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

% ***Decision delivered on: 13.10.2023***

\+ **ITA 579/2023**

PR. COMMISSIONER OF INCOME TAX-7, DELHI ..... Appellant

Through: Mr Puneet Rai, Sr. Standing Counsel with Mr Nikhil Jain, Adv.

versus

TIMES INTERNET LIMITED ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No.53514/2023 ***[Application filed on behalf of the appellant seeking condonation of delay of 288 days in re-filing the appeal]***

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of 288 days in re-filing the appeal.

2. For the reasons given in the application, the prayer seeking condonation of delay in re-filing the appeal is allowed.

3. The application is disposed of, in the aforesaid terms.

ITA 579/2023

4. This appeal concerns Assessment Year (AY) 2012-13.

5. *Via* the instant appeal, the appellant/revenue seeks to assail the order

dated 30.03.2021 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

6. The appellant/revenue has proposed the following questions of law for our consideration:

> *"A. Whether on facts and circumstances of the case and in law, Hon'ble ITAT has erred in deleting the disallowance of Rs 20,84,878/- u/s 14A r/w Rule 8D of the Income Tax Act 1961?*
> *B. Whether on facts and circumstances of the case and in law, Hon'ble ITAT has erred in deleting disallowances of expenses of Rs. 1,89,45,379/- u/s 37(1) of the Act?*
> *C. Whether on facts and circumstances of the case and in law, Hon'ble ITAT has erred in deleting disallowance made on account of depreciation for Rs 32,12,253/- on software licences @ 25% by relying on the earlier order and without assigning any specific reasons?*
> *D. Whether on facts and circumstances of the case and in law, Hon'ble ITAT has erred in deleting the addition of Rs 1,34,48,062/- on account of Software expenses by treating it as Revenue Expenses."*

7. It is not disputed by Mr Puneet Rai, learned senior standing counsel, who appears on behalf of appellant/revenue that the proposed question "A" stands covered by the decision of the coordinate bench rendered in ***Cargo Motors (P.) Ltd. v. Deputy Commissioner of Income-tax,*** [2022] 145 taxmann.com 641 (Delhi).

8. The proposed question "A" concerns the manner in which disallowance under Section 14A of the Income Tax Act, 1961 [in short, "1961 Act"] read with Rule 8D of Income Tax Rules, 1961 [in short, "1962" Rules] is to be calculated. In other words, whether only investments made to earn exempt income should be taken into account excluding other investments while calculating the disallowance.

9. Via the aforementioned decision, the coordinate bench has ruled that the disallowance calculated under Rule 8D of 1962 Rules should

factor in only investments made by an assessee to earn exempt income. Therefore, the said proposed question of law need not be considered by us.

10. Insofar as proposed question "B" is concerned, the same is also covered by a coordinate bench judgment rendered in the respondent/assessee's case in ***Pr. Commissioner of Income Tax-9 vs. Times Internet Ltd.*** 2017:DHC:5197-DB.

11. To be noted, the Commissioner of Income Tax (Appeals) [in short "CIT(A)"] had deleted the disallowance amounting to Rs.1,89,45,379/-. The CIT(A), in this regard, followed the decision of the Tribunal in respondent/assessee's case concerning AY 2006-07 to 2008-09.

12. Significantly, the decision of the coordinate bench in ***Pr. Commissioner of Income Tax-9 vs. Times Internet Ltd.*** 2017:DHC:5197-DB relates to the said AYs. The coordinate bench confirmed the view taken by the Tribunal, which has been adopted by the CIT(A) in the instant appeal and like for the aforementioned AY, in the instant case, the said decision has been confirmed once again by the Tribunal. For convenience, the Tribunal's view, as adopted by CIT(A), in the instant case is set forth hereafter:

