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

% *Date of Decision: 28.07.2023*

\+ **ITA 761/2018**

THE PR. COMMISSIONER OF INCOME TAX -6..... Appellant
Through: Mr Ruchir Bhatia, Sr Standing Counsel with Ms Deeksha Gupta, Adv.

versus

NOKIA SEIMEANS NETWORKS INDIA P. LTD. ..... Respondent
Through: Mr Deepak Chopra, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This appeal concerns Assessment Year (AY) 2004-05.

2. *Via* the aforesaid appeal, the appellant has sought to assail the order dated 31.01.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

3. A perusal of the appeal would show that the following questions of law have been proposed:

> *"(i) Whether on the facts circumstances of the case and in law, ld. ITAT erred in deleting the addition of Rs.3,19,98,632/- made by the Assessing officer on account of provision for warranty?*
>
> *(ii) Whether on the facts and circumstances of the case ld. ITAT erred in deleting of Rs.17,61, 99,671/- made by Assessing officer on account of provision for liquidated damages claimed in the profit and loss account by the Assessee even when the provisions are*

unascertained liabilities, hence were not admissible under the provision of Income Tax Act,1961?

(iii) Whether on the facts and circumstances of the case ld. ITAT erred in deleting of Rs.17,61,99,671/- made by Assessing officer on account of provision for liquidated damages claimed in the profit and loss account by the Assessee by not considering the fact that the assessee was following the mercantile systems of accounting and the law does not allow the claim of unascertained liabilities?"

4. Insofar as the proposed question no. (i) is concerned, Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, cannot but accept that it is covered against the appellant/revenue in the respondent/assessee's case titled, ***Commissioner of Income-tax, Bangalore vs. Nokia Siemens Networks India (P.) Ltd***., [2011] reported in 14 taxmann.com 84 (Karnataka).

5. Thus, the only aspect that we are required to consider is indicated in the proposed question nos.(ii) and (iii).

5.1 A closer look at the proposed questions would show that they relate to the same aspect i.e., whether the Tribunal had erred in deleting the addition made by the Assessing Officer (AO) amounting to Rs.17,61,99,671/- on account of the provision created for liquidated damages?

6. According to Mr Bhatia, the Tribunal was dealing with the issue for the second time. In this context, Mr Bhatia has drawn our attention to the order dated 30.06.2017 passed in ITA No.3202/Del/2014.

6.1 Mr Bhatia submits, based on the hard copy of the order which placed before us that the Tribunal had remanded the issue to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] with the following observations:

> *"17. While appreciating the above submissions, LD. CIT (A) has not dealt with the contract in the relevant clauses based on which he has agreed with the submissions of assessee that revenues and liabilities are capable of being estimated with reasonable level of certainty. Hon'ble Supreme Court in the case of Rotork Controls India (supra) has held that a provision is recognised when an enterprise has a president obligation as a result of past event; that is it is probable that an outflow of resources will be required to settle the obligation and a reliable estimate can be made on the amount of the obligation. If these conditions are not met no provision could be recognised.*
>
> *18. Although the Ld. CIT (A) pointed out that obligation has to be seen on the basis of assurance given by assessee on in respect of services agreed to have been rendered by assessee under the contract, Ld. CIT (A) has failed to take it to the logical end while granting the relief.*
>
> *19. We are therefore inclined to send this issue back to the file of Ld. CIT (A) to verify from the contracts, whether the parameters laid down by the Hon'ble Supreme Court in the case of Rotork Controls India (supra) has been fulfilled. Ld. CIT (A) is directed to analyse this issue on the basis of the terms of agreement between assessee and its customer and to grant relief as per law."*

7. Furthermore, Mr Bhatia points out that the aforementioned order of the Tribunal was assailed by the respondent/assessee by way of an appeal lodged in this court. In this context, our attention has been drawn to the hard copy of the order dated 23.11.2017, passed in ITA 641/2017, titled: ***Nokia Siemens Networks India Pvt. Ltd. vs. Principal Commissioner of Income Tax-VI***. For the sake of completeness, the order is extracted hereafter:

