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

\+ **ITA 439/2014**

COMMISSIONEROFINCOMETAX-III ..... Appellant

Through: Mr.Kamal Sawhney and Mr.Raghvendra Singh, Advocates.

versus

SMCC CONSTRUCTION INDIA LIMITED ..... Respondent

Through: Mr.Abhimanyu Jhamba and Mr.Vikrant Suri, Advocates.

WITH

\+ **ITA 511/2014**

COMMISSIONER OF INCOME TAX-III ..... Appellant

Through: Ms.Suruchi Aggarwal, Standing Counsel.

versus

SMCC CONSTRUCTION INDIA LTD. ..... Respondent

Through: Mr.Abhimanyu Jhamba and Mr.Vikrant Suri, Advocates.

AND

\+ **ITA 526/2014**

COMMISSIONER OF INCOME TAX-III ..... Appellant

Through: Ms.Suruchi Aggarwal, Standing Counsel.

versus

SMCC CONSTRUCTION INDIA LTD. ..... Respondent

Through: Mr.Abhimanyu Jhamba and
Mr.Vikrant Suri, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE I. S. MEHTA

O R D E R

% 03.07.2015

1. The challenge in these appeals by the CIT is to the orders passed by the Income Tax Appellate Tribunal ('ITAT') in appeals arising out of assessment orders pertaining to the Respondent Assessee for the Assessment Years (AYs), i.e., 2008-09, 2009-10 and 2010-11.

2. The common question that arose for determination in the aforesaid AYs was:

(i) Whether the assessee was given excessive depreciation for the UPS and Inverters?

(ii) Whether it was justified in treating the fees and royalties for technical knowhow as revenue/business expenditure?

3. As far as the first question is concerned, it is sought to be urged by the Revenue that under Section 32(1) of the Income Tax Act, 1961 unless the assessee was able to show that the concerned UPS and computer peripherals

have been used for more than 180 days in the previous year, it could not have claimed higher rate of depreciation @ 60%. The Court finds that the above ground urged by the Revenue ought to have been based on the factual determination as to whether with reference to the actual dates of purchase of the concerned UPS and computer peripherals, it could be demonstrated that the assessee could not have used such UPS and computer peripherals for more than 180 days in the relevant previous year. However, no such factual determination appears to have been undertaken either by the Assessing Officer (AO) or, at the instance of Revenue, at any of the subsequent stages. Consequently, the Court finds no merit in the contention of the Appellant as regards the issue of depreciation.

4. As far as the second question is concerned, the Court's attention is drawn to the Technical Collaboration Agreement ('TCA') entered into between the Sumitomo Mitsui Construction Co. Ltd. (SMCL) incorporated in Japan and the Assessee on 10th December 1997 wherein SMCL is described as a Licensor and the Assessee as the Licensee. The TCA notes that there are three broad kinds of services in which the Licensor and the Licensee are engaged, i.e. provision of construction management services, turnkey contract service and the consultancy services including project management.

Under Article 2 of the TCA, technical assistance is to be rendered by the Licensor to the Licensee. Under Article 3, the Licensor was to train the Licensee's personnel. Under Article 5, technical information was to be transmitted from the Licensor to the Licensee. Under Article 6, the Licensor was to be given exclusive selling/servicing rights. Under Article 7, the Licensee was to pay the Licensor a lump sum consideration of US Dollars 1 million over a period of 10 years. Under Article 7.2, the Licensee was to pay royalty @ 5% for the contract services provided by the Licensee for the domestic market and 8% for export markets.

5. The question before the AO was whether the expenditure incurred by the Assessee in terms of the aforesaid TCA was capital or revenue expenditure. The question was answered by the AO against the Assessee. Aggrieved by the said order, the Assessee appealed to the CIT (Appeals). A specific issue before the CIT (Appeals) was the justification for the AO having added the amount paid by the Assessee to SMCL on account of royalty and fees for technical assistance. CIT (Appeals) came to the conclusion that by incurring the said expenditure, no benefit was obtained by the Assessee for the period beyond the relevant assessment years. It was a periodical payment linked to the annual turnover and did not constitute capital expenditure for the reason

that it was incurred for obtaining selling/servicing rights under Clause 6 of the Agreement and, therefore, did not provide any benefit of enduring nature to the Assessee. Consequently, the plea of the Assessee was accepted and the appeal was allowed as far as this issue was concerned.

6. The ITAT has in the impugned order, while rejecting the plea of the Revenue, which was in appeal before it, come to a similar conclusion that by making payment in terms of TCA, the Assessee did not become the owner of the technical knowhow. The benefit to it was not of an enduring nature.

7. Learned counsel for the Appellant submitted that in coming to the above conclusion, the ITAT mainly relied on the decisions in ***Premier Automobiles Ltd. vs. CIT, (1984) 150 ITR 28 (Bom)*** and ***Travancore Sugars and Chemicals Ltd. vs. CIT (1966) 62 ITR 566 (SC)***, which dealt with Assessees which were manufacturing units and therefore different considerations would apply. He urged that inasmuch as the essential business of the Assessee was entirely dependent on the technical knowhow provided by SMCL and the benefit to the Assessee was of an enduring nature, the expenditure incurred should be treated as capital expenditure.

8. We are unable to agree with the submissions of learned counsel for the

Appellant. A perusal of the TCA shows that the payment by the Assessee to SMCL is for the technical knowhow given to the Assessee as a Licensee. Although the payment is spread over a period of 10 years, it does not make the Assessee the owner of the technical knowhow. The very nature of the license agreement is that it is not of a permanent nature. The view taken by the CIT (Appeals), and concurred with by the ITAT, cannot in the circumstances be said to be improbable or contrary to the settled legal position. The Court, therefore, concurs with the view of the CIT (A) and the ITAT that the benefit to the Assessee as a result of payment of royalty for technical knowhow was not of an enduring nature, and therefore cannot be construed to be a capital expenditure.

9. The appeals are accordingly dismissed.

S. MURALIDHAR, J

I. S. MEHTA, J

JULY 03, 2015
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