 2013-14.

1.1 This appeal filed by the appellant/revenue concerns Assessment Year (AY) 2013-14 and impugns a common order dated 31.07.2020 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"]. The order dated 31.07.2020, thus, concerns the following AYs: AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 (the AY in issue) and AY 2014-15,

1.2 Pertinently, *via* this order, as noticed above, the Tribunal has disposed of appeals concerning other AYs also, appeals concerning these AYs are listed on our board today as well.

2. Mr Abhishek Maratha, senior standing counsel, who appears on behalf of the appellant/revenue, informs us that the following issues arise for consideration:

(i) First, whether the Tribunal was correct in sustaining the deletion of



addition made on account of disallowance of license fee amounting to Rs. 1,17,83,98,395/-?

(ii) Second, whether the Tribunal was right in sustaining the view of the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”] in reducing disallowance under Section 14A of the Act from Rs. 33,42,193/- to Rs. 20,13,989/-?

(iii) Third, whether the Tribunal was right in sustaining the deletion made by CIT(A) concerning addition of Rs. 4,50,01,287/- made by the AO, on account of disallowance of depreciation on account of energy saving and pollution control devices?

3. Mr Maratha does not dispute that the first issue is covered by the judgment of this Court dated 11.05.2011, rendered in ITA 662/2005, titled ***Commissioner of Income Tax vs. M/s Nestle India Ltd.***

4. Likewise, insofar as the second issue is concerned, Mr Maratha also concedes that this issue is covered by the judgments rendered by Coordinate Benches of this Court in ***HT Media Ltd. vs. Principal Commissioner of Income Tax IV, New Delhi*** (2017) 399 ITR 576 (Delhi) and ***Coforge Ltd. vs. ACIT.*** (2021) 436 ITR 546 (Delhi).

4.1 Insofar as the judgment in ***HT Media*** is concerned, *inter alia*, it requires the AO, while dealing with the issue involving disallowance under Section 14A of the Act, read with Rule 8D of the Income Tax Rules 1962 [in short, “Rules”], to satisfy himself, *inter alia*, with regard to the amount offered for disallowance by the assessee under Section 14A of the Act.

5. Insofar as the judgment in ***Coforge Ltd.*** is concerned [See paragraphs 12.5 to 13.2], the Tribunal, in the impugned order, with regard to the aspect pertaining to satisfaction concerning the AY in issue and other concerned



AYs, has stated the following:

6.0.1 We also note that although the Ld. CIT-DR has submitted that the issue of recording the satisfaction has to be examined ever year and that there is no res-judicata in Income Tax proceedings, all the same, a perusal of the Asst. orders for the years under appeal shows that the Assessing Officer has made identical observations in all the years under appeal and in all the years the factum of recording of satisfaction is completely absent. We also note that the assessee had made suo moto disallowances in the years under appeal as under:

2010-11	Rs. 11,52,656/-
2011-12	Rs. 10,02,954/-
2012-13	Rs. 9,64,928/-
2013-14	Rs. 20,13,989/-
2014-15	Rs. 17,02,026/-

6.0.2 The above suo moto [sic: suo motu] disallowances were not commented upon by the Assessing Officer but were completely disregarded and no satisfaction for not accepting the suo moto disallowances was recorded by the AO. The Ld. AR has also submitted that the disallowances may be restricted to the suo moto [sic: suo motu] disallowance offered by the assessee company. Therefore, we sustain the disallowance u/s 14A, as offered by the assessee company for the previous years under appeal as under:

2010-11	Rs. 11,52,656/-
2011-12	Rs. 10,02,954/-
2012-13	Rs. 9,64,928/-
2013-14	Rs. 20,13,989/-
2014-15	Rs. 17,02,026/-

6.0.3 Accordingly, the ground raised by the assessee stands allowed and grounds raised by the Department are dismissed with respect to disallowance u/s 14A in all the five years under consideration.



