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

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Decision delivered on: 04.09.2023

+ **ITA 499/2023 & CM Nos.45546-47/2023**

PRINCIPAL COMMISSIONER OF INCOME
TAX, CENTRAL-3, DELHI

..... Appellant

Through: Mr Abhishek Maratha, Sr Standing
Counsel.

versus

HIKE PRIVATE LIMITED

..... Respondent

Through: Mr Deepak Chopra and Ms
Manasvini Bajpai, Advs.

+ **ITA 500/2023 & CM Nos.45548-49/2023**

PRINCIPAL COMMISSIONER OF
INCOME TAX, CENTRAL-3, DELHI

..... Appellant

Through: Mr Abhishek Maratha, Sr Standing
Counsel.

versus

HIKE PRIVATE LIMITED

..... Respondent

Through: Mr Deepak Chopra and Ms
Manasvini Bajpai, Advs.

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.45546/2023 in ITA No.499/2023

CM No.45548/2023 in ITA No.500/2023 [*Applications filed on behalf of
the appellant seeking condonation of delay of 7 days in filing the appeals*]

CM No.45547/2023 in ITA No.499/2023

CM No.45549/2023 in ITA No.500/2023 [*Applications filed on behalf of*



the appellant seeking condonation of delay of 104 days in re-filing the appeals]

1. The above-captioned applications, concerning Assessment Year (AY) 2014-15 [ITA No.499/2023] and AY 2013-14 [ITA No.500/2023], have been moved on behalf of the appellant/revenue, seeking condonation of delay in filing and re-filing the appeals.

1.1 The period for which condonation of delay is sought is identical in both the subject appeals.

1.2 According to the appellant/revenue, there is a delay of seven (7) days in filing and 104 days in re-filing the appeals.

2. Mr Deepak Chopra, who appears on behalf of the respondent/assessee, says that he does not oppose the prayers made in the above-captioned applications.

3. Accordingly, the delay is condoned.

4. The applications are disposed of, in the aforesaid terms.

ITA 499/2023

ITA 500/2023

5. As noted above, the above-captioned appeals concern Assessment Year (AY) 2014-15 [ITA No. 499/2023] and AY 2013-14 [ITA No. 500/2023].

6. *Via* the above-captioned appeals, the appellant/revenue seeks to assail a common order passed by the Income Tax Appellate Tribunal [in short, “Tribunal”] dated 22.09.2022.

7. The short issue which arose for consideration before the Tribunal was, whether the Assessing Officer (AO) had adopted the correct approach in law and on the facts obtaining in the instant appeals, in re-characterizing revenue



expenses incurred by the respondent/assessee as capital expenditure.

8. Since the issue which arises for consideration is common to both appeals, we intend to advert to the facts obtaining in AY 2014-15.

9. Briefly, the facts obtaining in AY 2014-15 are the following:

(i) The respondent/assessee had filed a Return of Income (ROI) in which it had declared a loss amounting to Rs.42,24,57,146/-.

(ii) The respondent/assessee was subjected to scrutiny assessment and the order dated 14.12.2016 was passed under Section 143(3) of the Income Tax Act, 1961 [in short, "Act"], whereby its income was assessed at Rs.76,83,350/-.

(iii) In assessing the respondent/assessee's income at the aforementioned amount, the AO had disallowed expenses amounting to Rs.43,01,40,500/-.

(iv) The AO had noted that the respondent/assessee had not earned any revenue from its business. The only income that it had earned was income from other sources, i.e., interest earned on fixed deposits.

(v) The respondent/assessee, being aggrieved with the approach adopted by the AO, preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

(vi) The CIT(A), *via* order dated 28.02.2019, sustained the addition made by the AO with regard to expenses that had been disallowed.

(vii) It is in these circumstances that the respondent/assessee preferred an appeal with the Tribunal.

9. The Tribunal reversed the view taken by the CIT(A) and the AO. While doing so, the Tribunal also took note of the fact that in AY 2012-13, the AO had accepted the stand of the respondent/assessee that the expenses incurred by it were on the revenue account, and not capital expenditure.



10. The Tribunal also noted that the Principal Commissioner of Income Tax [in short, “PCIT”] had taken out the proceedings under Section 263 of the Act, vis-vis AY 2012-13. However, the Tribunal *qua* the said AY, i.e., AY 2012-13, had reversed the order passed by the PCIT.

11. Mr Abhishek Maratha, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the expenditure claimed by the respondent/assessee was disallowed by the AO, as there was nothing to suggest that it had set up its business. In other words, the drift of this submission advanced by Mr Maratha was that since the expenditure had been incurred by the respondent/assessee before it had set up its business, it could only be treated as capital expenditure.

11.1 In support of this plea, Mr Maratha drew our attention to the assessment order dated 14.12.2016 and order dated 28.02.2019 passed by the CIT(A).

12. On the other hand, Mr Chopra has relied upon the order passed by the Tribunal.

13. Mr Chopra emphasized that the submission made by Mr Maratha does not find mention in the orders passed in the AY or the order passed by the CIT(A).

14. Having heard learned counsel for the parties and perused the record, we are of the view of that the submission advanced by Mr Maratha does not emerge from the record.

15. As a matter of fact, a bare perusal of the proposed questions of law suggests that the objection that the AO had in allowing the expenditure claimed by the respondent/assessee was that the said amount had been spent in building a brand for future utilization which was, according to him, an



intangible asset, as per the Accounting Standard-26 issued by the Institute of Chartered Accountants of India.

