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

\+ ITA 63/2021, CM APPL. 8744/2021 & CM APPL. 8745/2021

VEDANTA LIMITED ..... Appellant

Through: Mr. Sachit Jolly with Mr. Rohit Garg & Ms. Disha Jham & Mr. Sohum Dua, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR. ..... Respondents

Through: Mr. Sunil Kumar Agarwal, Sr. Standing Counsel for Revenue with Mr. Tushar Gupta and Mr. Utkarsh Tiwari, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

O R D E R

% **19.09.2022**

CM APPL. 8745/2021(exemption)

Exemption allowed, subject to all just exceptions.

Accordingly, present application stands disposed of.

ITA 63/2021

1. The present Income Tax Appeal has been filed seeking a direction for setting aside the order dated 21st September, 2020, passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 12/DEL/2020 for the Assessment Year ('AY') 2014-15.

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2. The appellant in compliance with the order dated 25th July, 2022 has placed on record a control chart proposing seven (7) questions of law.

3. We have heard the learned counsel for the parties at length and thereafter, framed the following three (3) questions of law:-

1. Whether on the facts and in the circumstances of the case and in law, the ITAT erred in not holding that the final assessment order dated 28.11.2019 passed under Section 143(3) r.w.s 144C was barred by limitation in terms of Section 153 of the Act?

2. Whether on the facts and in the circumstances of the case and in law, the ITAT erred in not allowing claim of balance additional depreciation for earlier year under Section 32(1)(iia) of the Act?

3. Whether on the facts and in the circumstances of the case and in law, the ITAT erred in upholding the disallowance of reduction claimed by appellant on account of Debenture Redemption Reserve **('DRR')** by failing to appreciate that DRR is in the nature of provision, and not a reserve?

4. Admit. List in due course.

5. The appellant has also proposed the following three (3) separate questions of law challenging the remand order passed by the ITAT. :-

i. Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in remanding the issue of upward adjustment on account of Management Consultancy Fee paid by the Appellant to the file of the Assessing Officer ("**AO**")/Transfer Pricing Officer **("TPO")** when all the facts/evidences/details pertaining to this issue were already placed on record before the ITAT?

ii. Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in remanding the issue of addition on account of alleged Out of Books Receivables **('OBR')** to the file of the AO when all the facts/evidences/details pertaining to this issue were already placed on record before the ITAT?

iii. Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in remanding the issue of reduction of provision of taxes while computing Book Profits in terms of Section 115JB of the Act when all the facts/evidences/details pertaining to this issue were already placed on record before the ITAT?

6. The said questions are framed as under and were taken up for hearing with the consent of the parties With respect to question of law (i), the Dispute Resolution Panel ('DRP') had directed the AO that the expenses incurred on account of Management Consultancy Fees paid to AE should be disallowed on protective basis under Section 37(1) of the Income Tax Act, 1961 (for short 'the Act') and this was challenged by the assessee before the ITAT. The ITAT concluded that the evidence placed on record by the Assessee is not sufficient to demonstrate that the AE had actually rendered services, which are mentioned in the agreement. The ITAT, therefore, set aside the issue for fresh determination to the TPO with liberty to the Assessee to place on record additional documents for demonstrating that the services were actually rendered by the AE.

The Assessee is, however, aggrieved by the said direction of the ITAT as it is the contention of the Assessee that it does not have any further evidence to lead in the matter and seeks determination of the said issue by the ITAT on the evidence available on record. The learned counsel for the appellant states that the evidence relied upon by the Assessee to establish the

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rendition of the management consultancy services is annexed as Annexure 22 to this appeal at pages 2334-2387 and he therefore, seeks a direction to the ITAT to determine the said issue on the basis of the said documents.

