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

Decided on: 13th January, 2015

\+ **ITA 767/2014**

\+ **ITA 796/2014**

THE. COMMISSIONER OFINCOMETAX-IV ..... Appellant
Through: Mr.Balbir Singh, Adv.

versus

M/S DENSO INDIA LTD. ..... Respondent
Through: Mr.C.S.Aggarwal, Sr.Adv. with Mr. Prakash Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The revenue has preferred the present appeals against the impugned order of the Income Tax Appellate Tribunal (ITAT) dated 27.02.2013 in ITA No. 3014/Del./ 2009 (for Assessment Year 2002-03) and ITA No. 887/Del./2010 (for Assessment year 2003-04). It urges that the Court should consider the following substantial question of law:

> *"1. Whether the Hon'ble ITAT is correct in confirming the order of Ld. CIT(A) to delete the addition made by the Assessing Officer on account of Royalty paid by the Assessee to its parent Company by treating the same as Capital in nature?*

2. Whether the Hon'ble ITAT is correct in deleting the Addition made by the Assessing Officer on Disallowance of the payment made to Denso Haryana for use of the intranet?

3. Whether the Ld. ITAT was correct in deleting the disallowances of Expenditure paid to Denso Corporation, Japan for Technical Services & treating the same as Revenue Expenditure?

4. Whether the Ld, ITAT was correct in allowing the claim made by the Assessee u/s 35AB the same was disallowed by the Assessing Officer?"

2. Brief facts are that the assessee was promoted by Denso Corporation, Japan. The latter holds 47.93% equity in the assessee and the assessee's overall management and the control rests with Denso Japan. M/s Sumitomo a Trading Company holds 12.27% of the equity in the assessee. The assessee filed return for the year 2002-03, declared a total income of ₹19,44,45,442/- which was subject to scrutiny assessment. The Assessing Officer (A.O.) assessed a total income of ₹27,17,76,470/-. The A.O. made certain additions on account of transfer pricing provision (which are not the subject matter of the present appeals). The additions, which were ultimately disallowed by the ITAT, (against which the revenue claims to be aggrieved) pertain to the payment of royalty, technical fee, the allowance made under [Section 32(1)] of the Income Tax Act and the payment to Denso Haryana, a sister concern, for availing intranet service.

Question No.3

3. At the outset, learned counsel for the parties submit that so far as the question of technical fee is concerned, the question of law stands concluded

in favour of the respondent/assessee Denso India Ltd., in the judgment for A.Y.2001-02, in ITA No.16/2008 decided on 08.10.2010. This Court in that case in para 23 stated that the expenditure, claimed by the assessee was allowable, as a business expenditure under Section 37(1) of the Act. Question No.3 is accordingly answered against the revenue and in a negative.

Question No.1.

4. The assessee in terms of its arrangement with parent company-Denso Japan had to remit loyalty at different rates. These were sought to be brought to tax on the ground that expenditure was not revenue but it was capital in nature as it would result in enduring benefit. The CIT (Appeals) disagreed and after analyzing the nature of the transaction held that the amounts paid correctly belonged to the revenue stream and for all the previous years the amount was treated as revenue expenditure, i.e. for A.Y. 1988-89 to 1997-98. In a previous year i.e. ITA No. 479/Del./2004 decided by the ITAT on 20.03.2008, it was held after an elaborate analysis of case law and agreement on the record that the royalty was revenue expenditure and could not be treated as capital expenditure. The extract of that decision appears in para 6 of the impugned order. It is not disputed that no new fact or development took place or was taken into account by the A.O. Considering that consistently for 12 years identical payments were treated as revenue expenditure and in fact are entitled to be treated as such this Court is of the opinion that the question of law has to be answered against the revenue and in favour of the assessee.

Question No. 2.

