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

% Date of decision: 22.03.2023

\+ **ITA 235/2020 & CM APPL. 34818/2020**

CIT (INTERNATIONAL TAX) 1, DELHI ..... Appellant

versus

BHARTI AIRTEL LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr G.C. Srivastava (Special Counsel), Mr Sunil Kumar Agarwal, Sr. Standing Counsel with Mr Shivansh B. Pandya and Mr Utkarsh Tiwari, Advs.

For the Respondent : Mr Ajay Vohra, Sr. Adv.with Mr Sachit Jolly, Ms Soumya Singh & Mr Sohum Dua, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

TARA VITASTA GANJU, J.: (ORAL)

1. This Appeal concerns Assessment Year (AY) 2009-10.

2. The present Appeal has been filed against the Order dated 17.03.2016 passed by the Income Tax Appellate Tribunal [hereinafter called, “ITAT”]. The ITAT has *inter-alia* held that the inter-connection usage charges paid to Foreign Telecom Operator(s) are neither 'Royalty' nor 'Fees' for Technical Services.

2.1 The same issue arises in 3 other connected Appeals filed for different AY's, being ITA 232/2020, ITA 233/2020 and ITA 234/2020 all of which have been heard together.

3. On 24.12.2020, a Coordinate Bench of this Court issued a limited notice in the Application for condonation of delay; CM APPL No. 34818 of 2020. Given the substantial delay in filing the Appeal, the Appellant/Revenue filed an Affidavit dated 10.10.2022 [hereinafter called "Additional Affidavit"] seeking also to explain the delay in filing of the Appeal. Although the Additional Affidavit references all connected Appeals, it is only on the record of ITA 232 of 2020. A Reply Affidavit to the Additional Affidavit was also filed by the Respondent/Assessee on 17.10.2022 in ITA 232 of 2020.

4. There is a typographical error in paragraph 6 of the order dated 10.03.2023, as it indicates that the request of the adjournment is from the "Respondent/Revenue" instead of "Appellant/Revenue". The order dated 10.03.2023 should be read to reflect this change. The rest of the order remains unchanged.

5. Learned Senior Standing Counsel for the Appellant/Revenue, Mr Sunil Kumar Agarwal, had, on 10.03.2023, requested for an adjournment/accommodation on behalf of the Additional Solicitor General (ASG).

6. Today, Mr Agarwal submits, that the ASG will not be able to appear in this matter as he is conflicted, having appeared in a batch of connected matters in which the Respondent/Assessee was also a party. He further submits that the Appellant/Revenue has appointed a Special Counsel i.e., Mr G.C. Srivastava, to assist the Court in this

matter, who is present in Court today.

6.1 Mr G.C. Srivastava, Special Counsel, requests for an adjournment, being only recently engaged by the Appellant/Revenue.

7. Learned Senior Counsel for the Respondent/Assessee, Mr Ajay Vohra, strongly opposes this request. Mr Vohra submits that several adjournments have already been sought by the Appellant/Revenue after the filing of the Appeal in this Court. Reference was drawn to the earlier orders passed by the Coordinate Benches of this Court including orders dated 15.03.2021, 13.08.2021, 30.11.2021 28.03.2022, 18.07.2022, 29.08.2022 20.10.2022 and 01.12.2022 and on the last date of hearing on 10.03.2023.

7.1 Mr Vohra emphasises that prior to any decision on merits, the Appellant/Revenue has to explain the huge delay of 4 years and 100 days in filing of the Appeal. Reliance has been placed by the Respondent/Assessee on the decisions of the Supreme Court in ***State of Madhya Pradesh and Ors. Vs. Bherulal***[1] and ***Union of India Vs. Vodafone Mobile Phone Ltd.***[2] to submit that where there is an unexplained and inordinate delay in filing an Appeal by a government department, the delay cannot mechanically be condoned.

8. Mr G.C. Srivastava, on the other hand, draws the attention of the Court to the Additional Affidavit to submit that the contradictory decisions of other Benches have led to the delay in filing of the present Appeal. In this regard, it is *inter-alia* submitted that due to

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[1] (2020) 10 SCC 654

[2] 2022 SCC OnLine SC 1580

certain developments, a need arose for reconsideration of an earlier administrative decision of the Appellant/Revenue of not filing an Appeal.

9. The record shows that the present Appeal has been filed after delay of 4 years and 100 days as per the Appellant/Revenue [i.e.,1560 days] and 1589 days as per the Registry of this Court. The Application which was filed accompanying the Appeal; C.M. APPL. No. 34818 of 2020 for condonation of delay in filing the Appeal is cryptic. The only reason cited in this Application for the delay is that there was a contrary decision of the Bangalore Bench of ITAT which was in favour of the Appellant/Revenue. The relevant extract reads as follows:

> *"2. That in filing the present appeal, there is a delay of roughly 4 years and 100 days.*
> *3. That the reason which has warranted the filing of the present appeal at such a belated stage is that on similar facts, Bangalore bench of the Ld. ITAT has decided in favor of Revenue, and Assessee is in 260A appeal before the Hon'ble Bangalore High Court wherein strong reliance is being placed on non filing of the present appeal.*
> *4. That since both the matters involve substantial and far reaching questions of law, the Appellant seeks to file the present appeal to enable consistency of the views and to avoid any legal objection to the same".*

