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

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ITA 503/2014

COMMISSIONER OF INCOME TAX-III Appellant

Through: Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel.

versus

M/S SOCOMEC HPL PVT. LTD. Respondent

Through: Mr Gajendra Maheshwari and Ms Swati Thapa, Advocates.

WITH

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ITA 504/2014

COMMISSIONER OF INCOME TAX-III Appellant

Through: Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel.

versus

M/S SOCOMEC HPL PVT. LTD. Respondent

Through: Mr Gajendra Maheshwari and Ms Swati Thapa, Advocates.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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16.09.2015



1. These are two appeals by the Revenue against the common order dated 6th December, 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 983/Del/2011 (Revenue's appeal) and ITA No. 694/Del/2011 (Assessee's appeal) for the Assessment Year ('AY') 2007-08.
2. The Assessee is a joint venture company of HPL India Ltd. (HIL) with a French Company Socomec SA France (SSA). It is engaged in the business of manufacturing switchgears, energy meter components and UPS.
3. The Assessee filed a return of income on 31st October, 2007 for AY 2007-08 declaring an income of Rs. 3,12,84,020/-. The case of the Assessee was picked up for scrutiny. The Assessing Officer ('AO') noted that the Assessee had debited a sum of Rs.3,56,12,515 in its Profit and Loss Account (P&L A/c) under the head of 'Selling and Distribution Expenses'. On further enquiry, the AO found that a sum of Rs.3,00,00,000/- had been paid to HIL as expenses under this head.
4. A copy of an Agreement dated 18th March, 2006 entered into by the Assessee with HIL was produced. Copies of the invoices raised by the HIL and evidence of payments made by Assessee were produced. The AO observed that no TDS had been deducted on the payment made. The AO



held that apart from the copy of the agreement filed and the bills generated by HIL, there was no other evidence to show that any service was actually provided by HIL to the Assessee. The expenses of Rs.3 crores was disallowed and added to the income of the Assessee. Disallowance was also made with reference to Section 40 (a) (ia) of the Act for failure to deduct tax at source while making such payments.

5. The AO also held that the expenditure of Rs.17,76,275/- debited on account of payment towards 'commission on sales' was not genuine since the Assessee had furnished inaccurate particulars. Further the said payment was also made without deduction of tax at source. The said amount was accordingly added to the income of the Assessee.

6. The third item picked up for scrutiny was a sum of Rs.11,89,454/- which was disallowed by the claim as business promotion expenses. The AO allowed Rs.2 lakhs and disallowed the balance of Rs. 9,89,454 on the ground of the absence of sufficient documentary evidence.

7. The fourth item picked up by the AO was Rs.21,02,774/- claimed as expenditure under the head 'incentive in the selling and distribution expenses'. This amount too was disallowed since the Assessee had not filed



any document to prove the genuineness of the expense.

8. The Assessee had claimed an expense of Rs.55,16,840/- on account of payment of 'technical knowhow fee' to SSA. The Assessee enclosed a copy of the Agreement entered into by it with SSA to substantiate its plea that it was a revenue and not a capital expenditure. The AO, however, rejected the plea and capitalized the amount. After allowing depreciation at 12.5%, the AO disallowed a sum of Rs.48,27,235/- and added it back to the total income of the Assessee. Liabilities to the tune of Rs, 13,15,648 were disallowed on the ground that they were not genuine since there was no evidentiary support.

9. In the appeal filed by the Assessee, the Commissioner of Income Tax (Appeals) [CIT (A)] asked the Assessee to substantiate its claim of 'selling and distribution expenses'. The Assessee produced photocopies of some pamphlets which showed that its products were marketed by HIL. In its order dated 11th November 2010, the CIT (A):

- (i) Confirmed the disallowance and consequent addition of Rs.3 crores paid to HIL towards selling and distribution expenses by holding that the agreement with HIL was sham and an attempt



to divert funds.

- (ii) Confirmed the disallowance and consequent addition of Rs.9,89,454/- incurred as 'business promotion expenses'.
- (iii) Confirmed the disallowance and consequent addition of Rs.21,02,774/- incurred as 'incentive in selling and distribution expenses' by holding that credit notes produced by the Assessee were not counter-signed by the recipients.
- (iv) Confirmed the disallowance and consequent addition of Rs.13,15,648/- on account of liabilities not being genuine by holding that the reversal of the entries in the subsequent years did not absolve the Assessee for having made a false claim in the first instance.

10. As regards the disallowance of the capitalized portion of the technical knowhow fee of Rs.55,16,840/-, the CIT(A) held that that 50% of the expenditure should be treated as a capital expenditure and 50% as revenue expenditure. As regards, the disallowance of Rs. 17,76,275/- paid towards commission on sales, the CIT(A) disagreed with the AO and remitted the issue to the AO for deciding afresh whether the expenditure had to be allowed.