5. This pertains to payments made to M/s Denso Haryana by the assessee. Here again the amounts were treated as revenue expenditure for all the previous years. The A.O. had sought to include the amount paid to M/s Denso Haryana for use of intranet facility. Apparently the facility was a communication network known as "NICE NET". The network was availed on cost sharing basis for reporting and communication, and changed to the Denso Group Companies world over. Since it was an actual payment in respect of the service availed by the assessee, the first Appellate authority was of the opinion that there could be no dispute in this regard. The CIT (Appeals), therefore, set aside the observations of the A.O., based upon his surmise that no service was in fact rendered and agreement was itself sham. This Court is of the opinion that findings of the ITAT affirming the conclusions of the CIT (Appeals) are reasonable. Apart from questioning the agreement, the A.O. had no material to say that in fact no service was provided by Denso Haryana for this purpose. This question of law is answered against the revenue and in favour of the assessee.

Question No.4.

6. This pertains to the amounts paid as know-how fees by the assessee to Denso Japan. This was for the manufacturing technology, provided by Denso Japan. The ITAT noticed- in this context by its analysis of the findings of the CIT (Appeals)- that up to the period 1998-99, the assessee had claimed the benefit of Section 35AB but thereafter sought to avail provision of Section 31(1).

7. The assessee initially had sought to avail the benefit of Section 35AB. Once the initial period ended in 1988-89, it sought whatever benefits were permissible under Section 31(1). This position has been reflected by the ITAT in the impugned order in the following terms :

> *"15. Ground No.7 is on the disallowance of deduction under sec. 35AB of the Act. The Tribunal in its order for A.Y. 2001-02 in assessee's own case at Paras 8 & 9 held as follows:-*
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> > *"8. .The next ground is with regard to deletion ofaddition of &.3.71 crores on account afknow how fee paid, we found that the assessee has debited Rs.3.71 crores in its P&L Account under the head "Know how fee" paid. In the return of income filed with the Department the assessee added back the sum of Rs. 3.08 crores on account of acquisition of technology in its computation of income on the pretext that deduction is available under section 35AB. However, during the course of assessment proceedings the assessee had made a claim U/S 32(1) for depreciation on the said know how fee instead of claiming the same uls 35AB, as the same is applicable only up to assessment year 1998-99. The CIT (A) has accepted the assessee's contention and allowed the depreciation U/S 32(1) at &.3.08 crores as know how fee paid by treating the same as intangible assets. This verdict of the CIT (A) was accepted by the assessee and no appeal was filed before the Tribunal.*
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> > *9. With regard to the amount of Rs. 63. 46 lakhs the assessee claimed it as revenue expenditure which was disallowed by the*

Assessing Officer on the plea that it was capital in nature. By the impugned order, the CIT (A) confirmed the action of the Assessing Officer and allowed only depreciation thereof U/S 32(1) which was also accepted. The assessee preferred an appeal before ITAT and the ITAT had allowed the assessee's appeal ' and allowed the said amount in full as revenue expenditure in 1.T.A. No.4714/Del/2004. Thus to the extent, the ground taken by the revenue is misconceived. So far as the ' amount of Rs.63,.46 Iakhs is concerned, the - same is covered by the order of ITAT in assessee's own case, respectfully following the same to this extent, we do not find any reason to interfere in the order of CIT (A).

16. The first appellate authority followed the order of the Tribunal and in Para 10.6.3 of his order, held as follows:-

"10.6.3 I have gone through the submission and contention of the appellant and have also perused the order of the CIT(A) for the assessment year 2001-02. It is brought to my notice that the revenue appeal for AY 2001-02 on this issue have been dismissed by the ITA T. Since, the issue is identical and the facts of the year under consideration are same, therefore by following the orders of the my predecessor orders for AY2001-02, the above ground of appeal is allowed, with direction that
AO to allow the depreciation on the WDV of the sum of

Rs.3,8517,487 after due verification of the assessment records. In the result, the above grounds of appeal stands allowed."

8. In view of the above position, this Court is of the opinion that since the depreciation under Section 32(1) is available, in respect of an amount, claimed by the assessee, that it sought benefit under Section 35AB earlier could not have been the only reason to deny it. The revenue can succeed only if it establishes that such depreciation is impermissible in law. The ITAT's findings are to the contrary. There is no substantial question of law on this aspect.

9. In view of the above reasons, the appeals have to fail and accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 13, 2015
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