Hyundai Motor India Limited, Chennai vs Department Of Income Tax on 27 August, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

BEFORE SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

ITA Nos.1987 & 1988/Mds/2011
(Assessment Years: 2004-05 & 2005-06)
&
C.O.No.43/Mds/2012
(In ITA No.1988/Mds/2011)
(Assessment Year: 2005-06)

Deputy Commissioner of Income Tax, Large Taxpayer Unit, Chennai-600 101.	Vs.	M/s. Hyundai Motor India Ltd., Plot No.H1, SIPCOT Industrial Park, Irungattukottai, Sriperumpudur, Kancheepuram Dist. PAN: AAACH2364M
(Appellant)		(Respondent/Cross Objector)

Appellant by : Smt. Anupama Shukla, CIT DR
Respondent by : Shri S.Hariharan, C.A.,

Date of Hearing : 27th August 2012
Date of Pronouncement : 25th September, 2012

ORDER

PER VIKAS AWASTHY, JUDICIAL MEMBER:

The present appeals i.e. ITA No.1987/Mds/2011 relevant to the assessment year 2004-05 and ITA No.1988/Mds/2011 relevant to the assessment year 2005-06 have been filed by the Department impugning two separate orders of the CIT(A), LTU dated 23.09.2011 for the respective assessment years. The assessee has also filed cross objection impugning the order of the CIT(A) relevant to the assessment year 2005-06.

2. The brief facts of the case are that the assessee company is engaged in the manufacture and trading of passenger cars and vehicle components. For the assessment year 2004-05 the assessee filed its return of income on 30.10.2004 declaring total income of ` 5,08,72,14,630/-. The case of the assessee was selected for scrutiny and assessment under section 143(3) was completed on 29.12.2006 determining total income at ` 5,48,34,61,386/-. Aggrieved against the assessment order, the assessee preferred an appeal before the CIT(A), LTU impugning the assessment order dated 29.12.2006. During the pendency of the said appeal, the Assessing Officer issued notice under section 148 on 17.3.2009. The Assessing Officer vide letter dated 5.6.2009 gave reasons for reopening the assessment which are reproduced hereunder:-

"In the Schedule 4 (fixed asset) of the balance sheet additions made during the year is ` 14,33,133 thousand s. This is the net of ` 1,44,897 thousands pertaining to gains from foreign exchange rate fluctuation on loans taken to acquire the fixed asset. The assessee has claimed a deduction of ` 2,42,957 thousands from the profit as per P&L account in the computation statement towards R& I capital expenses u/s.35.

Actual cost of addition during the year as per income tax depreciation statement is ` 13,35,053 thousands and the assessee has deducted a sum of ` 1,46,04,383 from the actual cost of the asset while computing depreciation u/s.32 whereas the assessee has made a profit of ` 1,44,897 thousand from foreign exchange rate fluctuation on loans taken to acquire the fixed assets. Hence, the assessee has not reduced the entire gain on fluctuation gain for the purpose of computation of depreciation as per the Income Tax Act. Further, if the profit on foreign exchange rate fluctuation on loans pertains to the fixed assets which is used for R & D purpose on which deduction u/s.35 was claimed, as per sec.43A of the act, the assessee can claim deduction only to the extent of ` 11,26,65,180 (24,29,57,797 - 13,02,92,617) u/s.35 of the Income Tax Act, whereas the assessee has claimed entire R &D capital expenses as deduction including the gain on foreign exchange rate fluctuation.

