

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B': NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**ITA No.792/Del/2010  
(Assessment Year: 2006-07)**

M/s. Escorts Limited,  
11, Scindia House,  
Connaught Circus,  
New Delhi.

vs.

DCIT, Central Circle 3,  
New Delhi.

**(PAN : AAACE0074B)**

**ITA No.1313/Del/2010  
(Assessment Year: 2006-07)**

DCIT, Central Circle 3,  
New Delhi.

vs.

M/s. Escorts Limited,  
11, Scindia House,  
Connaught Circus,  
New Delhi.

**(PAN : AAACE0074B)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri R.M. Mehta, CA  
REVENUE BY : Shri T. James Singson, CIT DR

Date of Hearing : 20.02.2024  
Date of Order : 27.02.2024

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER :**

These cross appeals filed by the assessee and Revenue are arising out of order of Id. CIT (Appeals)-II, Delhi dated 11.01.2010 pertaining to Assessment Year 2006-07.

2. The assessee has taken the following grounds of appeal :-

“1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the addition of Rs.441.87 crores made by the Assessing Officer on account of capital gain on sale of shares of EHIRC Ltd. which, being a subject matter of substantial dispute before the Hon'ble Delhi High Court, is not assessable in the year under appeal. It is a settled law that the taxability of such capital gain would arise only in the year in which dispute is settled.

2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the disallowance of long term capital loss of Rs.96.81 crores on sale of investment in Esconet Services Ltd. and Escosoft Technologies Ltd. in spite of the fact that the transfer of shares and ownership in these companies had taken place during the relevant assessment year and the learned CIT(A) himself recorded the finding of the fact that the transaction is not sham as opposed to the Assessing Officer's remarks that the transaction is sham and collusive.

3. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in deleting only Rs.24.50 lacs out of the disallowance of Rs.7,00,11,165/- on account of prior period expenses claimed during the year.

4. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in deleting only RS.4,35,150/- out of total disallowance of Rs.10.00 lacs made by the Assessing Officer on account of expenses claimed towards gifts and presents.”

3. Grounds of appeal taken by the Revenue read as under :-

“1(a) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs.2450000/- on account of previous year expenses.

1(b) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs.10 lacs made by way of disallowance of gifts and presents.

1(c) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs.15 lacs by way of disallowance of Misc. expenses. .

1(d) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs.128934000/- made on account of disallowance of advisory fee paid.

1(e) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition 66066800/- made on account of upfront fee paid.

1(f) On the facts and in law and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of made on account of disallowance of Royalty payment.

2. The order of the Ld. CIT(A) is erroneous and not tenable in law and on facts.”

### **ASSEESSEE’S APPEAL (ITA NO.792/Del/2010)**

4. Apropos Ground No.1 : At the outset, Id. Counsel of the assessee submitted that he shall not be pressing this ground, hence this ground is dismissed as not pressed.

5. Apropos Ground No.2 : On this issue, long term capital loss of Rs.96.81 crores was disallowed by the AO holding it as non-genuine. The reasons given by the AO read as under :-

“(i) There is an attempt by assessee to somehow reduce tax liability by taking advantage of setting off of capital loss.

(ii) There is' no apparent commercial expediency in selling the shares of M/s Esconet Services Ltd. and Escosoft

Technology Ltd incurring capital loss on these shares as the sale consideration of Rs.40,000/- is too paltry a sum .

(iii) The consideration is received only on 19/5/2006 i.e. much after 31.3.2006 being the date of claimed transfer of shares which is against normal practice in genuine transaction where consideration is received first then only shareholding is transferred.”

6. Against the above order, assessee is in appeal before the Id. CIT (A).

Ld. CIT (A) elaborately considered the submissions. Ld. CIT (A) upheld the

AO's action by observing as under :-

“ I have considered the facts and circumstances of the case. The submissions of the appellant have also been gone through. Though I agree in principle with the Id AR that the date of receipt of consideration is not relevant to decide the date of transfer but in the case of the appellant it definitely creates a prima facie doubt as the transaction appears to have been done in hurry admittedly to get a capital loss which may be claimed for set off against huge capital gains arising on account of shale of its shares in EHIRCL. The paltry consideration of Rs.40,000/- against such huge investments also needed examination. Accordingly I myself tried to verify cursorily the claim of the appellant that the NAV of the shares of these companies has become negative and this is evidenced by equity valuation and due Diligence Reports. Accordingly I have gone through the Due Diligence Report and also the Balance Sheet of these companies.

