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

\+ ITA 930/2017

BECHTEL INDIA PRIVATE LIMITED ..... Appellant
Through: Mr. Himanshu S. Sinha, Mr. Parash Biswal & Mr. Bhuwan Dhoopar, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Abhishek Maratha, SSC with Ms. Nupur Sharma & Mr. Parth Semwal, Advs.

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

O R D E R

% **15.03.2024**

1. The appellant/assessee impugns the order of the Income Tax Appellate Tribunal ["**ITAT**"] dated 29 May 2017 and has proposed the following questions for our consideration:

> "I. Whether the ITAT was right in upholding the action of AO/DRP of disallowing the 'marked to Market' (MTM) losses on account of fluctuation in foreign currency in respect of hedging of forward contracts claimed by the Appellant?
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> II. Whether the Impugned Order is untenable in the eyes of law as the ITAT has erred in contradicting and reviewing its own order in the first round of litigation wherein the ITAT itself in principle agreed with the ratio laid down by the Apex Court in CIT . Woodward Governor (2009) 312 ITR 254, which is not permissible?
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> III. Whether the Impugned Order of the ITAT is untenable in the eyes of law as it ignored the principle of consistency by ignoring the position of law settled in Appellant's own case in AY 2008-09?"

2. Having heard learned counsels for parties, we find that the principal question which stands raised appears to be conclusively settled in light of the following binding conclusions rendered by a coordinate Bench of this Court in **Pr. Commissioner of Income Tax vs Simon India Ltd.** [2022 SCC Online Del 4284]. We deem it apposite to extract the following passages from that decision:

> "**25.** Thus, according to the Revenue, the learned CIT(A) and the learned Tribunal had erred in finding that the loss on account of Forward Contracts is allowable under Section 37(1) of the Act and is covered as a hedging transaction under Section 43(5)(a) of the Act. The Revenue contends that the said loss is required to be disallowed as a speculative loss in terms of the CBDT Instruction no.3/2010.
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> **26.** The Revenue's contention is unmerited. <u>There is no dispute that the Forward Contracts were entered into by the Assessee to hedge against foreign exchange fluctuations resulting from inflows/outflows in respect of the underlying contracts for provisions of consultancy and project management. Concededly, the Assessee is not dealing in foreign exchange. Clearly, the said transactions were to hedge against the risk of foreign exchange fluctuations and thus, fall within the exceptions of proviso (a) to Section 43(5) of the Act. The Forward Contracts were to guard against any loss on account of future exchange fluctuations in respect of inflows and outflows relating to contracts for execution of the works entered into by the Assessee</u>.
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> **27.** It is material to note that there is no allegation that the Assessee has not been following the system of accounting consistently. In CIT v. Woodword Governor India Pvt. Ltd. (supra), the Supreme Court had 2022/DHC/005364 ITA No.67/2018 Page 11 of 15 referred to AS-11. In terms of AS-11, the exchange difference arising on foreign currency transactions are necessary to be recognized as income or expense in the period in which they arise, except in cases of exchange differences arising on repayment of liabilities for acquiring fixed assets.
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> **28.** In the present case, the Assessee had stated that it was reinstating its debtors and creditors in connection with execution of contracts entered into with foreign entities on the basis of the value of the foreign exchange. Thus, clearly the loss on account of Forward Contracts would require to be recognized as well.

> **29.** It is also relevant to refer to the findings of the learned CIT(A) in this regard. Paragraph no.13 of the appellate order reads as under:
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> > "13.It may be noted that the valuation-loss is reflected on the debit side of the P&L account whereas the corresponding valuation Gains resulting on the valuation of the debtors is reflected on the credit side included as part of sales / exchange Gains and in respect of imports as reduction in the import price on the debit of the Profit & Loss account. In other words, the entire transaction of either realization of debtors in foreign exchange / payment for imports in foreign exchange which are designated in foreign currency and the entering into Forward cover contract are integral part of the same transaction i.e. two sides of the same coin. By considering both sides of the P&L the correct net profit is worked out. Therefore, in order to ascertain the correct taxable profits of the appellant the loss has to be allowed as a business loss because it is due to the business exigency the forward contracts are entered into to 2022/DHC/005364 ITA No.67/2018 Page 12 of 15 protect against any loss that might result due to foreign exchange currency fluctuation foreign currency fluctuation."
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> **30.** Undisputedly, the Forward Contracts, in the present case, are hedging transactions. The Assessee has reinstated its debits and credits from the underlying transactions on the value of the foreign exchange on the due date. The corresponding losses/gains under the Forward Contracts, thus, were also required to be accounted for to arrive at the real profits. It would be anomalous if, on the one hand, debtors and creditors, in respect of current assets, are stated at the current value of foreign exchange and the corresponding loss on the hedging transaction is not accounted for. In essence, the Assessee has stated his income by taking into account the foreign exchange value as it stands on the due date. It is well settled that the CBDT Instructions and circulars which are contrary to law are not binding."

3. We additionally take note of the legislative amendments which have been introduced pursuant to the view which was expressed by the Supreme Court in **Commissioner of Income Tax vs Woodward Governor India Private Limited** [(2009) 13 SCC 1] and which has led to the introduction of Section 43AA of the Income Tax Act, 1961 ["**Act**"] with effect from 01 April 2017 and which reads as follows:

"Taxation of foreign exchange fluctuation.

43AA. (1) Subject to the provisions of section-43A, any gain or loss arising on account of any change in foreign exchange rates shall be treated as income or loss, as the case may be, and such gain or loss shall be computed in accordance with the income computation and disclosure standards notified under sub-section (2) of section-145.

(2) For the purposes of sub-section (1), gain or loss arising on account of the effects of change in foreign exchange rates shall be in respect of all foreign currency transactions, including those relating to—

(i) monetary items and non-monetary items;

(ii) translation of financial statements of foreign operations;

(iii) forward exchange contracts;

(iv) foreign currency translation reserves."

4. It is thus manifest that Forward Exchange Contracts were clearly not covered within the ambit of the provisions concerned prior to 01 April 2017.

5. In view of the aforesaid, we answer the questions posited in favour of the appellant. The order of the ITAT dated 29 May 2017 shall consequently stand set aside. The appellant is held entitled to consequential relief.

6. The appeal shall stand disposed of on the aforesaid terms.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 15, 2024/kk