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

+ ITA 164/2024

PR. COMMISSIONER OF INCOME TAX – 1 Appellant

Through: Mr. Prashant Meharchandani,
Sr.SC with Mr. Akshat Singh,
Jr.SC along with Ms. Ritika
Vohra and Mr. Utkarsh
Kandpal, Advs.

versus

FRIGOGLASS INDIA PRIVATE LIMITED Respondent

Through: Mr. Nageswar Rao and Ms.
Viyushti Rawat, Advs.

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+ ITA 185/2024

PR COMMISSIONER OF INCOME TAX 1 Appellant

Through: Mr. Prashant Meharchandani,
Sr.SC with Mr. Akshat Singh,
Jr.SC along with Ms. Ritika
Vohra and Mr. Utkarsh
Kandpal, Advs.

versus

FRIGOGLASS INDIA PRIVATE LIMITED Respondent

Through: Mr. Nageswar Rao and Ms.
Viyushti Rawat, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

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13.05.2024

**CM APPL. 14220/2024 (140 Days Delay) & CM APPL.
14221/2024 (57 Days Delay in Refiling) in ITA 164/2024**



CM APPL. 16056/2024 (140 Days Delay) & CM APPL. 16057/2024 (73 Days Delay in Refiling) in ITA 185/2024

1. Bearing in the mind the disclosures made, the delay of 140 days' in filing and 57 days' in re-filing the ITA 164/2024; the delay of 140 days' in filing and 73 days' in re-filing ITA 185/2024 is condoned.

2. Applications shall stand disposed of.

ITA 164/2024 & ITA 185/2024

3. The Principal Commissioner of Income Tax assails the validity of the judgment rendered by the Income Tax Appellate Tribunal ["ITAT"] dated 20 February 2023 and has proposed the following questions for our consideration:

"A) Whether on the facts and circumstances of the case, and in law, the ITAT has erred in law & on facts in deleting the addition made by the Assessing Officer ["AO"] amounting to Rs.6,72,85,014/- on account of disallowance of royalty expenses claimed by the assessee under Section 37 of the Income Tax Act, 1961 ["Act"].

B) Whether on the facts and circumstances of the case, and in law, the ITAT has erred in law & on facts deleting the addition made by the AO amounting to Rs.6,72,85,014/- on account of disallowance of royalty expenses claimed by the assessee under Sections 37 of the Act by relying on the judgment of the Supreme Court in assessee's own case for Assessment Year ["AY"] 2010-11 wherein the Apex Court has dismissed the SLP filed by the Revenue, ignoring that the facts involved in the both assessment years i.e., AY 2010-11 and AY 2014-15 are different.

C) The appellant craves leave to add, alter or amend any substantial question of law raised above at the time of the hearing."

4. We note that undisputedly the additions with respect to royalty made in the course of a transfer pricing exercise undertaken, were ultimately annulled and the issue was answered in favour of the respondent-assessee by this Court in ITA 123/2017. The aforesaid



proceedings have since then attained finality consequent to the dismissal of the Special Leave Petition.

5. However and as would be evident from a reading of the following passage as appearing in the order of the AO since the transfer pricing thresholds could not be met, the AO chose to resort to Section 37 of the Income Tax Act, 1961.

6. This would be evident from the following observations as they appear in the order of AO:

“5. From the profit and loss account of the assessee it was seen that it has claimed royalty expense for Rs.6,72,85,014/-. During the course of assessment proceedings’ the assessee was asked that to file the complete details of royalty expenses and to explain that as the facts of such expenses remain same as A.Y. 2013- 14 then why the same may not be disallowed on grounds of these expenses were not found genuine as per the order of the Transfer Pricing Officer for the assessee’s own case for, A.Y. 2013-14. The assessee has filed its reply vide letter dated 16.12.2016 in which it has stated that the transaction related to royalty has been disallowed on account of ALP determination by the TPO in A.Y. 2013-14. It has further stated that as per Instruction No.3/2016 issued by CBDT the current year case does not fall within the parameter of TPO reference. Also the assessee has stated that as per Instruction 3.7 the determination of ALP should not be carried out at all by the Assessing Officer where reference is not made to the TPO.

5.1. In this regard attention is drawn towards para 3 of this order wherein it has been specifically mentioned that as per para 3.7 of Instruction No. 03/2016 regarding Guidelines for implementation of transfer Pricing Provisions reference to Transfer Pricing Officer for A.Y. 2014-15, the assessee has international transaction during the year and as reference is not made to the TPO, the Transfer Pricing issue has not been examined at all. It is clarified here that the issue of allow ability of royalty expense is not being examined in the purview of international transaction but within the ambit of the royalty expense being an allowable expenditure to determine the taxable income of the assessee. As the assessee has not filed any details with justification to the claim of expense for royalty the finding of the Transfer Pricing Officer in its order u/s 92CA(2) dated 30.09.2016 for the A.Y. 2013-14 is being relied on for disallowance of such expense. As extensively discussed in the said order it is evident that the payment of royalty was being claimed by the assessee for the purpose of reducing net profit during the year.



The royalty payment by the assessee has been ascertained to be made only from the A.Y. 2010-11 from which the assessee had started earning regular profits. As the facts and circumstances related to such charging of royalty remains the same as in preceding years, the same is being treated as a means of reducing the taxable profit of the assessee by claiming expenditure which is not done solely for the purpose of business of the assessee. It is again clarified that the disallowance being made for expenses of royalty paid for Rs.6,72,85,014/- is on account of unjustified expenditure made- by the assessee during the current year as not being done wholly and exclusively for the purposes of the business of the "assessee" u/s 37(1) of the Act. Hence this amount of royalty expense of Rs.6,72,85,014/- is being disallowed and added to the income of the assessee. In view of the Facts and circumstances of the case, I am satisfied that the assessee company has furnished inaccurate particulars of its income, therefore, penalty proceedings, U/s 271 (1) (c) of the Act is initiated separately for failure to disclose the true particulars of income as mentioned above."

7. The view as taken is thoroughly misconceived and wholly untenable. We consequently find ourselves unable to uphold the view taken against the respondent-assessee by the AO.

8. We thus find no justification to interfere with the order of the ITAT. The appeal fails to raise any substantial question of law and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 13, 2024/p