7.3.1. It is seen that M/s Escosoft Technology Ltd is having investment in three companies namely Escotoonz Entertainment Pvt. Ltd, CA-Escosoft Limited and E-Soft Mauritius Holdings Ltd. Only in the case of E-Soft Mauritius Holdings Ltd, the fair value of shares has been valued at Nil. The shares of CA-Escosoft Limited' has been valued at Rs.3.61 per share and that of Escotoonz Entertainment Pvt. Ltd. at RS.7.83 per share. Thus the value of investment of M/s Escosoft Technology Ltd in these three companies is at Rs.4,55,59,500/-. Similarly Esconet Services Pvt.Ltd. has investment in the form of equity share as well as Cumulative

Redeemable Preference Shares in Cellnext Solutions Ltd and in I-Serv India Solutions Pvt Ltd. Except Cumulative Redeemable Preference Shares of Cellnext Solution Ltd whose fair value per share has been estimated at Rs.7.41, the fair value of other shares has been estimated at Nil. Thus the realisable value of investment of MIs Esconet Services Pvt. Ltd. in these companies is Rs.5,56,00,000/-. Thus, these two companies are having investment whose realisable value is not Nil unlike the case made by the appellant. The net value of shares (NAV) of these two companies have been shown as negative only because a provision of diminution in the value of investment has been made on the date of valuation which is 10th March, 2006 but the same cannot be done during the year as per principle of accountancy. Any such provision can be made only at the year end. If this provision would not have been considered which can not be considered as per law, the NAV of the shares of these companies, as claimed by the appellant, could not have been negative. Thus, the apparent consideration of Rs.40,000/- shown by the appellant on the sale of its entire investment in these two companies is far too below than the real value.

7.3.2. Be as it may, it is also worth examining as to whether transfer has been completed during the year or not. As per details furnished by the appellant, the share purchase agreement between Escorts Ltd i.e. the appellant company and Jagmata Electricals Exim Pvt. Ltd. i.e. is the Acquirer and Esconet Services Ltd has been made on 31/3/2006. Similarly the share purchase agreement amongst Escorts Ltd. i.e. the appellant company and Jagmata Electricals Exim Pvt. Ltd. i.e. the Acquirer and Escosoft Technologies Ltd has also been entered on 31/3/2006. The appellant had' furnished copy of details of shares sold as well as share certificates. On the back of share certificate i.e. Memorandum of Transfer, in the case of one set of shares the date of transfer is 31/3/2006 (Paper Book page 105 to 125) whereas in other set of shares, it is 30/3/2006 (Paper Book page No.144 to 155). It is not understood as to how the share can be transferred in the name of Acquirer on 30/3/2006 i.e. before agreement is signed which is done on 31/3/2006. The appellant also could not throw any light on this aspect during appellate proceedings except submitting search report accessed from ROC website duly attested from Neelam Gupta & Associates, Company Secretary. But this certificate only gives the date on which the name of acquirer has been

entered in the list of shareholders as it is appearing in the record of ROC. In no way, it explains the discrepancy. It is also noticed that the share certificates have been shown as transferred in physical form without getting it De-matted. It is not understood how the same can be transferred which in my opinion is against SEBI guidelines. In case had it been De-matted the exact date of transfer could have been verified. In absence of D-mat account the claim of appellant of transfer cannot be conclusively established as the evidence filed in support of the transfer of shares during the year is not conclusive as it is not a third party evidence. Thus, considering the totality of circumstances, it is held that appellant is not able to establish that the transfer is complete during the year and equitable right in these shares has been transferred to Acquirer. It is, therefore; held that the sale of the shares has not taken place during the year. Therefore, the loss has not arisen during the year. This is without prejudice to my finding that sale consideration also does not appear to be adequate.

7.3.3. In the circumstances, This is without prejudice to my finding that sale consideration also does not appear to be adequate. it is held that the capital loss so claimed by the appellant has rightly been treated as disallowable by the A.O. though I agree with the Id AR to the extent that AO is not able to establish that this transaction is sham. Having said so, I agree with the alternate submission of the appellant that if a claim is made in subsequent year for this capital loss then A.D. may like to examine the exact date when transfer under reference is complete and may examine the adequacy of consideration as well. This ground is, therefore, effectively decided against the appellant.”

