$~113 to 115

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

\+ **ITA 284/2019**

THE PR. COMMISSIONER OF INCOME TAX-4

..... Appellant

Through: Mr. Sanjay Kumar, Ms. Easha, and Ms. Hemlata Rawat, Advocates

Versus

M/S HUMBOLDT WEDAG INDIA PVT. LTD.

..... Respondent

Through: Counsel (appearance not given)

114

\+ **ITA 285/2019**

THE PR. COMMISSIONER OF INCOME TAX -4

..... Appellant

Through: Mr. Sanjay Kumar, Ms. Easha, and Ms. Hemlata Rawat, Advocates

Versus

HUMBOLDT WEDAG INDIA PVT. LTD. ..... Respondent

Through: Counsel (appearance not given)

115

\+ **ITA 286/2019**

THE PR. COMMISSIONER OF INCOME TAX-4

..... Appellant

Through: Mr. Sanjay Kumar, Ms. Easha, and Ms. Hemlata Rawat, Advocates

Versus

M/S HUMBOLDT WEDAG INDIA PVT. LTD.

..... Respondent

Through: Counsel (appearance not given)

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% **07.03.2024**

1. We had dealt with the various questions which were sought to be canvassed for our consideration in some detail in terms of our order dated 6 March 2024. As was noticed by us while passing that order the only questions which survived for consideration were 2.5 and 2.6 and which relate to expenses incurred by the assessee in respect of certain bank guarantees which had been furnished and which undisputedly came to be encashed in Assessment Year ["**AY**"] 2011-12.

2. We note that while dealing with the assessee's appeal namely ITA 494/Kol/2015 pertaining to AY 2010-11, the Income Tax Appellate Tribunal **["ITAT"]** had held as follows:-

> "11.1 As far as ground nos. 2 to 6 challenging the upholding of transfer pricing adjustment pertaining to legal and professional charges under intra-group services are concerned, it has been submitted by the Ld. AR that the TPO had passed a rectification order on 18/04/2017 which has resulted in reduction of total adjustment from Rs. 42,50,763/- to Rs.9,91,844/- only which represents the disallowance of mark-up charged by the AE. It was also submitted that the Final Assessment Order subsequent to the rectification by the TPO was still awaited. The Ld. AR submitted that and if the assessee's ground was accepted in principle, the adjustment with respect to the mark up will not be contested by the assessee. <u>In such a situation, we direct the AO to pass the final</u>

assessment order incorporating the adjustment only to the extent of Rs.9,91,844/- and also protect the assessee's right to raise these grounds again in this assessment year in the event of the final assessment order not having been passed restricting the transfer pricing adjustment to Rs.9,91,844/- only. The assessee shall also be at liberty to challenge the mark-up in subsequent assessment years should the need so arise. Thus, these grounds stand allowed in terms of our observations.

11.2 The corporate tax related grounds are ground nos. 8 and 9 and they challenge the directions of the Ld. DRP in confirming the provision for loss on suspended contracts amounting to Rs. 9 crores by treating the same as contingent liability. The facts remain undisputed. The amount represents bank guarantee furnished by the assessee to its customers which was given in the year under consideration but en-cashed by the customers in AY 2011-12. It is also undisputed that the assessee has already offered to tax the amount of advance which had been forfeited from the customers and to which the bank guarantee relates. The bank guarantee has been en-cashed in the subsequent assessment year, therefore, the liability has crystallized in the subsequent assessment year when it was en-cashed on 28/04/2010. The fact remains that at the time of furnishing the bank guarantee, it was not known as to when the liability will crystallize. Accordingly, we find no reason to interfere with the directions of the Ld. DRP in this regard and dismiss ground nos. 8 and 9.

11.3 Accordingly, the assessee's appeal ITA 494/Kol/2015 stands partly allowed.

3. The Department appears to have contended that since those deductions were not claimed in the return which was filed, the same could not have been allowed. We find ourselves unable to sustain that submission bearing in mind the undisputed fact that the ITAT itself had protected the right of the assessee to raise those grounds pertaining to the subject deductions in AY 2011-12.

4. The aforesaid action as taken would also be in tune with the observations made by the Supreme Court in **Goetze (India) Ltd. v. Commissioner of Income-Tax** [2006 SCC OnLine SC 1446], which is reproduced as under:-

"4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."

5. Consequently, we find no merit in these appeals. No substantial question of law arises. The appeal shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 7, 2024
p'ma