2. It is seen from the profit and loss account that the assessee company debited on account of ` 2,04,81,35,000/- towards Royalty & Technology Transfer Fee. Out of the total amount, the Royalty paid was to the tune of ` 1,93,97,95,716/- as detailed below:-

Royalty for the period from 1.4.03 to 30.9.03 ` 81,86,35,068 Royalty for the period from 1.10.03 to 31.3.04 ` 1,02,87,89,423 ` 1,84,74,24,491 Add: Cess ` 9,23,71,225

Total ` 1,93,97,95,716 Thus, the balance of ` 10,83,39,284/- (i.e. 2,04,81,35,000 - ` 1,93,97,95,716 represents amount paid towards technology transfer fee. It is seen from the agreement contract between M/s. Hyundai Motor Company and the assessee that the HMC had granted the assessee, the right to manufacture, assemble, sell and service the licensed products and supply of technical know- how on the terms and conditions stipulated in the agreement.

According to Article 6 of the agreement in consideration of the rights granted and technical knowhow supplied by M/s. HMC to the assessee company the assessee company shall make the following payments to M/s. HMC.

(a) Royalty as mentioned clause 6(2) of the agreement.

(b) Lump sum fee not exceeding US $ 2 Millions or as fixed by the Govt. of India from time to time.

The Royalty and lump sum fee as mentioned above should be paid by the assessee company M/s. HMC in foreign currency decided by the parties. The assessee shall pay the Royalty to M/s. HMC commencing from 1.4.02. The parties shall through a letter of concurrence specify the percentage of royalty payable by the assessee company to M/s. HMC. The agreement shall be effective for the period of 10 years commencing from 1.4.2002 and ending on 31.3.2012 unless terminated under any other provisions of the agreement.

In this connection, the lump sums payment of `10,83,39,284/- made by the assessee towards supply of technical know how requires to be capitalized after allowing depreciation under section 32(i)(ii) in view of the decision in 23 Taxman 66(SC) in the case of Scrutij Engineering Home (P) Ltd. Vs. CIT wherein it was held that where under an agreement assessee made payment to its foreign collaborator for documents such as manufacture, drawings, processing documents, designs charts, plan etc. the expenditure has to be treated as capital expenditure.

3. As per Taxation Law Amendment 2005, if the export turnover exceeds ` 10 crores, the benefit of deduction on the DEPB u/s.80HHC shall be given subject to the fulfillment of conditions laid down as per the above amendment to the section 80HHC(3) of the Act. Hence, the assessee has to prove that it had opted to choose either duty drawback or the DEPB/DFRC being the duty remission scheme and the rate of the duty drawback was higher than the DEPB/DFRC during that period. The corresponding proviso is reproduced as under:-

> "Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub- section or after giving effect to the first proviso as the case may be, shall be further increased by the amount which hears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that :-
>
> (a) He had an option to choose either the duty draw back or the Duty Entitlement Pass Book Scheme being the Duty Remissions Scheme; and
>
> (b) The rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remissions Scheme."

It has been observed that during the current year the assessee has export turnover of ` 9,41,08,31,440/- and income by way of DEPB/DFRC credit to the tune of ` 1,28,86,38,853/- but the assessee has not proved that it had opted to choose either duty drawback or the DEPB being the duty remission scheme and the rate of duty drawback was higher than the DEPB during that period.

Hence, the above DEPB/DFRC receipt should be excluded for the purpose of computation of 80HHC deduction being the export incentives as per the proviso to section 80HHC(3) otherwise means that the deduction u/s.80HHC cannot be further increased on the above receipt by way of

DEPB/DFRC credit.

Based on the above facts, it is clear that assessee has not produced the material facts fully and truly before the tax authorities.

Therefore, I have the reason to believe that the income has escaped the assessment within the meaning of section 147 of the Income Tax Act." The assessee filed objections to the reopening proceedings. The Assessing Officer rejected the objections of the assessee and completed the assessment under section 143(3) read with section 147 of the Act on 23.12.2009 determining total income of the assessee at ` 5,70,17,10,121/-. Aggrieved against the assessment order dated 23.12.2009, the assessee preferred an appeal before the CIT(A) LTU primarily on the following grounds:-

> i) Reopening of the assessment is beyond the period of four years;
>
> ii) The Assessing Officer reopened the assessment for the reasons that the appellant did not reduce the entire foreign exchange gain from the actual cost of asset for claiming depreciation under section 32 and deduction under section 35 of the Act;
>
> iii) The lumpsum consideration paid towards technical knowhow needs to be capitalized after allowing depreciation @ 25% ;
>
> iv) The assessee did not prove that it had opted to choose either duty draw back or DEPB/DFRC for the purpose of deduction under section 80HHC.