7. Against the above order, assessee has filed appeal before us. We have heard both the parties and perused the records.

8. Ld. Counsel for the assessee stated that assessee is within his rights to plan his affairs to his advantage. It is further pleaded that AO and CIT (A) have referred to paltry sale consideration but no attempt has been made to

confront the purchaser who significantly is not a connected party but a complete outsider and that the said paltry consideration is duly supported by the valuation and due diligence reports. It is further pleaded that the observation of Id. CIT (A) on the value of shares of certain subsidiaries of M/s. Escosoft Technologies Ltd. and M/s. Esconet Services Ltd. are made by reference to only a part of the valuation reports and that too without raising any query on the assessee. Furthermore, Id. Counsel made submissions in support of assessee's claim that the transaction is appropriate and proper. It has been further submitted that the AO at no stage of proceedings sought to undertake any enquiry in respect of the transaction and the grounds on which he rejected the transactions.

9. Per contra, Id. DR for the Revenue relied upon the orders of the authorities below.

10. Upon careful consideration, we note that AO has not made proper enquiry in this regard. Similarly, the buyer has not been examined by the Revenue authorities. Furthermore, it is the submission of the Id. Counsel for the assessee that the value of shares of subsidiaries is not correct and that the value has been arrived at without giving assessee an opportunity to rebut. Furthermore, Id. CIT (A) has passed an order in which he has tried to verify cursorily the claim of the assessee that the NAV of the shares of these companies has become negative. Thereafter, Id. CIT (A) has embarked upon

the valuation which the assessee contended that it is not based upon full details and assessee was not confronted also. In this view of the matter, in our considered view, there are shortcomings in the assessment order as well as in the order of Id. CIT (A) which need to be examined afresh. We refer to the decision of Hon'ble Apex Court in the case of Kapurchand Shrimal vs Commissioner Of Income Tax 131 ITR 451 wherein it is held that it is the duty of the appellate authority to correct the lacunae in the orders of the authority below and remit the matter with or without direction unless prohibited by law. In the present case, we have already noted that there are shortcomings and lack of proper enquiry by the AO and the assessee has further contended that Id. CIT (A) has arrived at the valuation of the shares without giving the assessee an opportunity in this regard and the documents relied upon by the Id. CIT (A) are incomplete. In such circumstances, we deem it proper to remit the issue to the file of AO. AO shall consider the issue afresh and shall keep in mind our observations herein above. Needless to add, assessee should be given an opportunity of being heard. This ground is allowed for statistical purposes.

11. Apropos prior period expenses : The AO made disallowance of previous year expenditure by observing as under :-

“It is found from the Tax audit report that the assessee company had claimed prior period expenses amounting to Rs.70011165/-. During the course of assessment proceedings, it was stated by

the A/R that these expenses include personnel expenses of Rs.845112/-; sales and administrative expenses of Rs.69,75,258/-; Interest of Rs.31,797/- and operating expenses of Rs.136601/-. Since these expenses pertain to earlier years and the assessee company had been following mercantile system of accounting, these expenses are hereby disallowed and added back to the total income of the assessee.”

11.1 AO further made addition of prior period expenses amounting to Rs.6,71,83,363/-.

12. Upon assessee’s appeal, Id. CIT (A) elaborately considered the issue. He noted that on the issue of disallowance of Rs.6,71,83,363/-, the same has already been found to be double addition and in the order passed u/s 154, the AO has deleted the addition.

12.1 As regards, previous year expenditure of Rs.7,00,11,165/- is concerned, we note that Id. CIT (A) has examined in detailed the nature of expenditure and his reasoning for classifying it as prior period expenditure is credible. We may gainfully refer to the order of Id. CIT (A) on this issue as under :-

“10. Ground No.9 & 10 are reproduced as under:-

“9. The Assessing Officer erred in disallowing previous year expenditure to the tune of Rs.7,00,11,165/- without appreciating that the said expenditure accrued in Assessment Year 2006-07 and as per the past history of the case as also taking into account the system of accounting maintained by the company no such addition was required to be made.”

"10. Without prejudice to Ground No.9, a 'double addition' in respect of the previous year expenses has been made in a sum

of Rs.6,71,83,363/- under the head "prior period expenses". This double addition even otherwise is required to be deleted. "

10.1. During appellate proceedings, it was brought to my notice that the double addition of Rs.6,71,83,363/- made in this order has been deleted by A.O. in the order passed u/s 154 dated 9/3/2009. Accordingly, this ground is not pressed. Thus, ground No.10 is treated as dismissed as not pressed.