> *"The assessee/appellant claims to be aggrieved by the impugned order of the Income Tax Appellate Tribunal which directed a remit to the CIT(A) on the question of provision for liquidated damages and warranty. The appellant urges that the permissibility of the claim – which appears to have been added back under Section 41 of the Income Tax Act, 1961 has been noted by the judgment of the Supreme Court in Rotork Controls India Pvt. Ltd. v. CIT 314 ITR 62 (SC), which turned down the Revenue's*

contention that such provisions are "contingencies" or "unascertained liabilities.
It is submitted that having regard to the restricted nature of the claim which is more by way of appreciation of the precedents, the course adopted by the ITAT was not appropriate; rather it should have decided the issue.
Learned counsel for the respondent urges that the issue with respect to such provision – i.e. for liquidated damages and warranty is pending adjudication before the ITAT for another year in the assessee's case.
Having regard to the statements made, the ***Court is of the opinion that the impugned order of the ITAT requires to be modified; instead of the remand to the CIT(A), the Court hereby directs the ITAT to decide the issue with respect to provision for liquidated damages and warrants – claimed by the assessee as expenses, in this appeal along with the appeals for AY 2005-06, said to be pending before it****. The parties shall be present before the ITAT on 28.11.2017 when the other appeals are listed.*
The appeal is partly allowed in the above terms."

[Emphasis is ours]

8. As would be evident, a coordinate bench of this court had modified the order of the Tribunal dated 30.06.2017 to the extent that, instead of the CIT(A) being burdened with the task of determining whether the provision of liquidated damages was warranted, as a deduction, the Tribunal was directed to examine the issue.

9. It is in this backdrop that the impugned order came to be passed.

10. Mr Deepak Chopra, who appears on behalf of the respondent/assessee submits that the only issue which arose before the Tribunal was: whether the provision made for liquidated damages represented an ascertained liability? In this context, Mr Chopra has drawn our attention to the chart which is appended on page 146 of the case file. For the sake of convenience, the details given in the chart are extracted below:

Movement of Provision of Liquidated Damages

Assessment Year	Opening Balance	Creation during the year	Utilization	Release/ Written back	Closing Balance	Debited to P/L
AY 2004-05	135,314,238	196,651,910	20,452,238		311,513,910	176,199,672
AY 2005-06	311,513,910	29,602,855	4,643,188	110,046,185	226,427,392	24,959,667
AY 2006-07	226,427,392	59,373,585	44,391,108	79,030,343	162,379,526	14,982,477
AY 2007-08	162,379,526	102,684,554	70,272,572	50,392,194	144,399,314	32,411,982

10.1 A perusal of the chart would show that in a given AY, there is an opening balance, followed by the amount provided towards liquidated damages in a given AY and the amount utilized in the very same period. The table also adverts to the closing balance under the provision made for liquidated damages.

10.2. The figures which are in the last column concern amounts which are debited towards liquidated damages in the profit and loss account of the respondent/assessee.

10.3. In the AY in issue, the record shows that it is this amount that was claimed by the respondent/assessee as ascertained liability.

11. Mr Chopra says that this methodology has been followed consistently by the respondent/assessee from year to year, as would be evident from the chart extracted hereinabove.

11.1 Therefore, according to Mr Chopra, since the facts and figures are not in dispute, the Tribunal rightly relied upon the order of the CIT(A), and, thus, concluded that the provision amounting to Rs.17,69,99,671/- (shown in the impugned order as Rs,17,69,99,672/-) was an ascertained liability and, hence, a deductible expenditure.

12. On the other hand, Mr Bhatia submits that a closer look at the impugned order would show that the Tribunal has not reached a definite finding as to whether the said amount arrived at represented an ascertained liability.

12.1 It is also Mr Bhatia's contention that this was, precisely, the exercise that the Tribunal wanted the CIT(A) to undertake in the first round, an aspect which did not find favour with this court. The court, thus, placed the burden on the Tribunal.

13. Having examined the record, there is no dispute *qua* the following aspects:

(i) The respondent/assessee entered into a contract for supply of specified goods with BSNL.

