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

\+ ITA 619/2023

\+ ITA 668/2023

\+ ITA 50/2024

PRINCIPAL COMMISIONER OF INCOME TAX -p7

.....Appellant

Through: Mr Aseem Chawla, SSC, Ms Pratistha and Ms Prerna Raman, Advocates for the Revenue.

versus

M/S VALUE FIRST DIGITAL MEDIA PVT. LTD.

.....Respondent

Through: Mr Ajay Vohra, Sr Advocate with Mr Samarth Chaudhari and Mr Shashvat Dhamija, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

ORDER

% **25.11.2024**

1. The Revenue has filed the present appeals impugning an order dated 08.02.2023 passed by the learned Income Tax Appellate Tribunal (hereafter *ITAT*) whereby the three separate appeals filed by the Revenue were dismissed. The said appeals were ITA No. 3143/Del/2019 in respect of the assessment year (AY) 2012-13; ITA No. 2050/Del/2021 in respect of the AY 2014-15; and ITA No.5127/Del/2019 in respect of the AY 2016-17.

2. The dismissal of the said appeals has led the Revenue to file the above captioned appeals. ITA No.619/2023 concerns the AY 2016-17; ITA

No.668/2023 concerns the AY 2012-13; and ITA No.50/2024 concerns the AY 2014-15.

3. The Revenue has projected the following question of law in the present appeals:-

> (i) Whether on the facts and circumstances of case and in law the Hon'ble ITAT was correct in deleting the disallowance of INR 4.73 crore & INR 40.60 lac u/s 37 & 40(a) (ia) of the Act on non – deduction of TDS on SMS charges and web hosting charges without appreciating the fact that payment received by the Respondent outside India for the said services is royalty as defined u/s 9(1)(vi) of the Act.
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> (ii) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in deleting the disallowance of INR 4.73 Crore & INR 40.60 lac u/s 37 & 40(a) (ia) of the Act on non – deduction of TDS on SMS charges and web hosting charges, without appreciating the fact that Explanation 6 to Section 9(1)(vi) of the Act clarifies the expression 'process', hence, irrespective of possession, control with the payer or use by the payer or location in India the consideration would be treated as royalty.
>
> (iii) Whether on the facts & circumstances of case and in law, the Hon'ble ITAT was correct in deleting the disallowance under Section 14A of the Act amounting to INR 23.55 lac on the ground that no exempt income has been claimed by the Respondent without appreciating that Circular 5/2014 by the CBDT has not been quashed by the Hon'ble Courts in any of the judicial pronouncements."

4. We may note that question no.(iii) as stated above, is not one of the questions projected in ITA No.668/2023. Additionally, the Revenue has also

projected a general question as to whether the impugned order passed by the ITAT is perverse, in ITA No.50/2024.

5. In so far as the first two questions are concerned (i) and (ii), the same relates to the disallowance of the expenditure incurred in purchasing the SMS capacity and payments web hosting charges.

6. According to the Revenue, the same are covered within the scope of the royalty as defined under Section 9(1)(iv) of the Income Tax Act, 1961 (hereafter *the Act*) and, accordingly, chargeable to tax under the Act. Since the Assessee had not withheld any tax on the said amount, the Revenue contends that the Assessee would not be entitled to claim such payment as an expenditure for determining its total income chargeable to tax.

7. The question whether the said payments are required to be considered as royalty is concededly covered by the decision of the coordinate bench of this court in ***The Commissioner of Income Tax - International Taxation-3 v. Telstra Singapore Pte Limited: Neutral Citation: 2024: DHC:5440-DB.***

8. It is material to note that these appeals had come up for hearing on 24.07.2024 and this court had noted that identical issues were raised in the appeal [ITA No.334/2022 – *The Commissioner of Income Tax International Taxation-3 v. Telstra Singapore Pte Limited*] and the order in respect of the said appeal was reserved at the material time.

9. In the present case, the Assessee has acted as an intermediary trader. It not only purchases but sells the said services (SMS capacity and web hosting services). Thus, the Assessee's case in these appeals stands on a higher footing than the case in ***Commissioner of Income Tax- International Taxation-3 v. Telstra Singapore Pte Limited*** *(supra)*.

10. In view of the above and in the given facts, the question of law as

framed with regard to the disallowance by virtue of Section 40(a)(ia) of the Act are not substantial question of laws.

11. In so far as the third question is concerned, regarding the disallowance under Section 14A of the Act. Admittedly, the same is also covered in favour of the Assessee and against the Revenue. The coordinate Bench of this court in ***Pr. Commissioner of Incometax-7 v. TV Today Network Limited: Neutral Citation: 2022:DHC:2951-DB*** has held as under:-

> "28. As per the law settled by this court in the case of ***Cheminvest Ltd. vs. CIT) (2015) 61 taxmann.com 118 (Del.);*** and ***PCIT vs. IL & FS Energy Development Company Ltd. reported*** in ***2017 SCC OnLine Del 9893***, the disallowance to be made under Section 14A cannot be in excess of the exempt income earned by the assessee. The counsel for the revenue has placed reliance on the CBDT circular 5/2014 to contend that disallowance under Section 14A would be attracted even if corresponding exempt income is not earned during the financial year. The said circular cannot be relied upon since its contrary to the law laid down by this Court."

12. The question whether the amendment to Section 14A by virtue of the Finance Act 2022, is applicable retrospectively was answered in the negative by the coordinate bench of this court in ***Pr. Commissioner of Income Tax (Central)-2 v. M/s Era Infrastructure India Limited : Neutral Citation : 2022 : DHC:2690-DB.***

13. Admittedly, in the present case, there is no income that is declared by the Assessee, which is not chargeable to tax. Clearly, the disallowance under Section 14A of the Act – which is in respect of the expenditure rateable to exempt income – does not arise.

14. Thus, in our view, no substantial questions of law arise in this regard as well.

15. The present appeals are, accordingly, dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 25, 2024
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Click here to check corrigendum, if any