10.1.1. Thus, the only ground No.9 has to be discussed which is regarding non allowance of expenditure to the extent of Rs.7,00,11,165/- which according to A.O. does not pertain to Assessment Year 2006-07.

10.2. Before undersigned details have been submitted by the appellant and it has been argued that all these expenses have been accrued during assessment year 2006-07 only though they may be pertaining to the prior period. The expenses are definitely incurred in connection with the business of the company. Therefore, the same should be allowed. The appellant has filed an Annexure regarding all these expenses. In some cases invoices have also been produced.

10.3. I have gone through all these items as under:-

(i)	Repair to Machinery	1,51,000
(ii)	Repair to Machinery	<u>2,850</u>
		1,53,850

Though the appellant has claimed that bills pertaining to these expenses were received late and hence could not be accounted for in the relevant assessment year, but no evidence in the form of invoice could be produced to establish the claim. Therefore, to that extent appellant's claim is not accepted. The disallowance of Rs.1,53,850/- is, therefore, upheld.

(iii) Annual Maintenance Contract Rs.12,25,000/-

The reasons given by the appellant for allowability of the same during the year is as under:-

"The party has raised the invoice in the A.Y. 2006-07 and hence there is no case for disallowance as prior period expense as the

liability to pay the expenses has accrued during the A. Y.2006-07. Inv. NO.USGI00206A dated 1/10/2005."

Copy of invoice is also produced. It is seen that invoice is dated 1/10/2005. Though the work may pertain to earlier years but since invoice is dated 1/10/2005, therefore, technically it cannot be said that it is prior period expenses. Since the assessee is following mercantile system of accounting, the expenses are to be acknowledged only on the receipt of invoice. Therefore, this expenditure of Rs.12,25,000/- is directed to be allowed.

(iv) Annual Maintenance Contract Rs.4,08,333/-.

Though the appellant claimed that invoice is dated 1/12/2005, but copy of invoice could not be produced. In absence thereof claim cannot be accepted.

(v) Annual Maintenance Contract Rs. 6,12,500/-

(vi) Annual Maintenance Contract Rs. 6,12,500/-

It is the claim of appellant that invoice was received only on 1/11/2005 and, therefore, the expenditure is not prior period expenses. The copy of invoice has also been produced. Based on the reasons as discussed for item No.(iii), it is held that expenses pertaining to these two items are also cannot be said as prior period expenses. The same are, therefore, allowed. (Rs.12,25,000/-)

(vii) Advertisement Expenses Rs. 1,52,076/-

The reasons given by the appellant for the allowability of the same is as under:-

"The expenditure relates to advertisement on Punjabi TV Channel during the month of November 2004. The bill of the party was received in May 2005 and hence accounted for in the A.Y.2006-07."

On going through the invoice, it is seen that there is no mention about the date of receipt of the bill and the appellant also could not establish that bill was received in Financial Year 2005-06.

In the circumstances, it is held as prior period expenses and, therefore, correctly held as not allowable.

(viii) Sales Promotion Rs.80,000/-

The reasons given by the appellant for the allowability of the same is as under:-

"The expenditure relates to participation in Surajkund Trade Fair held in December, 2004. The consent was given for participation but the payment note was received and entered in June 2005."

A copy of letter from Dy.Commissioner, Faridabad addressed to the Chairman of the appellant company has been filed. On perusal of the same it is seen that the payment is related to participation in Surajkund Trade Fair which was held from 22 to 30/12/2004. An amount of rent was also fixed in this letter itself. Thus, there is no need of any invoice. The expenditure definitely pertains to Assessment Year 2005-06 and the appellant could have provided the same in previous year relevant to Assessment Year 2005-06. This expenditure is also, therefore, treated as prior period expenses and correctly not allowed by the AO.

(ix) Sales Promotion Rs. 169,552/-

The reasons given by the appellant for the allowability of the same is as under:-

"The expenditure relates to participation in Kissan Mela 2004 in Ludhiana. The Invoice No.1 C0411NVI1 01111 dated 14/11/2004 of M/s. Impact Communications was received late and after due verification could only be entered in the books of accounts on 30/6/2005 .