5.1 It is in this backdrop that the Tribunal sustained the view of the CIT(A).

6. In our opinion, the view taken by the Tribunal cannot be found fault with. The Tribunal accepted the *suo motu* disallowance made under Section 14A of the Act by the respondent/assessee to the extent of Rs. 20,13,989/- (for AY 2013-14). We are in agreement with the view taken by the Tribunal, having regard to the judgment of Coordinate Bench in **Coforge Ltd's** case.

7. As regards the third issue, Mr Maratha has submitted that the conclusion reached by the Tribunal required interference. In this regard, Mr Maratha sought to place reliance on the order passed by the AO.

7.1 According to Mr Maratha, the assets in issue i.e., energy saving and pollution control devices had to be put to use for a claim of depreciation. For the sake of convenience, the relevant part of the assessment order on which Mr Maratha placed reliance is extracted hereafter:

“5.2 The submissions of the assessee have been carefully considered. The disallowance of depreciation on Pollution Controlling Equipment was made in the preceding years by my predecessors giving elaborate reasons for such disallowances. The reasons cited are as under:-

*"The submission made by the assessee only establishes the fact that assets have been purchased by it. Even the certificates issued describe the assets and the functions they are meant to perform. As per the provisions of the Act the depreciation is allowed only when two conditions namely (i) The ownership of the asset and (ii) The asset having been put to use for the purpose of business, are fulfilled. Then the depreciation is allowed at the rates prescribed in the Income Tax Rules, 1962. In this case the assessee has been able to establish the purchase of the assets. **But it has not been able to establish that the assets have been put to use and they have been used for the purpose they are manufactured to perform. The assessee was categorically asked to establish that the assets***



have helped it in controlling pollution. The assessee could establish that the pollution controlling asset has helped in controlling pollution through a comparative results i.e. pollution level measured before the installation and put to use of the pollution controlling assets and the pollution level i.e. emission / effluents after the assets have been put to use other conditions remaining the same. Such comparative results would have gone to establish the fact of the assets being pollution controlling asset and further that they have been put to use. The asset purchased, if does not perform the function it is meant to perform then the very purpose of investing money in that is defeated. Like, a car is entitled to depreciation @ 15%. But to be eligible for the claim, it should be able to serve the purpose of moving and transporting the people, goods etc. A car if it has not been able to move and transport then it is not a car though may be called so. Similarly the so called pollution controlling assets have either not been put to use or they are not the pollution controlling assets. Therefore, the claim of depreciation made by the assessee in respect of the said assets does not get established."

[Emphasis is ours]

8. A careful perusal of the above paragraph would show the AO has asked himself the wrong question and, therefore, reached, in our view, an erroneous conclusion.

8.1 What is evident (something which even Mr Maratha does not dispute), is that the assets on which depreciation was being claimed were purchased by the respondent/assessee. The AO joined issue with regard to the performance of the assets i.e., whether or not they produced results which demonstrated that *inter alia*, pollution control had taken place.

8.2 According to us, the statutory conditions which are provided in Section 32 of the Act are such that they require the assessee claiming



depreciation to establish that the concerned asset has been purchased by the assessee and the same has been put to use.

8.3 The first aspect is not dispute. The other aspect, clearly, gets demonstrated, as the AO has not disputed the fact that the devices were installed. The level of performance of devices is not a measure based on which the AO could have denied depreciation to the respondent/assessee.

8.4 Therefore, asking the respondent/assessee to place on record the comparative chart, in our view, was not imperative, for arriving at a decision whether the respondent/assessee should be entitled to depreciation under Section 32 of the Act. We are informed that this view has been affirmed in favour of the respondent/assessee (i.e., concerning the sustainability of claim of depreciation) in AYs 2009-10, 2010-11 and 2011-12, as well.

9. In our opinion, the Tribunal has reached the correct conclusion. Therefore, no interference is called for even with regard to this issue.

10. Accordingly, we are of the opinion that no substantial question of law arises for our consideration.

11. The appeal and the pending application are, consequentially, disposed of.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

MAY 17, 2023/v

Click here to check corrigendum, if any