(ii) The contract contained a provision for imposition of liquidated damages for delay in supply. The rate for imposition of liquidated damages was pegged at 0.5% of the value of the delayed supply for each week of delay, or part thereof for the period up to 10 weeks, and thereafter, the rate would stand enhanced to 0.7% of the value of the delayed supply for each week of delay or part thereof for another 10 weeks of delay. [Clause 15.2 of the contract executed between the respondent/assessee and BSNL captures this aspect of the matter].

(iii) The AO disallowed the provision amounting to Rs.17,61,99,671/-, which was the difference between the provision

created during the year i.e., Rs.19,66,51,910/- and the amount actually utilized i.e., Rs.2,04,52,238/-; although the actual difference is Rs.17,61,99,672/-. According to the AO, the said amount i.e., Rs.17,61,99,671/- represented unascertained liability.

(iv) The CIT(A), via the order dated 26.02.2014, reversed this view, which, as indicated above, was, in turn, overturned by the Tribunal, in the first round, via order dated 30.06.2017.

(v) The Tribunal, upon remand by a coordinate bench of this court via the order dated 23.11.2017, reexamined the matter. While reexamining the matter, the Tribunal noted *in extenso* the order of the CIT(A) passed in the first round. After extracting the order of the CIT(A), the Tribunal made the following observations, which are contained in paragraph 8. For the sake of convenience, the said observations are set forth:

> *"8. In the present case from page no.136 of the assessee's book, it is noticed that total provision for liquidated damages was of Rs.19,66,51,910/- out of which Rs.2,04,52,238/- were utilized and credited written back the remaining amount of Rs. 17,61,99,672/- was the actual amount of the damages which were accounted for in the profit and loss account. In the instant case, the learned CIT(A) categorically stated that when the payments were actually made, the accounts were adjusted with reference to any remission or waiver that the company may get in respect of damages payable for the late delivery and the same was brought to tax u/s 411) of the Act by crediting the liquidated damages accounts.* ***Therefore, the impugned amount was not only the provision but the actual amount of the liquidated damages pertaining to the period of delay falling within the previous year relating to the assessment year under consideration. The learned CIT(A) categorically stated that the assessee was following this method consistently****.*
> *We, therefore, do not see any valid ground to interfere with the factual findings given by the learned CIT(A) and accordingly do not see any merit in the ground raised by the Department."*
>
> [Emphasis is ours]

14. A careful perusal of the said paragraph would show that the Tribunal has made no reference to either the clause relating to liquidated damages or the agreement which was operable between the respondent/assessee and BSNL, nor did it clearly formulate as to whether Rs.17,61,99,672/- represented the ascertained liability under the head "Provision for Liquidated Damages".

14.1. To our minds, the flaw in the Tribunal's formulation is found in the following part of paragraph 8, which reads as follows:

> "…*Therefore, the impugned amount was not only the provision but the actual amount of the liquidated damages pertaining to the period of delay falling within the previous year relating to the assessment year under consideration…*"

15. It is no one's case, leave alone that of the respondent/assessee, that Rs.17,61,99,672/- represented the actual amount of liquidated damages. It is the respondent/assessee's case that Rs.17,61,99,672/- represents an ascertained liability, which could change if there are any waivers or remissions.

16. The issue which the Tribunal had to grapple with, and clearly return a finding, one way or the other, was whether the said amount i.e., Rs.17,61,99,672/-, in the given facts and circumstances of the case, represented an ascertained liability.

17. Given this position, both counsels agree that the matter can be remanded to the Tribunal, with a direction to dispose of the matter based on the documents already on record.

17.1 It is ordered accordingly.

18. The impugned order is set aside.

18.1 The Tribunal will reexamine the issue based on the material already on

record and return a finding, one way or the other, as to whether Rs.17,61,99,672/- represented an ascertained liability.

19. Needless to add, the Tribunal will confine itself only to this aspect of the matter i.e., the aspect concerning liquidated damages.

20. Counsel for the parties will appear before the Tribunal on 28.08.2023.

21. We request the Tribunal to dispose of the matter as expeditiously as possible, though not later than eight (8) weeks from the date of receipt of copy of the judgement.

22. The appeal is disposed of, in the aforesaid terms.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

JULY 28, 2023/pmc