The appellant has not produced any evidence in support of its claim that the bill was received in 2005-06. Even in the explanation it is written that bill is received is late but the date of receipt is not mentioned. Therefore, this expenditure is also treated as prior period expenses and rightly disallowed by the AO.

(x) Interest on delayed payment of Sales tax.  
Rs.1,19,67,409/-

On examination of the details filed it is found that this amount is in the nature of penalty. The Ld.AR. is also in agreement with this finding. Therefore, irrespective of the fact whether it is pertaining to this year or not, the same is not allowable. The disallowance is, therefore, upheld.

(xi) Cash Discount Rs.1,35,00,000/-

The reasons given by the appellant for the allowability of the same is as under:-

"The financial year of the company is from October to September. Accordingly, tile provisions 'of such as discounts, incentives, etc are created based on the years/periods' performance of dealers/distributors. The cash discount for the period from April 2004 to September 2005 was to be provided as on 30/9/2005 for which state-wise calculation was made and on conservative basis the provision was made at Rs. 135 lakhs in the books. Therefore, it cannot be said that the expenditure is a prior period expenses because the liability to pay this expense has been determined during the Assessment Year 2006-07."

During appellate proceedings, it is ascertained that this liability pertains to earlier year and could have been provided as on 31/3/2005. Therefore, definitely this is prior period expenditure and disallowance thereof is upheld.

(xii) Agni Incentive Rs.195,00,000/-

Though the appellant has given a detailed reason as to why the same cannot be said as prior period expenses, however, alternatively it was submitted by them that this provision is no more required and accordingly it was reversed during Assessment Year 2008-09. It was submitted that in case this disallowance is upheld here then in assessment year 2008-09 when the assessee itself has added back this amount, the same may be directed to be withdrawn else it will amount to double addition. I agree with the alternate submission of the appellant. Thus the disallowance in this year is upheld on the ground that this pertains to earlier year. However the A.O. at the same time

is directed to reduce the income by identical amount after due verification of the claim of the appellant that this amount has been written back in the Profit and Loss Account and in turn to the total income of the assessee for AY 2008-09.

(xiii) Homologation Expenses Rs.18802143/-

Though the appellant has given a detailed reason as to why the same cannot be said as prior period expenses, however, alternatively it was submitted by them that this provision is no more required and accordingly it was reversed during Assessment Year 2007-08. It was submitted that in case this disallowance is upheld here then in assessment year 2007-08 when the assessee itself has added back this amount, the same may be directed to be withdrawn else it will amount to double addition. I agree with the alternate submission of the appellant. Thus the disallowance in this year is upheld on 'the ground that this pertains to earlier year. However the A.O. at the same time is directed to reduce the income by identical amount after due verification of the claim of the appellant that this amount has been written back in the Profit and Loss Account and in turn to the total income of the assessee for AY 2007-08.

10.3.1. Apart from this, following expenses are included in prior period expenses and pertaining to different divisions as under:-

Engineering Division	Rs. 2,85,528/-
Corporate Office	Rs. 3,58,320/-
Registered Office	Rs.21,83,954/-

About these expenses, the claim of the assessee is that the same are pertaining to current year only but no conclusive evidence thereof could be given. Therefore, the disallowances made by the AO. to that extent is upheld.

10.3.2. Thus, to sum, relief of Rs.24,50,000/- is allowed to the appellant on this ground and the disallowance of Rs.6,75,61,165/- is upheld.”

13. Ld. Counsel has made general submissions that the company is huge and all expenditure is for the purpose of business and Tribunal in several years has deleted the prior period expenditure.

14. We find that general submissions cannot lead to reverse the order of the ld. CIT (A) on this issue. We find that ld. CIT (A) has examined in detail and passed an elaborate and speaking order. Hence, we affirm the order of ld. CIT (A) on this issue. Thus, this issue in the cross appeals filed by the assessee and Revenue is dismissed.

15. Apropos gifts and presents : On this issue, AO noted that assessee had debited Rs.56,48,500/- towards gifts and presents. AO made general observations that from the details filed, during the course of hearing, he found that most of the expenditure was incurred other than during the Diwali. Hence, he made ad hoc disallowance amounting to Rs.10,00,000/-

16. Upon assessee's appeal, ld. CIT (A) also made general comments and held that 10% disallowance amounting to Rs.5,64,850/- is to be upheld and the AO is directed to give relief of Rs.4,35,150/-.