7. With respect to question (ii)**,** during the course of survey conducted under Section 133A of the Act on 20th March, 2014, certain documents were impounded which contained e-mail exchanges between the senior executives of the Assessee. Upon the perusal of the said e-mails, the AO formed the opinion that 'Out of Books Receivables' of Rs. 1095.93 Crores have not been disclosed by the Assessee in its books of accounts. The AO, accordingly, treated the aforesaid amount as the business income of the Assessee and this addition was upheld by the DRP. The Assessee challenged the aforesaid addition before the ITAT, *inter alia,* on the ground that the said receivables were not accounted in the books of accounts on accrual basis due to the uncertainties attached to the said receivables and the said receivables are to be accounted only upon actual receipt. The ITAT after perusal of the e-mails exchanged between the senior executives observed that it would be prudent if the AO verified the receipt of the said 'out of book receivables' from the insurance companies banks, government bodies and other corporate entities. The ITAT observed that since the entire addition has been made by the AO on the basis of the e-mails, it would be appropriate to restore the issue to the file of the AO with a direction to verify the said claims from the respective bodies mentioned in the impugned order.

7.1. The learned counsel for the appellant states that the ITAT fell in error in remanding the matter to the AO for making enquiries from the third parties while failing to appreciate that it was not the case of the AO or the

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DRP that the said amounts had been received by the assessee. He states that out of the total sum of Rs. 1096 Crores, an amount aggregating to Rs. 261 crores is related to receivables of other entities and thus, to that extent there was no warrant for upholding the addition made by the AO. He states that the sum of Rs. 414 Crores related to Vedanta Aluminium Ltd. which again is a separate entity and therefore, the aforesaid amounts of Rs. 675 Crores (261 Crores + 414 Crores) ought to be excluded.

7.2. The learned counsel for the appellant states that rather than remanding the matter for fresh determination by the AO, the ITAT may seek a remand report from the AO with respect to the verification of the receipt of the said claims and thereafter, determine the said assessee's challenge to the addition made on account of the 'Out of Books Receivables' on the basis of the evidence filed on record by the appellant and the remand report received.

8. With respect to the question no. (iii), learned counsel for the appellant states that while computing the book profits for the purpose of Section 115JB of the Act, the AO has reduced an amount of Rs. 1782.09 Crores from the net profit. The ITAT observed that the figure of Rs. 1782.09 Crores which pertains to reversal of unutilized provision for taxes in the current year, requires verification. It accordingly restored the said issue to the file of the AO for verifying the correctness of the figures.

8.1. The learned counsel for the appellant is aggrieved by the said remand as it is stated that the verification of figures was not doubted either by the AO or the DRP. Further, the said figures can also be verified from the audited accounts and computation of the book profits of the amalgamated entities. He further states that the issue arising for consideration before the

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ITAT is only to determine whether the Assessee was entitled to claim deduction of unutilized provision of taxes in the books of the amalgamated entities.

9. The learned Senior Standing Counsel for Revenue has relied on the judgment of ***Tin Box Company vs. Commissioner of Income-Tax, [2001] 249 ITR 216 (SC)*** to support the directions of remand issued by the ITAT in the present appeal. He contends that the direction of remand is in conformity with the said judgment of the Supreme Court. He states that the Assessee should place additional evidence in the first instance before the AO and permit the AO to verify the documents and return its findings on the said additional evidence before the same is considered by the ITAT.

10. The present proceedings pertain to AY 2014-15. The draft assessment order was passed on 28th December 2018 and the final assessment order was passed by the AO on 28th November, 2019. The remand to the AO and the consequential proceedings will admittedly set back the clock.