> *"3.1 I have considered the submission of the appellant and order of the AO. The issue involved is that AO has made disallowance of Rs. 18945379/- on account of that part of the expenditure incurred and claimed is not related to the business/sales contents of other group companies. The AO has rejected the claim of the appellant keeping in view of the past history of this issue. So, the income @ 62.8% of the receipt of the sale of contents by BCCL was disallowed. The issue has been decided by the Hon'ble ITAT in 2006-07, 07-08 and 08-09 by the Hon'ble ITAT. The finding is reproduced here as under:-*
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> *"Ground no.1 of the Revenue's appeal is against the*

deletion of disallowance of Rs.16,12,31,000/-. The facts apropos this ground are that the AO observed that the assessee declared revenue receipts of Rs.112.97 crore for the current year as against the revenue receipts of Rs.124.67 crore for the immediately preceding year. The assessee was found to have incurred expenditure during the instant year at Rs.1230.02 crore as against the expenditure of Rs.94.80 crore in the preceding year. On the perusal of details it was observed that the assessee had not shown any income during the year in respect of (i) Medianet: (ii) content selling: and (iii) sale of standalone publication. On being called upon to explain the reasons for not shown income from these sources, the assessee stated that the Medianet business consisted of a PR brand which was managed by the assessee company on behalf of its holding company, Benett Coleman and Co. Ltd till 30.09.2004. The holding company withdrew this right from the assessee company from 30.09.2004 and handed over this business to a new group company called Optimal Media solutions Ltd. After the termination of this line of business in the immediately preceding year, the assessee claimed not to have been engaged in rendering any services relating to Medianet Business. The assessee also furnished particulars of income earned by new company, M/s Optimal Media Solutions Lt., from the business. Similarly, regarding the sale of contents, the assessee submitted that this business hitherto entrusted to the assessee by its holding company was withdrawn w.e.f 1.10.2004. Necessary communications withdrawing the above business from the assessee were also furnished to the AO. In this backdrop of the facts, the AO noticed that albeit such business were not carried on by the assessee during the year, the overall expenses of the assessee were still on northwards sojourn. This was held on the strength of the percentage of the expenses to revenue at 62.85 for the AY 2004-05 when the assessee was having these business: during the assessment year 2005-06 when these businesses remained with the assessee for a part of the year, the percentage of expenses went up to 73.5%; and during the year under consideration when these businesses were not at all carried on by the assessee, the percentage of expenses increased to

107.8%. The AO inferred that though: "there is no income on the account of these two businesses to the assessee, but, still, it is incurring expenses for these two businesses."Applying the percentage of expenses at 62.8% as relevant for the AY 2004-05, the AO made disallowance for the remaining expenses of Rs.16,12,31,000/-. This disallowance was deleted in the first appeal. The revenue is aggrieved against such deletion. Having heard the rival submissions in the light of the material placed on record, it is observed that the AO made the disallowance by retaining the percentage of expenses to the revenue at 62.8%. This was done in accordance with the percentage of expenses incurred by the assessee for the AY 2004-05 when the assessee was having these business from its holding company. Such businesses were withdrawn by the holding company from the assessee w.e.f 1.10.2004. The opinion of the AO that though there was no income to the assessee from these businesses, still it was incurring expenses for them, is unfounded. On a specific query, the ld. DR failed to draw our attention towards any specific expenditure incurred by the assessee qua these businesses withdrawn by the holding company. The AO made disallowance of Rs.16.12 crore simply by means of a mathematical exercise carried out by him. If he found the expenditure incurred by the assessee to be on higher side, it was incumbent upon him to specifically point out as to which expenses were not incurred for the purposes of business. No such exercises worth the name has been carried out. In our considered opinion, the Ld. CIT(A) was fully justified in deleting this addition made by the AO on ad hoc basis. This ground is therefore, not allowed."

Considering the above facts, I find that on identical facts the issue has been decided by the Hon'ble ITAT in appellant's own case in AY 2006-07, 07-08 and 08-09. Further, CIT(A)-33 in AY 2009-10 has also decided the issue by following the above judgment of Hon'ble ITAT. The AO has also mentioned in his order that the disallowance was made on the basis of past history. Since, in this year also identical facts are there so respectfully following the decisions of Hon'ble ITAT and CIT(A) the disallowance made by the AO is hereby deleted. Hence, the ground of appeal is allowed."

13. We agree with the aforesaid rationale adopted by the Tribunal

in the earlier AYs, which was accepted by the coordinate bench of this court. The deletion of disallowance amounting to Rs.1,89,45,379/- was rightly ordered by the Tribunal. The said expenditure was claimable by the respondent/assessee under Section 37(1) of the 1961 Act.

