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

+ **ITA 125/2024**

**THE COMMISSIONER OF INCOME TAX -
INTERNATIONAL TAXATION -3**

..... Appellant

Through: Mr. Ruchir Bhatia, SSC with
Ms. Deeksha Gupta, Adv.

versus

TGE GAS ENGINEERING GMBH Respondent

Through: Mr. Neeraj Jain, Mr. Anshul
Sachhar & Mr. Tavish Varma,
Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

20.02.2024

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CM APPL. 10270/2024 (72 days delay in filing) & 10271/2024 (88 days delay in re-filing)

1. These are applications filed by the appellant seeking condonation of 72 days delay in filing and 88 days delay in re-filing the appeal. For the reasons stated in the applications, the delay of 72 days in filing and 88 days in re-filing are condoned.

2. Applications stand disposed of.

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3. The instant appeal has been preferred seeking to question the correctness of the view taken by the Income Tax Appellate Tribunal [“ITAT”] in the impugned order dated 09 March 2023. The appellant has proposed for our consideration the following questions of law:

2.1 Whether the ITAT has erred in allowing the carry forward



of business losses by not appreciating the fact that the claim of carry forward of business losses are not made under the due process of law as such claim was not made originally in the Return of Income or through a revised Return for the purposes of the Income Tax Act, 1961 [“Act”]?

2.2 Whether the ITAT has erred in allowing the carry forward of business losses without appreciating the fact that there is no difference to make a claim at a later point of time which was not made in the books of accounts, whether through a statement of total income or before any appellate authorities and any claim which not originally claimed in the Return of Income or by way of revised Return within the prescribed time limit is not allowable under the Act?

4. However, Mr. Bhatia, learned counsel appearing in support of the appeal has restricted his submissions to the issue of carried forward losses. We note that in respect of the aforesaid, the ITAT in paragraphs 13 and 14 has observed as follows:

“13. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that the Revenue has not disputed the fact that the expenses are related to the project office and claimed on the basis of audited financial statement. Ld. Counsel for the assessee took us through the finding of Ld. DRP in the regard. Ld. DRP in its direction has directed the AO in para 3.4 as under :-

3.4 “The AO has held the project office as constituting a PE in India in terms of the India –Germany DTAA and business connection in terms of the IT Act. Under Paragraph 3 of Article 7 of India-Germany DTAA, in the determination of profits of the PE, expenses which are incurred for the purposes of the business of the PE are allowable as deductions in accordance with the domestic law of the contracting state in which the PE is situated. In view of above mentioned article 24(2) of the DTAA, the project office being the PE shall be allowed deduction of expenses and carry forward of the



same. The AO shall verify the expenses claimed from the said additional evidence in terms of Section 144C(13) of the Act and allow accordingly as per DTAA and IT Act. Ground 2 is disposed of as above.”

14. In our considered view, the AO ought to have given set off of losses in pursuance of the direction of Ld.DRP. The AO failed to take note of the fact that the assessee had raised its claim before the Ld.DRP. Therefore, the AO was under legal obligation to comply with the direction of higher authority. We therefore, considering the totality of the facts, direct the Assessing Authority to allow set off of the losses as claimed by the assessee before the Ld.DRP. Thus, Ground no 2 raised by the assessee is allowed in terms indicated herein above.”

5. We have further been apprised that after due verification, an appeal effect order has also come to be passed by the Assessing Officer on 02 August 2023.

6. Consequently, we find no merit in the instant appeal. It shall stand dismissed.

YASHWANT VARMA, J

PURUSHAINDR KUMAR KAURAV, J

FEBRUARY 20, 2024/kk