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

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Decision delivered on: 16.11.2023

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ITA 626/2023 & CM APPL. 59071/2023

THE PR. COMMISSIONER OF INCOME TAX -7 Appellant

Through: Mr Ruchir Bhatia, Sr Standing
Counsel with Ms Deeksha Gupta,
Adv.

versus

VERIZONE COMMUNICATIONS INDIA
PVT. LTD.

..... Respondent

Through: Mr Ajay Vohra, Sr Adv. with Mr
Rajeev Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

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

RAJIV SHAKDHER, J. (ORAL):

**CM No.59071/2023 [Application filed on behalf of the appellant seeking
condonation of delay of 440 days in re-filing the appeal]**

1. This is an application filed by the appellant/revenue seeking
condonation of delay in re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of 440 days in re-
filing the appeal.

2. Mr Ajay Vohra, learned senior counsel, who appears on behalf of the
respondent/assessee, says that he would have no objection if the delay in re-
filing is condoned.

2.1 It is ordered accordingly.



3. The application is, accordingly, disposed of.

ITA 626/2023

4. This appeal concerns Assessment Year (AY) 2011-12.

5. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 20.03.2020 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

6. According to the appellant/revenue, there are two issues which arise for consideration.

6.1 First, whether the Tribunal erred in deleting the addition amounting to Rs.5,89,34,508/- on account of disallowance made under Section 80IA of the Income Tax Act, 1961 [in short, “Act”]?

6.2 Second, whether the Tribunal committed an error in deleting the addition amounting to Rs.179,16,46,819/- on account of disallowance made under Section 40(a)(i) and Section 40(a)(ia) of the Act?

7. Insofar as the second issue is concerned, it is not disputed by Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, that it stands covered by a judgment rendered by the coordinate bench in *Director of Income Tax v. New Skies Satellite BV*, 2016:DHC:1003-DB.

8. We may note that Mr Vohra submits that the aforementioned judgment of the coordinate bench has received the imprimatur of the Supreme Court in *Engineering Analysis Centre of Excellence Private Ltd. v. Commissioner of Income Tax & Another.*, (2022) 3 SCC 321.

8.1 In this context, our attention has been drawn to paragraph 166 of the said judgment.

9. On the other hand, Mr Bhatia says that the facts that obtained in



Engineering Analysis case were different from those that obtained in *New Skies Satellite BV* case.

10. Mr Bhatia informs us that the appellant/revenue has preferred an appeal to the Supreme Court against the judgment of the coordinate bench in *New Skies Satellite BV*, which is pending adjudication.

11. Insofar as the this court is concerned, either way, no substantial question of law would arise, as, according to Mr Bhatia, the issue stands covered by the judgment rendered by the coordinate bench of this court in *New Skies Satellite BV* case.

12. As regards the first issue, the following broad facts are required to be noticed which are gleaned from the record.

12.1. The respondent/assessee was incorporated on 11.01.2002 with the main object of rendering telecommunication services.

12.2. To progress its main object, the respondent/assessee, in and about May 2002, obtained an Internet Service Provider (ISP) License from the Department of Telecommunication (DOT).

12.3. Accordingly, the respondent/assessee sought to provide services under the ISP License in 2002-March 2003.

12.4. Consequently, the respondent/assessee claimed tax holiday under Section 80IA of the Act at the rate of 100% of the profits earned up until AY 2011-12 and, thereafter, at the rate of 30% between AY 2012-13 and AY 2016-17.

12.5. In the interregnum, i.e., around 2008, the respondent/assessee acquired two licenses, namely, International Long Distance (ILD) License and National Long Distance (NLD) License.

12.6. The AO disallowed the tax holiday claimed for the AY in issue,



albeit, on a proportionate basis (i.e., in proportion to the contribution of each segment) pivoted on the rationale that a new and separate undertaking had come into existence with respondent/assessee having acquired, in 2008, NLD and ILD Licenses.

12.7. In an appeal preferred by the respondent/assessee, the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”] confirmed the view taken by the AO *via* order dated 28.12.2018.

12.8. The CIT(A)’s order dated 28.12.2018, impelled the respondent/assessee to prefer an appeal with the Tribunal to seek redressal.