In view of the statement of the learned counsel for the appellant that the Assessee does not wish to place on record any additional documents in support of its pleas opposing the deletions and additions, which are the subject matter of the remanded issues and states that the said claims may be determined by the ITAT on the basis of the documents filed on record, we agree with the appellant that the directions of remand on the said three issues need to be set aside. The learned counsel for the appellant has stated that Assessee has no objection if the ITAT seeks a remand report or any other further information from the AO for determining the said three (3) issues pertaining to Management Consultancy Fees, Out of Book Receivables and

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computation of book profits. Thus,

11. In this regard the reliance placed by the appellant on the judgment of this Court in ***Microsoft India (R&D) Pvt. Ltd. vs. Deputy Commissioner of Income Tax, (2021) 431 ITR 483*** is apposite wherein this Court has held as follows:-

> *"12. Mr. Rao submits that the learned ITAT has erred in restoring for adjudication, the questions of law to the file of the AO, thereby allowing him a second inning on a topic which both the AO and the DRP have already considered. He submits that the impugned order fails to finally decide the issue or provide guidance on questions of law involved in corporate tax dispute of taxability of composite rental income under the heads 'income from house property' or 'income from other sources'. He submits that the ITAT ought to have followed the decision of the High Court in the case of* ***Jay Metal Industries (P) Ltd. v. CIT-V,*** *and granted relief finally and conclusively, especially as all the facts are available on record. He further submits that in these circumstances, it would only prolong litigation on an issue which had already been settled by a decision of this Court. We are inclined to agree with Mr. Rao. The learned ITAT has restored the above issues to the AO for a fresh decision following its earlier order dated 28.06.2016 in ITA No. 2058/DEL/2015. The ITAT being a last fact finding authority, is empowered to examine the documents and law placed by the assessee in support of its claim. It is well settled law that remand is not a power to be exercised in a routine manner and should be used sparingly, as an exception only when the facts warranted such course of action. In our opinion, when the requisite materials and the intervening decision of the jurisdictional high court was available for deciding the issue urged by the Assessee, the Tribunal ought to have arrived at a conclusion rather than remanding the matter back to the Assessing Officer."* (Emphasis supplied)

12. Accordingly, we partly allow the appeal of the Assessee on question nos. (i), (ii) and (iii) and direct the learned ITAT to take up and decide the

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said issues urged by the Assessee in its appeal on the basis of the documents filed by the Assessee. We clarify if there is any further verification or evidence required by the ITAT for determining the said issues it shall be entitled to seek a remand report. Thus, the appeal of the Assessee is restored to the file of the ITAT for AY 2014-15 to the limited extent noted above.

13. We clarify that we have not examined the said three (3) issues on merits and nothing said in this order may be considered as an expression of merits.

Question of law proposed as (F)

14. The appellant has also proposed the following question of law:-

> *"Whether on the facts and in the circumstances of the case and in law, the ITAT erred in upholding the disallowance of claim of Corporate Social Responsibility ('**CSR**')?"*

15. The AO disallowed a sum of Rs. 50,36,663/- claimed by the Assessee as expenditure on account of Corporate Social Responsibility (CSR). The learned counsel for the respondent states that to qualify for deduction as CSR, the expenditure must fall in one of the categories enlisted in Schedule (VII) of the Companies Act, 2013, whereas admittedly, none of the institutions to whom donations have been made by the Assessee fall in the said category.

15.1. The AO after examination of the record held that the said amount has not been incurred for the purpose of business and therefore does not fall within the provisions of Section 37 of the Act. The ITAT after perusing the details of the expenditure incurred by the Assessee on account of CSR

returned a finding that the said expenses are not in the nature of CSR. The ITAT held that in fact, the payment details show that these were in fact, in the nature of charity and donations made to the third parties listed therein and therefore, the same do not merit to be claimed as an expenditure. The appellant has failed to show any infirmity in the said finding of fact of the ITAT and therefore, in our opinion question (F) does not arise for consideration and we decline to entertain the appeal on the said question.

16. List the matter in the category of finals, in normal course, for determination of the three questions of law as framed in paragraph no. 3 above.

CM APPL. 8744/2021 (interim relief)

This application has been filed seeking an interim order restraining the respondents from pursuing the assessment proceedings in pursuance to the impugned order dated 21st September, 2020.

In view of the direction of remand passed by this Court in paragraph nos. 5 to 13 above, the said application does not survive for consideration and the same is accordingly disposed of.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

SEPTEMBER 19, 2022/msh

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