14. As regards the proposed question "C", it may be noted that the Assessing Officer (AO) took the view that depreciation on software should be calculated at the rate of 25% instead of 60%.

15. The CIT(A), following the decision taken by his predecessor for AY 2009-10, which was in favour of the respondent/assessee, deleted the disallowance.

15.1. The deletion of disallowance made by the CIT(A) was confirmed by the Tribunal by following its decision for AY 2006-07 to AY 2008-09.

16. It appears that *vis-à-vis* this issue, the matter was not carried by the appellant/revenue in appeal to this court.

17. The decision in ***Pr. Commissioner of Income Tax-9 vs. Times Internet Ltd.*** 2017:DHC:5197-DB does not advert to this aspect, although it concerns with respondent/assessee's cases spanning over AYs 2006-07 to 2008-09.

18. Mr Rai has, helpfully, placed before us the decision of the Tribunal concerning AY 2006-07 to AY 2008-09. The relevant parts of the order dated 21.10.2016 in ITA Nos. 2333, 2986, 4130 & 4132/Del/2011 is extracted hereafter:

> *"20. Having heard the rival submissions and perused the relevant material on record, we find that the assessee explained to the ld. CIT(A) vide its written submission, whose copy is available on record, that the software used by the assessee were of standard nature meant for use in the computer hardware and had not*

> *independent utility or usage. The ld. DR has not controverted the reasoning by the ld. CIT(A) in deleting the addition. Once it is found that the software used by the assesee were of standard nature to be used in computer hardware and not meant for any independent usage, such software qualify for depreciation @ 60% Appendix I to the Income-tax Rules under the broader head 'III – Machinery and plant' at Sl. no. (5) provides : 'Computers including computer software'. Rate of depreciation at 60% has been prescribed against this item. When we consider Appendix I to the Income-tax Rules containing rates of depreciation available for the purposes of income-tax, it becomes manifest that the computer software which are necessary and integral for the working of hardware are eligible for depreciation @ 60%, as was claimed by the assessee. We, therefore, approve the view taken by the ld. CIT(A) in deleting this disallowance."*

19. The rule of consistency should prevail *vis-à-vis* proposed question C.

20. As regards the proposed question "D", the deleted disallowance includes Rs. 1,79,30,749/- towards software charges/software expenditure and Rs. 44,82,687/-, which was accorded as depreciation, upon the AO treating it as capital expenditure.

21. Thus, the treatment of this disallowance ordered by the AO will depend on whether software expenditure is treated as money expended on revenue or on capital account.

21.1. The coordinate bench of this court in in ***Pr. Commissioner of Income Tax-9 vs. Times Internet Ltd.*** 2017:DHC:5197-DB has concluded that the such expenditure is in the nature of revenue expenditure. The observations made by the coordinate bench are set forth hereafter:

> *"4. In ITA No. 716/2017, another ground is urged by the Revenue as to the treatment to be given to the website expenditure. The AO had disallowed the assessee's claim that properly fell in the revenue stream holding that the expenditure resulted in the capital advantage of an enduring nature. Both the CIT and the ITAT upset the findings of the AO concurrently. The ITAT as follows:*
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> *"24. After considering the rival submissions and*

perusing the relevant material on record, we find that this issue is no more res integra in view of the judgment of the Hon'ble jurisdictional High Court in CIT vs. India Visit.com (P) Ltd. (2008) 219 CTR 603(Del) in which it has been held that the expenditure on development of website is a revenue expenditure. Similar view has been taken by the Tribunal in the assessee's own case for the immediately preceding year. Respectfully following the precedent, we uphold the impugned order on this issue. This ground fails."

5. This Court is of the opinion that since the reasoning in CIT v. India visit.com in ITA No. 1011/2008 dated 05.09.2008 was the premise and the basis of the ITAT's order, no question of law arises in respect of the nature of such expenditure."

22. Given this position, we are of the view that proposed questions C and D also need not be entertained by us.

23. Thus, for the foregoing reasons, as indicated by us hereinabove, none of the proposed questions of law arise for our consideration as substantial questions of law.

24. Accordingly, the appeal is closed.

RAJIV SHAKDHER
JUDGE

GIRISH KATHPALIA
JUDGE

OCTOBER 13, 2023/RY

Click here to check corrigendum, if any