13. In this context, what is required to be noticed, in our view, is the plain language of sub-section (4)(ii) of Section 80IA of the Act. The said provision is extracted hereafter:

“(4) This section applies to-

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xxx

xxx

(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation.- For the purpose of this clause, “domestic satellite” means a satellite owned and operated by an Indian company for providing telecommunication service....”

[Emphasis is ours]

14. A close perusal of the aforementioned provision would show that the main provision, i.e., Section 80IA, *inter alia*, applies to any undertaking which started or starts providing telecommunication services which includes internet services on or after 01.04.1995 but on or before 31.03.2005.

15. It is not in dispute (something which the AO has also noted), that the respondent/assessee is an undertaking which is eligible to claim deduction



under Section 80 IA, having been established and set up between the period referred to hereinabove, i.e., 01.04.1995 and 31.03.2005.

16. Accordingly, in the past the respondent/assessee had claimed and was granted deductions in respect of profits and gains earned from the undertaking established by it for providing ISP services.

16.1. As noticed above, the denial of deduction to respondent/assessee under Section 80IA in the AY in issue, i.e., AY 2011-12 by the AO was founded on the reason that the acquisition of two new licenses, whereby NLD and ILD services were provided to a certain group of private users, amounted to expansion of the existing undertaking and, therefore, fell beyond the cut-off date, i.e., 31.03.2005.

18. Concededly, ILD and NLD licenses were acquired by the respondent/assessee in 2008. Therefore, if the reasoning adopted by the AO is accepted, which is, that the expansion of services amounted to setting up a new and independent undertaking, then, the decision of the Tribunal would have to be reversed.

19. Mr Bhatia seeks to place reliance on the decisions both of the AO and CIT(A) in support of his contention. According to him, a new undertaking was set up/established with the acquisition of NLD and ILD licenses.

19.1. Mr Bhatia contended that new services were provided to private internet users and, therefore, could not be equated with the existing services provided by the respondent/assessee.

20. Mr Vohra, on the other hand, contended, that the expression which finds mention in Sub-Section (4) Clause (ii) of Section 80IA of the Act is “undertaking” and since the undertaking remained the same, merely because certain services were enhanced, the respondent/assessee could not be denied



full play of the deductions which were being provided before the impugned assessment order was passed by the AO.

21. We have heard learned counsel for the parties and perused the record.

22. As pointed out hereinabove and correctly argued by Mr Vohra, the expression used in Section 80IA(4)(ii) of the Act is “undertaking”. Therefore, the decision in the matter will turn on whether or not the addition of services or their expansion by the same undertaking would take it out of the realm of the said provision?

23. In other words, if the services were added or expanded with the same infrastructure and largely the same manpower content, *albeit*, after 31.03.2005, would the undertaking be deprived of the deduction which it previously claimed and was allowed under Section 80IA of the Act.

24. We find that the Tribunal has noted that there was no material brought on record by the appellant/revenue to back its claim that a separate undertaking had been established to provide the NLD and ILD services offered by the respondent/assessee.

24.1. There was also, according to the Tribunal, no case set up or established by the appellant/revenue there was reconstitution of the existing business.

24.2. According to the Tribunal, in 2002-03, the respondent/assessee had commenced its business by providing data transmission and internet services, which continued even after it acquired, in 2008, NLD and ILD licenses.

24.3. The only difference that was brought about, which is something that was noticed by the Tribunal, is that the respondent/assessee, with the acquisition of two new licenses, was now providing private internet services



in a secure form to a closed group of users.

25. In our opinion, given the aforementioned findings of fact returned by the Tribunal, it cannot be said that a new undertaking had come into existence after 31.03.2005. The respondent/assessee was and continued to provide internet services. The only difference was that it expanded its business footprint by it adding to it a niche consumer base.

25.1. The legislative policy of providing deduction under Section 80IA is to give leg-up to certain undertakings, which are capital intensive. The attempt of the AO to excise a portion of the benefit, in our opinion, cannot pass muster upon perusal of the plain language of Section 80IA(4)(ii) of the Act.

26. Thus, according to us, no interference is called for with the impugned order passed by the Tribunal. According to us, no substantial question of law arises for our consideration.

27. The appeal is, accordingly, closed.

28. Parties will act based on the digitally signed copy of the judgment.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 16, 2023

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