17. Against the above order, assessee and Revenue are in cross appeals before us. We have heard both the parties on this issue and perused the records.

18. We find that this addition has been made on ad hoc basis without bringing out necessary details. Hence, in our considered view, orders of authorities below on this issue are liable to be reversed. Accordingly, we hold that entire expenditure in this regard is allowable. The Revenue's appeal on this issue is dismissed and assessee's appeal on this issue is allowed.

19. Apropos misc. expenses : on this issue, AO noted that assessee had debited Rs.95,66,089/- towards misc. expenses under the head 'sales & administration expenses'. He noted that in absence of any details, an amount of Rs.15,00,000/- is disallowed on estimate basis.

20. Upon assessee's appeal, Id. CIT (A) on this issue examined the details and gave a finding that none of the expenditure could be said as not pertaining to the purpose of business of the assessee. He also noted that AO has not made out any case by brining any evidence whatsoever on record to show that some or any of the expenditure was not for the purpose of the business. Hence, in absence of any material brought on record by the AO, Id. CIT (A) directed to delete the addition in this regard.

21. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the records.

22. Ld. DR for the Revenue relied upon the order of the AO. However, ld. Counsel for the assessee relied upon the order of the ld. CIT (A).

23. Upon careful consideration, we find that ld. CIT (A) has passed a well-reasoned order on this issue after due examination. Hence, we do not find any infirmity in the order of the ld. CIT (A) on this issue. Accordingly, this ground of Revenue's appeal is dismissed.

24. Apropos disallowance of advisory fee paid : The AO for making this disallowance has observed that while calculating the capital gains the assessee has claimed a deduction of fee paid to J M Morgan Stanley of Rs.12,89,34,000/- which is said to be towards advisory services received for divestment of the assessee company's stake in EHIRCL. The AO for examining the claim of the assessee has gone through the terms as contained in the letter dated 18/1/05 of J.M.Morgan Stanley addressed to M/s Escorts Ltd. On examination thereof especially clause 17.1 of this letter, AO noted that the fee was in connection with affairs of the entire group including health care business. In addition to the assessee there were other entities also who were to transfer their shares. Further, the payment was not exclusively for transfer of Healthcare business but it was just one of the purposes/business included therein. Thus according to the AO this expenditure was not exclusively pertaining to assessee alone and thus it was not incurred wholly and exclusively in connection with the transfer of

shareholding of EHIRCL. Accordingly he disallowed entire expenditure of Rs.12,89,34,000/-.

25. Upon assessee's appeal, Id. CIT (A) deleted the addition by observing as under :-

“ I have gone through the bill dated 29/9/2005 from J.M.Morgan Stanley Pvt.Ltd. (JMMS) addressed to Escorts Ltd for Rs.12,89,34,000/-. The description as mentioned in this bill dated 29.09.05 is reproduced here as under for ready reference:-

"Being fee payable to us for acting as exclusively Financial Adviser to you in respect of advisory services rendered for divestment of your stake in Escort Heart Institute and Research Centre Ltd. as per the terms of the agreement letter dated 18/1/2005."

6.3.1. I have also gone through the copy of letter dated 18/1/2005 addressed by JMMS to the appellant which had been referred by the A.O. as well as in this bill. For ready reference the relevant portion is reproduced as under:

"Pursuant to our recent discussions, we are pleased to confirm the arrangement under which JM Morgan Stanley Limited ("JMMS") is engaged by Escorts limited ("Escorts" or "Company") to render services as its exclusive financial advisor in connection with a possible sale/divestiture/disposal of some or all of the share capital of, or the business or assets of Escorts Heart Institute and Research Centre Limited and/or some or all of its subsidiaries (together "Healthcare Business") (the "Transaction").

#### Scope of Services

During the term of our engagement JMMS will provide you with advice and assistance in connection with this transaction, which may include, if appropriate, advice and assistance with respect to:

1. Defining Objectives.

2. Identifying potential investors.
3. Perform.ing valuation analysis.
4. Structuring, planning and negotiating the transaction.

JMMS may provide such services through, or in conjunction with, one or more of its affiliates/associates.

#### Mandate Terms

The fees payable to JMMS for the services rendered would be as follows:

In consideration for the services rendered herein, an advisory fees of Rs.5 Lakhs shall be payable to JMMS by Escorts on signing of this engagement ..... JMMS would also be paid transaction fees @ 2% of the "Aggregate Value" (as defined below) of the transaction on the successful completion of the transaction."