11. In the further appeals filed both by the Assessee and the Revenue, the ITAT has impugned by the common order remanded two issues to the AO for re-determination: one regarding the addition of Rs.13,15,648/- on account of liabilities not being genuine and the other concerning the addition of Rs. 17,76,275/- towards commission on sales. As regards the other items of expenditure, the ITAT:

- (i) Deleted the addition of Rs.3 crores on account of 'selling & distribution expenses' on the principles of consistency since in the earlier AYs a similar expense had been allowed. It was also noticed that on subsequent payments of TDS by the Assessee, the AO had in the earlier AYs allowed similar claims.
- (ii) Restricted the disallowance of Rs.9,89,454/- on account of business promotion expenses to 20% i.e. Rs.2 lakhs.
- (iii) Deleted the disallowance of Rs.21,02,774/- paid as 'incentive in selling & distribution expenses', on the ground that the Assessee had floated a scheme for providing incentives and had also filed credit notes given to various parties.



(iv) Deleted the addition of Rs.55,16,840/- on account of technical knowhow fee by holding that the payment was in the nature of product royalty for use of name and technical information and had to be treated as revenue expenditure.

12. Aggrieved by the aforementioned order of the ITAT, the Revenue has filed the present two appeals. ITA No. 504/2014 concerns the issues of 'selling & distribution expenses', 'business promotion expenses', 'incentive in selling and distribution expenses' and 'liabilities not being genuine.' ITA No. 503/2014 concerns 'commission on sales' and payment of the 'technical knowhow fee'.

13. As far as the issue concerning liabilities not being genuine is concerned, the Court notices that the ITAT has itself remanded the issue to the AO for re-determination. Likewise, on the question of the payment of commission on sales, the ITAT has remanded the issue to the AO to examine the additional evidence filed by the Assessee. The Court finds no reason to interfere with the order of the ITAT on these two issues.

14. As regards the disallowance of 'selling & distribution expenses', the Court notices that what weighed with the ITAT was that the assessment for



AY 2004-05 was reopened by the Revenue on 31st March, 2011 under Section 148 of the Act. Yet, the reopening did not happen on the issue of genuineness of the selling and distribution expenses but on the ground of the payment of technical knowhow fee. The re-opening of the assessment was not upheld by the CIT (A). The ITAT also dismissed the Revenue's subsequent appeal. For AY 2010-11, after scrutiny, an assessment order was passed under Section 143 (3) of the Act in which a similar claim was allowed.

15. The Court further notes that even in AYs 2004-05 to 2006-07, the Assessee had justified the payments with reference to similar Agreements with HIL dated 18th March, 2004 and 26th March, 2005 where the only change was as regards the monthly remuneration figures. The remuneration in the first agreement was Rs. 12,54,996/- per month and in the second Rs.17 lacs per month. In the Agreement dated 18th March, 2006, relied upon for the AY in question, the remuneration was Rs.25 lakhs per month. No attempt has been made by the Revenue to question the corresponding receipt of the amounts in the hands of HIL. On the other hand, learned counsel for the Assessee informed the Court that HIL had offered the said amounts to tax and that was also accepted by the Department.



16. In the circumstances, the Court does not find any legal infirmity that the conclusion drawn by the ITAT on the principle of consistency that the above claim could not be held to be bogus and non-genuine. The Court, therefore, declines to frame the question of law as regards this issue.

17. On the issue concerning 'business promotion expenses', the ITAT has restricted disallowance to Rs.2,00,000/- and has explained the basis for arriving at such a conclusion. The Assessee had stated that the expenses were incurred through debit card and credit card towards fuel, hotel bills and some instances for which supporting bills could not be produced. The ITAT observed that there could be an inflation of expenditure and the possibility of use of certain facilities for personal purposes could not be ruled out. Therefore, the disallowance was restricted to 20%. The view taken by the ITAT is a plausible one. In the facts and circumstances, the Court is not inclined to frame a question of law on this issue.

18. On the issue of 'incentive in selling and distribution expenses', the ITAT has referred to the details provided by the Assessee of the various dealers, customers in respect of whom payments were made by issuing credit notes. The ITAT has also examined the scheme floated by the Assessee for



granting special incentives for achieving certain targets. It was noticed that the AO did not issue notices to the parties whose details were furnished. The ITAT was satisfied that in the absence of any exercise undertaken by the AO to verify the payments to such parties, there was no justification for the disallowance. The Court finds nothing legally erroneous in the approach of the ITAT in the matter. If the details were furnished by the Assessee were not verified by the AO for their genuineness by making enquiries, there was no basis for disallowing the expenses. The Court, accordingly, declines to frame a question of law on this issue.

19. On the question of the technical knowhow fee, the ITAT has examined the technical collaboration agreement entered into by the Assessee with the SSA. It was noted that what was being paid was a running royalty on fixed percentage of turnover for the use of the name and technical information. The same payment was allowed as revenue expenditure in the earlier AYs. The AO had failed to demonstrate what capital asset had been acquired by the Assessee in the process. The Court concurs with the view expressed by the ITAT that in the context of the Technical Collaboration Agreement, the claim by the Assessee of royalty paid as revenue expenditure could not have been disallowed. The Court accordingly declines to frame question on this



issue.

20. No substantial question of law arises for determination. The appeals are dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 16, 2015
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