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

\+ ITA 493/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC.

versus

SIEMENS MOBILE COMMUNICATION SPA .....Respondent

Through: Mr. Deepak Chopra, Ms. Priya Tandon and Mr. Priyam Bhatnagar, Advs.

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THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC.

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versus

SIEMENS MOBILE COMMUNICATION SPA .....Respondent

Through: Mr. Deepak Chopra, Ms. Priya Tandon and Mr. Priyam Bhatnagar, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

O R D E R

% **27.01.2025**

1. The Commissioner of Income Tax seeks to assail the judgment of the Income Tax Appellate Tribunal ["**Tribunal**"] dated 30 September 2019 and posits the following questions of law for our consideration:-

> "2.1 Whether on the facts and in the circumstances of the case and in law, the Id. ITAT has erred in holding that the Assessee did not have any business connection in India within the provision of section 9(1)(i) of the Income Tax Act, 1961?
>
> 2.2 Whether on the facts and in the circumstances of the case and in law. Id. ITAT has erred in holding that the Assessee did not have any a permanent establishment (PE) in the form of the Indian Subsidiary Siemens Public Communication Network Ltd. (SPCNL) within the provision of Article 5 of the Double Taxation Avoidance Agreement (DTAA) between the India and Italy, and holding that no profits can be attributed to the PE?
>
> 2.3 Whether on the facts and in the circumstances of the case and in law, the Id. ITAT has erred in holding that the consideration for licensing fee for right to use of software was not taxable as 'Royalty' within the definition of 'Royalty' under the Article 13 of the DTAA?
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> 2.4 Whether on the facts and circumstances of the case and in law, Id. ITAT has erred in holding that the consideration for licensing fee for right to use of software was not taxable as 'Royalty' within the definition of 'Royalty' as defined in Explanation 2 to section 9(l)(vi) of the Income Tax Act, 1961?
>
> 2.5 Whether on the facts and in the circumstances of the case, the Id. ITAT has erred in directing the Assessing officer not to levying interest under section 234B of the Income Tax Act, 1961 by relying on the order in the case of GE Package Power Inc. when this decision has not yet attained fmality as in the review application filed by the Department, the Hon'ble Apex Court has recalled its earlier order of dismissing the SLP against the decision of the Hon'ble High Court?"

2. We find that insofar as the question of a Permanent Establishment is concerned, the Tribunal has observed as follows:-

"34. As mentioned elsewhere, the Revenue has alleged that the appellant has failed to provide information with respect to employees who visited India during the subject AYs which precluded the Revenue to analyse whether the appellant has a PE in India. We have already pointed out the dates of execution of contracts from which it can be seen that almost all the contracts were signed in F.Y. 1997-98. Since all the contracts were entered into between 26.02.1997 and 15.01.1998, there was no occasion for any employee of the appellant to visit India thereafter.

35. A thorough understanding of the facts indicate that the role of the appellant was limited to mere supply of hardware components directly from Italy in such a manner that sales stood concluded, title transferred and consideration received outside India. Even the appellant was required to repair or replace faulty equipment during the warranty period. But for this, the telecom operator concerned was required to send the faulty equipment to the facility of the appellant in Italy.

36. It is pertinent to understand clearly that onshore income from onshore services, i.e., undertaking installation, testing and maintenance by SPCNL and income earned by SPCNL through performance of marketing and promotional activities for the appellant were voluntarily offered to tax in India."

3. We thus find no justification to entertain the appeal on the aforesaid issue in light of the uncontested position which emerges.

4. Insofar as the issue of payment of royalty on the use of software is concerned, the same stands authoritatively settled by the decision of the Supreme Court in **Engineering Analysis Centre of Excellence (P) Ltd vs. Commissioner of Income Tax** [(2022) 3 SCC 321] and is thus liable to be answered against the Revenue.

5. In view of the aforesaid, the appeals fail and shall consequently stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 27, 2025/nd