9.1 This aspect has already been dealt with by this Court in its order dated 10.03.2023. The ITAT chose to rely not on the decision of the Bangalore Bench but on the decisions of the jurisdictional High Court in the matter of ***DIT v. New Skies Satellite BV***[3] and ***Asia Satellite Telecommunications Co. Ltd. v. Director of Income Tax***[4]. Thus, on

[3] [2016] 382 ITR 114 (Delhi)
[4] [2011] 332 ITR 340 (Delhi)

10.03.2023, the Court had, recorded the following with respect to the Application for condonation of delay:

> *"4. A perusal of the condonation of delay applications shows that the appellant/revenue has preferred the instant appeals, for the reason that the Bangalore Bench of the Tribunal had decided this very issue in its favour.*
> *4.1. We are told that the aforementioned bench has held that the aforementioned payment would constitute royalty.*
> ***4.2. It is not in dispute that the Bangalore Bench rendered its decision on 30.12.2014, which is, as is obvious, prior to the date when the impugned order was passed by the Delhi Bench of the Tribunal.***
> *4.3. Furthermore, in any case, in the impugned order, there is a reference to the decision of the Bangalore Bench, which the Delhi Bench has chosen not to follow because of the decision of the* ***jurisdictional High Court i.e., this court."***

[Emphasis is ours]

10. Section 260A of the Income Tax Act, 1961 [hereinafter called "the Act"] provides that all Appeals from orders of ITAT must be filed within a period of 120 days from the date on which ITAT order is received by the Assessee or Revenue. As discussed herein, the Appeal has been filed, even according to the Appellant/Revenue, after a delay of 4 years and 100 days.

11. The law requisites that an applicant seeking condonation of delay is required to explain the delay in filing the Appeal. The reasons as cited in the Application for condonation of delay as filed by the Appellant/Revenue completely fails to explain the immense delay of over 4 years and a 100 days.

12. The record before this Court shows that even after the filing of the Appeal, the Appellant/Revenue has taken adjournments on almost each date of hearing over the last two years.

13. So far as concerns, the reliance placed by the Appellant/Revenue on

the Additional Affidavit, a perusal of order dated 29.08.2022 passed by a Coordinate Bench is apposite to be referred to here. The said order is reproduced below:-

> *"Though this Court was inclined to dispose of the matters today itself, yet on persistent requests made by Mr. Sunil Kumar Agarwal, learned senior standing counsel for the appellant, last and final opportunity is granted to the revenue to file an affidavit within four weeks.*
> *List on 20th October, 2022. It is made clear that no adjournment shall be granted on the next date of hearing."*

13.1 Further, the Additional Affidavit *inter-alia seeks to* rely upon on the Judgments of Supreme Court in ***Collector (LA) v. Katiji***,[5] and ***State of Haryana v. Chandra Mani***[6]**.** A review of these decisions shows that in the ***Katiji*** case (supra), the delay by the Government department was only 4 days, whereas, there was a delay of about 109 days in the ***Chandra Mani*** Case (supra). As referred to above, the delay in the present case is a huge 1589 days. Therefore, these decisions cannot come to the assistance of the Appellant/Revenue.

14. In any event, the Apex Court in ***Bherulal*** case (supra) while relying upon an earlier decision in ***Postmaster General And Others. Vs. Living Media India Limited and Another***[7] has categorically held that the law of limitation binds everybody including the Government and there is no separate statute of limitation provided for governmental appeals.

14.1 The Supreme Court in ***Postmaster General*** case (supra) has referred to the ***Katiji*** case (supra) [relied on by the Appellant/Revenue above]

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[5] (1987) 2 SCC 107
[6] (1996) 3 SCC 132
[7] (2012) 3 SCC 563

even while refusing to condone a filing delay of 663 days. It was held:

> *" **3.** No doubt, some leeway is given for the government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government [LAO v. Katiji [LAO v. Katiji, (1987) 2 SCC 107]]. This position is more than elucidated by the judgment of this Court in Postmaster General v. Living Media (India) Ltd. [Postmaster General v. Living Media (India) Ltd., (2012) 3 SCC 563: (2012) 2 SCC (Civ) 327 : (2012) 2 SCC (Cri) 580: (2012) 1 SCC (L&S) 649] wherein the Court observed as under: (Postmaster General case [Postmaster General v. Living Media (India) Ltd., (2012) 3 SCC 563 : (2012) 2 SCC (Civ) 327: (2012) 2 SCC (Cri) 580 : (2012) 1 SCC (L&S) 649] , SCC pp. 573-74, paras 27-30)*
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> > *"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. **<u>In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party</u>** before us....*
> >
> > *x x x .....*
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> > ***<u>30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay</u>."***
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> [Emphasis is ours]

15. As such, we find that the Appellant/Revenue has not been able to give any adequate or sufficient reasons, to explain the delay. We are therefore unable to condone the huge delay of more than 4 years and 100 days in filing of the present Appeal, which is dismissed as being time barred.

16. We clarify that we have not examined the matter on merits, since the Appeal is being dismissed on the ground of limitation.

17. The parties will act based on a digitally signed copy of the order.

TARA VITASTA GANJU, J

RAJIV SHAKDHER, J

MARCH 22, 2023/SA