6.3.2. Thus it is clear that JMMS has rendered services to the appellant in connection with disposal of the share capital of the appellant in EHIRCL on sale of which capital gain has been taxed by the AO though not offered in the revised return by the appellant. This action of AO has been upheld also by undersigned. The A.O. has also not disputed/denied that services were rendered by JMMS to the appellant. He has also not disputed the genuineness of the payment. As per provisions of Section 48 of the Act, expenditure incurred wholly and exclusively in connection with transfer has to be deducted from the full value of consideration received or accruing as a result of such transfer of the capital asset. Thus, the action of A.O. in disallowing entire payment made by the appellant to JMMS cannot be justified by any standard even if he feels that the same is not incurred wholly and exclusively in connection with this transfer. To that extent, I agree with the appellant.

6.3.3. Now it is to be seen as to whether the entire payment was incurred wholly and exclusively in connection with the transfer of these shares or not and if no then to what extent it can be said as not incurred in connection with this transaction. On a careful perusal of the terms and conditions as reproduced hereinabove it will be seen that JMMS has been engaged by the appellant to render services as its exclusive financial advisor and this is in connection with disposal of some or all the share capital of or

the business or assets of EHIRCL and/or some or of all its subsidiaries. From the letter dated 18/01/2005, it is clear that JMMS has been engaged by appellant in connection with a possible sale/divestiture/disposal of entire share capital/business/assets of entire EHIRCL and/or some or all of its subsidiaries. The term "some or all of its subsidiaries" is not qualifying the appellant but EHIRCL. Thus I do not agree with the interpretation of the AO that the fee paid by the appellant was in connection with affairs of the entire group including health care business. Further in the bill from JMMS, as reproduced hereinabove, it has been very clearly mentioned that fee payable is in connection with divestment of the stake of the appellant in EHIRCL. Thus even though there are other parties also who have sold the shares of EHIRCL, but JMMS has not been engaged by them and the bill raised by JMMS is also only in connection to the sale of shares of the appellant in EHIRCL. The other shareholders might have been benefited but it can not be said that any part of payment is pertaining to them. It is therefore held that entire payment is wholly and exclusively in connection with the transfer under reference of shares of the appellant in EHIRCL and therefore AO was not justified in making even part disallowance. The entire disallowance of Rs.12,89,34,000/- is therefore directed to be deleted. (Relief Rs.12,89,34,000/-).”

26. We find that the Id. CIT (A) has passed a well-reasoned order after elaborately considering all aspects. Hence, we do not find any infirmity in the order of the Id. CIT (A) on this issue. Accordingly, we affirm the same and this ground of Revenue’s appeal is dismissed.

27. Apropos upfront fee paid : AO made disallowance of Rs.6,60,66,800/- on this account by stating that facts and circumstances are same as in assessment year 1999-2000 where similar disallowance was made by holding the expenditure to be capital in nature.

28. Upon assessee's appeal, ld. CIT (A) referred to the ITAT order of the aforesaid assessment year and observed that the ITAT has allowed the same issue in favour of the assessee. Noting that ld. CIT (A) held that AO's disallowance does not hold good unless the AO brings on record that the aforesaid decision has been reversed by Hon'ble High Court and Hon'ble Supreme Court. He noted that on the other hand, assessee has brought that the appeal filed by the Department on this issue has been dismissed. He further observed that the issue has been decided by the ITAT on the basis of Hon'ble Supreme Court judgement in the case of India Cements Ltd.. He further observed that even the same view has been upheld by Hon'ble Madras High Court vide order dated 12.09.2006 in the case of CIT vs. Shree Meenaakshi Mills Ltd. wherein Hon'ble Madras High Court has further referred to the decision of Hon'ble Supreme Court in the case of CIT vs. Shiv Kashi Mills Ltd. 95 taxman 73. Accordingly, ld. CIT (A) held that the expenditure is allowable as revenue expenditure.

29. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the records.

30. Ld. DR for the Revenue relied upon the order of the AO.

31. Per contra, Id. Counsel of the assessee submitted that this expenditure has been rightly deleted by the Id. CIT (A) based on ITAT order on the same issue for the earlier period.