15.1 Therefore, this submission of Mr Maratha cannot be accepted.

16. The following observations made in the assessment order lend credence to what is noted hereinabove:

“The fact of the case is totally different from the fact of cases relied upon by the assessee. In all the above referred cases, efforts have been made to earn income but income could not be realized whereas in this case, the assessee has not started any effort to earn income. It is just in process of making a brand for future utilization of earning income so any expenses thereupon can't be held to be held in the expenses in the nature of revenue. Moreover, when there is no income chargeable u/s 28, no expenses u/s 30 to 37 can be claimed in this regard. In view of the total expenses claimed in the P & L a/c of Rs.43,01,40,500/- are hereby disallowed and capitalized. Since the assessee furnished inaccurate particulars of income and hereby concealed the income, penalty proceeding u/s 271(1)(c) is initiated separately.

[Emphasis is ours]

17. A careful perusal of the aforesaid extract from the assessment order would show that what worried the AO was that the respondent/assessee had made no effort to earn income.

18. As a matter of fact, the proposition put forth by the AO that since there is no income chargeable under Section 28 of the Act, therefore, no expenses could be claimed by an assessee under Sections 30 to 37 of the Act, in our view, is completely unsustainable.

19. This position has also been affirmed by the Tribunal.

20. We are in complete agreement with the approach adopted by the Tribunal. The AO, in our opinion, asked the wrong question and, therefore, got the wrong answer.

21. We may also note that during the course of arguments, we had asked Mr Maratha as to whether he had placed on record the order of the Tribunal



concerning AY 2012-13.

21.1 Mr Maratha informs us that the said order had not been filed.

22. Fortunately, Mr Chopra had a copy of the order dated 05.07.2022 passed by the Tribunal *vis-à-vis* AY 2012-13. We have perused the hard copy of the order placed before us.

23. A perusal of the aforementioned order revealed that the issue that Mr Maratha sought to raise before us, *albeit* across the bar, was the very issue which the Tribunal grappled with in AY 2012-13. Both the AO and the Tribunal noted the stand of the respondent/assessee with regard to the technology used by it to carry on its business.

24. It is important, therefore, to extract that portion of the respondent/assessee's submission which was accepted by the AO in AY 2012-13, as it lends perspective to the issue raised in the context of the nature of business conducted by the respondent/assessee:

“3. In this case, the ld. Pr.CIT gave a notice to the assessee and informed that the order passed by the Assessing Officer (AO) in this case was prima facie erroneous and prejudicial to the interests of the revenue, since the AO while framing the assessment order on 22.03.2016 had allowed an amount of Rs.2,85,00,224/- [which included depreciation of Rs. 2,77,16,925/-], being business expenditure whereas the same was not allowable as the assessee company had not set up/started its business activities during the year under consideration and the intangible asset i.e. software license purchased in the A Y 2012-13 was never put to use by the assessee company during the year under consideration. Further, in the computation of income, the assessee company had set off income from other sources i.e. interest income of Rs.90,24,8311- against the business loss.

X

X

X

8. During the course of hearing, a query was raised to the ld. counsel of the assessee regarding any date of commencement of software platform. In this regard, ld. counsel has submitted as under :-



1.1 This is not a conventional technology purchase for purposes of manufacturing/engineering.

1.2 The impugned agreement is for purchase of software in regard to “items of intellectual property” and was received in the form of “open source code” on the cloud on a platform similar to GitLab in the cloud. It was to be used on the cloud with the help of “Cloud Computing Tools”.

1.3 GitLab is a web-based Git repository that provides free open and private repositories, issue-following capabilities, and wikis. It is a complete DevOps platform that enables professionals to perform all the tasks in a project – from project planning and source code management to monitoring and security.

1.4 These items of intellectual property have been described on PB page 84 to 85 – Exhibit” A”.

1.4.1 These are of applications and do not need any certificate of being ready.

1.4.2 These are always available on the cloud and are messaging applications.

1.4.3 These are basically reached through open source code as supplied by the transferor and Cloud Computing Tools.

1.4.4 This open source code is deployed on the cloud on a platform such as GitLab, which is similar to “Drop Box”.

1.4.5 Lists of intellectual property items are (PB 84,85):

(1) SSO/Connect/Register, (2) Payment, (3) Contact Management, (4) Content Management, (5) Account Management, (6) News Feeds, (7) Sharing, (8) Advertisement, (9) Notification, (10) Anti-spam, (11) VIP System, (12) Gift System, (13) Profile, (14) Status, (15) Social Graph, (16) Apps Management, (17) Developer Portal, (18) User Control, (19) Statistics, (20) Business Intelligence, (21) Customer Service System, (22) Short URL, (23) Badge, (24) Website administration panels, (25) Check-in, (26) Community, (27) Inbox.”

25. Therefore, in our view, the AO in the abovementioned AY, consciously stepped away from the line of inquiry which was adopted in AY 2012-13. In the AYs in issue, i.e., AY 2014-15 and AY 2013-14, the emphasis of the AO was that expenses incurred were directed towards building a brand for utilization in the future.



26. Consequently, as noted above, the AO's approach, or rather we may say concern, was that the respondent/assessee was not earning revenue. This approach, as observed above, was completely misdirected.
27. Therefore, for the reasons given above, we are not inclined to interfere with the impugned order.
28. According to us, no substantial question of law arises for our consideration in the above-captioned appeals.
29. The appeals are, accordingly, closed.
30. Parties will act based on the digitally signed copy of the judgment.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 4, 2023/aj