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

\+ ITA 142/2024

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

Through: Mr. Ruchir Bhatia, SSC.

versus

TECHNIP ENERGIES ITALY S.P.A. ..... Respondent

Through: Mr. Neeraj Jain, Mr. Ansul & Mr. Tavish Varma, Advs.

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

O R D E R

% 28.02.2024

CM APPL. 12282/2024 (Delay of 165 days in re-filing)

1. This is an application filed by the appellant seeking condonation of 165 days delay in re-filing the present appeal. For the reasons stated in the application, the delay of 165 days in re-filing the appeal is condoned.

2. Application is disposed of.

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3. The Commissioner of Income Tax seeks to impugn the order of the Income Tax Appellate Tribunal ["**ITAT**"] dated 28 February 2023 and has proposed the following question of law for our consideration:

> "2.1 Whether the Ld. ITAT has erred in holding that the expenses incurred by the assessee are not excessive under the provisions of section 40A(2)(b) of the I.T. Act without appreciating the fact that during the assessment proceedings the said did not furnish any benchmarking analysis in order to justify expenses in relation to its related parties to substantiate its claim that the expense re not unreasonable in terms of the said provision of the Act?"

4. We note that on a due consideration of the material which had been placed by the assessee before the Dispute Resolution Panel ["**DRP**"], the ITAT has ultimately proceeded to record the following conclusions:

> "**21.** In the facts of the present appeal, admittedly, the assessee has furnished all necessary and relevant documents, including audited financial statements, Audit Reports/invoices etc. to justify its claim. Even, the assessee has furnished detailed replies to various queries made by the Assessing Officer. Thus, the assessee has discharged its onus with reference to the expenses. As per the provisions of section 40A(2)(a), the Assessing Officer has to form an opinion not in vacuum but based on cogent material that the expenses/payments made by the assessee to the related parties are excessive and unreasonable having regard to fair market value of goods or services. In the facts of the present appeal, the Assessing Officer has not demonstrated in what manner he has formed the opinion that the expenses with reference to related parties are excessive and unreasonable having regarding to the fair market value. The Assessing Officer has not referred to even a single comparable case of similar nature of expenses to demonstrate that the payments/expenses made by the assessee are excessive and unreasonable and more than fair market value. Thus, in our view, the Assessing Officer has failed to discharge the burden cast upon him under section 40A(2)(a) of the Act. Hence, the conditions remained unfulfilled. In any case of the matter, for the first time, at the final assessment stage, the Assessing Officer has invoked the provisions of section 40A(2)(b) of the Act without providing any opportunity to the assessee. In fact, neither at the draft assessment stage, nor before the DRP, applicability of section 40A(2)(b) was ever an issue. At the final assessment stage, the Assessing Officer having not found any anomalies in the documents furnished by the assessee, only for the purpose of circumventing the directions of learned DRP and to somehow repeat the addition, has gone in a different tangent by invoking section 40A(2)(b) of the Act. This, in our view, is wholly unjustified and is in complete violation of Rules of Natural Justice. It also militates against the directions of learned DRP. In any case of the matter, we have already held that the Assessing Officer has failed to fulfill the conditions of section 40A(2)(b) of the Act. Therefore, the addition made is unsustainable.
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> **22.** For the sake of completeness, we may also address the issue regarding applicability of section 44BBB(1) of the Act. On a careful reading of the said provision, we are of the view that it is not applicable to the assessee as the assessee is neither executing

> any turkey power project, nor the project is approved by the Central Government or a competent authority in terms of section 44BBB(1) of the Act. Even, assuming that section 44BBB applies, sub-section (2) of section 44BBB carves out an exception by providing that the assessee may claim lower profit, if he keeps and maintains the books of account and documents prescribed under section 44AA and his accounts are audited in terms of section 44AB."

5. Insofar as Section 44BBB of the Income Tax Act, 1961 ["**Act**"] and its applicability is concerned, it was found that the assessee was not executing a turnkey power project. As far as the invocation of provisions of Section 40A(2)(b) of the Act is concerned, according to the ITAT as well as in our considered opinion, all material particulars had been duly placed before the DRP and the Assessing Officer failed to justify the invocation of the said provision. The ITAT has further found that the Department had failed to produce any material or establish from the record that the expenses claimed were inflated or unjustified. The Department had also not founded its allegation on a single comparable so as to even prima facie establish that the expenses had been unduly claimed.

6. In view of the aforesaid, we find that the appeal raises no substantial question of law. It shall consequently stand dismissed.

YASHWANT VARMA, J

PURUSHAINDRA KUMAR KAURAV, J

FEBRUARY 28, 2024/kk