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

+ ITA 793/2019, CM APPL.39197/2019

THE PR. COMMISSIONER OF INCOME TAX -6 Appellant

Through: Mr.Sunil Agarwal, Sr.Standing
counsel with Mr.Tushar Gupta,
Jr.Standing Counsel and Mr.Samarth
Chaudhari, Advocate for ITO(TDS)-1

versus

MOSER BAER INDIA LTD. Respondent

Through: Mr.Upvan Gupta, Advocate

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Date of Decision: 16th March, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J (Oral):

1. The Principal Commissioner of Income Tax-6, I.P. Estate, Central Revenue Building, New Delhi – 110002 has filed the present appeal assailing the order dated 01.05.2018 passed by the Income Tax Appellate Tribunal, Bench “1-1” New Delhi passed in I.T.A. No.883/Del/2008&894/Del/2008 pertaining to Assessment Year 2003-2004.
2. Briefly stated the facts are that the Assessee had filed its return of income on 02.12.2003 declaring a loss of Rs. 86,15,30,820/-. The case was selected for scrutiny assessment and notice under Section 143 (2)

of the Income Tax Act, 1961 was issued. A reference was made to the Transfer Pricing Officer (TPO), as the Assessee had undertaken international transactions with its Associated Enterprises (AEs). A final Assessment Order under Section 143(3) of the Income Tax Act, 1961 was passed by the Assessing Officer. Assessing Officer enhanced book profit by Rs. 4,66,60,747/- towards profit under Section 10A of the Income Tax Act, 1961 by way of exclusion of receipt and expenses of the unit. The assessing officer also made disallowances of indexation benefit of Rs. 94,279/- against long term capital gain of Rs. 1,01,779/- on the sale of shares.

Aggrieved by this, the Assessee filed an appeal before the CIT(A). CIT (A) allowed the appeal of the assessee by holding that the proviso to Section 73A of the Act is not applicable to assessee company in respect of indexation benefit of Rs.94,279/- against long term capital gains of Rs.1,01,779/-. However, CIT (A) allowed the appeal of the assessee and deleted the addition by holding that no deduction was claimed under Section 10A of the Act.

3. The Assessee as well as the department filed cross appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT dismissed the appeal of the Revenue and allowed the appeal of the Assessee.
4. Aggrieved by this, the Principal Commissioner invoked the jurisdiction of this Court and assailed the order passed by the ITAT.
5. On 07.12.2021, learned counsel for the parties had drawn the attention of this Court to the order dated 21.07.2020 passed by the Apex Court in ***Commissioner of Income Tax v. Moser Baer India Ltd.*** Civil Appeal No.4705/2014 wherein the appeal filed by the Revenue was disposed of

leaving the question of law open as the company in question was in liquidation and was not in a position to pay its outstanding dues including its taxes. The order passed by the Apex Court is reproduced hereinbelow:

"The Official Liquidator has filed a report that the Respondent-Company (Moser Bear India Ltd.) is not financially viable and is under liquidation in proceedings pending before the National Company Law Tribunal. Even if the Appellant-Revenue were to succeed, the Official Liquidator is not in a position to pay the tax amount involved in these appeals.

Indisputedly, the respondent-Company has gone in liquidation. The company in liquidation is not in a position to pay its outstanding dues including taxes. Moreover, the tax effect in the concerned appeals is just over Rs. 2,00,00,000/- (Rupees Two Crore Only).

Taking overall view of the matter, we deem it appropriate to dispose of these appeals, leaving the question of law open to be decided in appropriate case.

Ordered accordingly.

Pending applications, if any, stand disposed of. "

6. Learned counsel for the Revenue was directed to obtain instruction as to whether the Revenue would like to pursue the appeals filed by it.
7. Mr.Sunil Agarwal, counsel for the Revenue has filed a letter received by him which is reproduced hereinbelow:

***"Office of the
Deputy Commissioner of Income Tax,
Central Circle-20, New Delhi***

*Room No.269A, ARA Centre, 2nd Floor, Jhandewalan Extn., New Delhi 110055
Email Id: delhi.dcit.cen20@incometax. gov.in Phone No.011-23593448*

F. No.DCIT/CC-20/Moser/2021-22/660 Date: 15.03.2022

To,

*The Sr.Standing Counsel
High Court of Delhi.*

Sir,

Subject: Request for Instructions regarding pursuing of pending appeals filed in Delhi High Court in the case of M/s. Moser Baer India Ltd. (PAN:AAACM03221) – Regarding.

Kindly refer to the above subject.

2. Reference is hereby drawn to your email dated 31.01.2022 vide which this office has been intimated that the Hon'ble Supreme Court vide Order dated 21.07.2020 has dismissed departmental appeal in the case of assessee company [AY 1999-2000 against Penalty u/s 271(1)(c)] on preliminary ground that the company is in liquidation before NCLT and the Liquidator on Affidavit has stated that the company does not have sufficient assets to satisfy Income tax demands, that even if the department were to succeed, no recovery will be possible for department.

3. Further, you have also intimated that, the Hon'ble High Court, Delhi has directed your goodself to seek instructions as to whether the Revenue would like to pursue the appeals (ITA No.1204/2018 and ITA 793/2019 filed by the department.

4.1 As pointed out by you, the assessee is desirous of pursuing its appeals. As such there may be situation, that , in case the assessee gets a favourable order, he may be entitled for a refund.

4.2 While the department would like to pursue the appeals, however in case the Court is inclined to dispose off the appeals in the spirit of decision of Hon'ble SC wherein the matter was not considered on merits but on ground of assessment being before NCLT, it would be equitable that the Hon'ble Court also gives directions that the refunds, if any, shall also not be admissible.

Yours faithfully,

(Kanika Hasija)
Deputy Commissioner of Income-tax,
Central Circle-20, New Delhi."

8. We have considered the submissions of learned counsel for the parties. A perusal of the aforesaid order of Apex Court in Civil Appeal No.4705/2014 makes it clear that the respondent company Moser Baer India Ltd. is not financially viable and is in liquidation before NCLT. The order also makes it clear that even if the Revenue were to succeed, the Official Liquidator would not be in a position to pay the tax amount involved in these appeals. Thus, even if the appellant-department succeeds in the present appeal, there would be no fructifying effect as the respondent company, which is under liquidation, would not be able

to discharge its debts and tax liability through the liquidator. The courts are already overburdened. Thus, while dealing with such matters, it has to be seen whether keeping such matters alive would serve any purpose. If such matters continue to remain on board, they would rather block other deserving matters. There is no purpose of flogging a dead horse. We are of the view that there is no purpose in keeping this matter alive. Hence, in view of peculiar facts and circumstances, the report filed by the department and the order passed by the Apex Court in Civil Appeal No.4705/2014, we dispose of the present appeal, leaving the question of law open to be decided in an appropriate case.

9. The present appeal along with pending application stands disposed of in above terms.

DINESH KUMAR SHARMA, J

MANMOHAN, J

MARCH 16, 2022

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