32. Upon careful consideration, we find ourselves in agreement with the submission of the Id. Counsel for the assessee that upfront fee is revenue expenditure and Id. CIT (A) passed a reasonable order on this issue. Hence, we do not find any infirmity in the order of the Id. CIT (A) on this issue. Accordingly, this issue is decided against the Revenue.

33. Apropos addition on account of royalty payment : On this issue, AO made a disallowance 25% of expenditure. During the relevant accounting period, the assessee company made payment of Rs.4.03 crores as royalty to M/s. Harprasad & Co. Ltd. From the details of agreement filed during the course of assessment proceedings, it is found that the assessee has been continuously payment royalty since 1954 and as such enduring benefit was derived by the assessee. Following the decision of the Apex Court in the case of M/s. Southern Switchgear Ltd. vs. CIT (1997) (232 ITR 359) wherein it had been held that entire payment towards royalty could not be allowed as revenue expenditure and that 25% of the expenditure would have to be taken as capital in nature. In view of this, AO disallowed the amount of Rs.100,75,000/- and added back to income.

34. Upon assessee's appeal, Id. CIT (A) deleted the addition. We may gainfully refer to Id. CIT (A)'s order in this regard as under :-

“ I have considered the facts of the case. The submissions of the appellant have also been gone through. It is true based on the material submitted by the appellant that the payment of royalty @ 0.25% of the total turnover is evidenced by Minutes of the Meeting of Board of Directors of Harparshad and Company Pvt. Ltd. held on 1/2/2001 which has been specifically confirmed by way of Deed of Confirmation signed between Shri Rajan Nanda, Chairman and Managing Director of Escorts Ltd and Shri Kedar Nath Sachdeva, Company Secretary for Harprashad and Company Pvt. Ltd. on 5/2/2001. The royalty is payable for the use of name "Escorts" as a Trade Mark which is evidenced by the Deed of Confirmation. The genuineness of the expenditure is admittedly not under dispute. The claim of appellant is also found correct that this expenditure has been allowed in full in earlier year also. The reasons given by the AO for the disallowance is only based on the decision of Apex Court in the case of Southern Switchgear Ltd. VS.CIT (supra).”

35. Thereafter, Id. CIT (A) distinguished the said decision and further held as under :-

“ I have gone through the decision relied upon by the A.O. and on going through the same, I agree with the appellant that this decision is squarely distinguishable and not applicable to the facts of the appellant's case as in that case under the terms of the agreement that company agreed to pay to the foreign company as consideration for the services rendered by it, a royalty on sales and a lump sum for the technical aid, payable in five equal instalments, the payment to be spread over a period of time. The Tribunal disallowed 25% of the technical fees and 25% of the royalty paid by the assessee to the foreign company. The Hon'ble Madras High Court has upheld the action of Tribunal of disallowing 25% of the royalty as in that case the Hon'ble Tribunal held that by making a payment towards royalty the appellant has obtained the technical

knowledge which is an enduring advantage and benefits and same will be available to the assessee even after the termination of the agreement. This decision of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court also. But in the instant case, the facts are totally different. Royalty is not being paid for acquiring any technical knowledge which may give any enduring benefit. Rather in this case royalty is being paid only for the use of name "Escorts" which is owned by Harparshad and Company Pvt. Ltd. Therefore, it cannot be said that by making this payment any enduring benefit is being obtained. Thus, the facts are distinguishable and, therefore, this decision is not applicable. In my opinion, this is a clear cut case of revenue expenditure. Not only that, it has been allowed in earlier years also by the AO in full as revenue expenditure. Therefore, royalty payment is directed to be allowed in full. The disallowance so made by A.O of Rs.1,00,75,000/- is directed to be deleted.

36. Against the above order, Revenue has come up in appeal before us.

We have heard both the parties and perused the record.

37. We find that Id. CIT (A) has passed a well-reasoned order after due examination. Hence, we do not find any infirmity in the same. Accordingly, this ground of Revenue's appeal is dismissed.

38. In the result, the assessee's appeal is partly allowed for statistical purposes and the Revenue's appeal is dismissed.

**Order pronounced in the open court on this 27<sup>th</sup> day of February, 2024.**

**Sd/-  
(CHALLA NAGENDRA PRASAD)  
JUDICIAL MEMBER**

**sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Dated the 27<sup>th</sup> day of February, 2024  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-II, Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT**  
**NEW DELHI.**