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

\+ **ITA 45/2019 & CM APPL. 2652/2019 (for delay)**

THE COMMISSIONER OF INCOME TAX –LTU ..... Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

HONDA CARS INDIA LTD. ..... Respondent

Through: Mr. Deepak Chopra, Advocate with Mr. Amit Shrivastava and Mr. Ankur Goyal, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R

% 13.05.2019

Dr. S. Muralidhar, J.:

1. There are five questions urged by the Revenue in the present appeal filed against an order dated 18th August 2017 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5483/Del/2014 for Assessment Year (AY) 2010-11.

2. The first three questions urged in para 2.2 to 2.4 read thus:

> "2.2 Whether the ITAT/CIT(A) erred in deleting the addition of Rs.2,85,14,345/- made by the Assessing officer treating the amount of expenditure on airfare booked under technical guidance fee as capital expenditure instead of revenue expenditure claimed by the Assessee?
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> 2.3 Whether the ITAT/CIT(A) erred in deleting the addition of Rs.6,80,73,802/- made by the Assessing officer on account of

disallowance of entry tax, which was claimed as a deductible under section 43B?

2.4 Whether the ITAT/CIT(A) erred in deleting the addition of Rs.97,32,768/- made by the Assessing officer treating the expenditure incurred on software expenses as capital expenditure instead of revenue expenditure?

3. The above three questions have already been answered against the Revenue by the order passed by this Court on 2nd August 2017 in the Revenue's appeal in the Assessee's own case for AY 2009-10 i.e. ITA 480/2017 ***(The Commissions of Income Tax – LTU v. Honda Cars India Ltd.)***

4. As far as the question at 2.5 is concerned viz., whether the ITAT erred in deleting the addition of Rs. 31,80,007/- made by the AO under Section 14A of the Act, the issue stands answered against the Revenue by the decision in ***Cheminvest Ltd. v. CIT (2015) 378 ITR 33 (Del).***

5. The only question, urged by the Revenue in the present case which remains to be considered reads as under:

> "2.1Whether the ITAT/CIT(A) erred in deleting the addition of Rs.1,59,74,53,889/- made by the Assessing officer treating the amount of royalty and lump sum fee paid by the assessee as capital expenditure instead of revenue expenditure as claimed by the Assessee?"

6. The Court has heard the counsel for the parties.

7. It is pointed out, at the outset, by Mr. Ruchir Bhatia, learned senior

standing counsel for the Revenue, that for AY 2009-10, the above issue stands remanded by this Court to the ITAT by the order dated 9th May 2018 in ITA 480/2017. This is not disputed by Mr. Deepak Chopra, learned counsel for the Assessee. Mr. Bhatia, therefore, submits that for the present AY 2010-11 also, the issue be remanded to the ITAT for a fresh decision, particularly, since, according to him, the ITAT has not given sufficient reasons in arriving at its conclusion. Further although for AY 2008-09, the issue of treatment of the expenditure towards royalty as revenue expenditure has been confirmed by the ITAT and upheld by this Court by dismissing the Revenue's appeal being ITA 34/2016 by the order dated 18th January 2016, Mr. Bhatia points out that the above order dated 18th January 2016 was in fact not on merits but on account of the extraordinary delay of over 790 days in the re-filing of the said appeal.

8. On the other hand, Mr. Deepak Chopra, learned counsel for the Assessee, points out that the ITAT has in the impugned order discussed the decision of the Supreme Court in ***Honda Siel Car Ltd. v. CIT (2019) 409 ITR 42*** which concerned treatment of royalty payment made to its principal during the initial years of the Assessee's operations whereas the royalty payment made by the Assessee to its principal during the AY in question was pursuant to the agreement dated 1st April 2005 and well over ten years after the Assessee's operations commenced. The ITAT therefore accepted the Assessee's contention that it had to be treated as revenue expenditure. .

9. The ITAT has given the reasons for its conclusion in para 33 of the impugned order which reads thus:

> "33. We have considered the rival submission and perused the relevant material on record. In the present case, payments are made pursuant to the agreement dated 01/04/2005. At the time of the agreement was executed, the assessee was in existence in operation for more than 10 years. Thus, it cannot be said that the technical knowhow given under the agreement was for setting up of the business of the assessee. It was also brought to our attention that a coordinate Bench of this tribunal in assessee's own case for assessment year 2008-09 & 2009-10 has held that the said expenditure of payment of royalty and lump sum model fee to be in the nature of revenue expenditure. The said order for assessment year 2008-09 has also been confirmed by the Hon'ble Jurisdictional Delhi High Court in ITA No. 34 of 2016 dated 18.01.2016."

10. Thereafter, the decision of the Supreme Court decision is discussed and the ITAT concludes that the judgment of the Supreme Court in ***Honda Siel Car Ltd. v. CIT*** (*supra*) which was for AY's 1999-2000 to 2005-06 would not be applicable in the AY under consideration, since, the Assessee was already engaged in the manufacturing of cars, spare parts and payments towards royalty/technical knowhow. Thereafter in paragraph 37, the ITAT has given the following reasons:

> "In view of the above discussion, we are of the view that the judgment of the Hon'ble Supreme Court in assessee's own case for assessment year 1999-2000 to 2005-06 would not be applicable in the assessment year under consideration, since the assessee was already engaged in the manufacturing of cars and spare parts and the payments towards royalty/technical knowhow paid in pursuant to agreement dated 01/04/2005 were not toward setting up of manufacturing facility, hence we hold that royalty/technical knowhow payment made by the assessee during the year under consideration were revenue in nature and the Ld. CIT-A has correctly allowed the said expenditure as revenue. Accordingly, we dismiss the ground of appeal of the Revenue."

11. Mr. Bhatia then urged that the ITAT has not discussed the clauses of the agreement dated 1st April 2005. The Court in fact finds that in paragraph 26 of the impugned order while setting out the submissions of learned counsel for the Assessee, the clauses of the said agreement have been set out. What appears to have weighed with the ITAT is the distinction between the royalty payments made during the initial phase of the Assessee's operations, which formed subject matter of the judgment of the Supreme Court and the subsequent AYs including the AY in question more than ten years after the Assessee commenced operations.

12. Mr. Chopra has also drawn the attention of the Court to a clarificatory order passed by the Supreme Court on 14th November 2018 where as a corollary of treating the royalty payment as capital expenditure during the formative years, the Supreme Court permitted the Appellant to claim depreciation thereon.

13. The ITAT has rightly drawn a distinction between the royalty payments made by the Assessee to the principal during its formative years and those made in subsequent years when the Assessee was fully operational. While the former payments were characterised as capital expenditure, the latter could not and were rightly treated as revenue expenditure.

14. Consequently, notwithstanding that for the earlier AY 2008-09 this Court has remanded the matter to the ITAT for a fresh determination of the above issue, it cannot be said that for the present AY i.e. 2010-11, the ITAT has not given cogent reasons for treating the expenditure as a

revenue expenditure.

15. No substantial question of law arises for determination on the above issue.

16. The appeal is dismissed. The pending application is also dismissed.

CM APPL. 2652/2019 (for delay)

17. For the reasons stated in the application, the delay in e-filing is condoned. The application is disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 13, 2019
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