The CIT(A) vide order dated 23.9.2011 allowed the appeal of the assessee on the ground that the Assessing Officer had called for the details regarding these issues during the original assessment proceedings. The assessee vide letters dated 13.9.2006 and 16.10.2006 had furnished details in respect of queries raised by the Assessing Officer. The Assessing Officer after considering the contentions of the assessee and the documents on record had completed the original assessment. Since, the information sought in the reassessment proceedings was already submitted by the assessee in original assessment proceedings under section 143(3) the reassessment proceedings have been initiated merely on change of opinion which is not permissible in law. The CIT(A) relying on the judgement of the Hon'ble Supreme Court of India in the case of CIT Vs. Kelvinator of India Ltd., reported as 320 ITR 561 allowed the appeal of the assessee for the assessment year 2004-05.

3. The Revenue aggrieved by the order of the CIT(A) preferred second appeal before the Tribunal. Smt. Anupama Shukla representing the Department submitted that notice under section 148 was issued to the assessee on 17.03.2009 which is very much within the time limit prescribed under the provisions of section 149 of the Act. The D.R. submitted that the reasons for reopening were duly conveyed to the assessee. The CIT(A) has erred in holding that the assessment was reopened on change of opinion only. The D.R. further contended that production of books of accounts or any other evidence before the Assessing Officer from which material evidence could have been discovered with due diligence by the Assessing Officer will not necessarily amount to disclosure

within the meaning of proviso to section 147. To support her contentions, the D.R. relied on the decision of the Hon'ble Delhi High Court in the case of Consolidated Photo & Finvest reported as 281 ITR 394 and the order of the Vishakapatnam Bench of the Tribunal in the case of Coastal Corporation Ltd. reported as 118 TTJ 563.

4. On the other hand, Shri S.Hariharan, Authorised Representative of the assessee submitted that the order passed by the CIT(A) is a well-reasoned and detailed order. No interference in the order of the CIT(A) is called for. He submitted that the case of the assessee is squarely covered by the judgement of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., reported as 320 ITR 561 and Division Bench judgement of the Hon'ble Madras High Court in the case of CIT Vs. Cholamandalam Investment & Finance Company Ltd., 309 ITR 110 (Mad). He contended that in the present case the entire documents were submitted by the assessee to the Assessing Officer and whatever queries raised were duly answered along with the evidences at the time of original assessment. He submitted that notice under section 148 of the Act was issued merely on the basis of change of opinion and no new issue or ground was raised in the reopening proceedings.

5. We have heard the submissions made by both the parties and have gone through the orders of the authorities below. The judgement/orders referred to by the respective parties have also been examined by us. It is an admitted fact that in original assessment proceedings under section 143(3) of the Act, the Assessing Officer had completed the assessment vide order dated 29.12.2006 making certain additions. A perusal of the original assessment order dated 29.12.2006 which is at page 32 to 37 of the paper book shows that the Assessing Officer had made detailed study of books of accounts of the assessee and thereafter had reworked the deduction under section 80HHC of the Act. The Assessing Officer had also taken into consideration the orders of the Transfer Pricing Officer dated 18.12.2006 passed under section 92CA3. During the pendency of the appeal before the CIT(A), the Assessing Officer issued notice under section 148 for reopening the assessment for the reasons mentioned hereinabove. A perusal of the reasons for reopening provided by the Assessing Officer shows that the Assessing Officer had already asked for the details pertaining to the issues during the course of original assessment proceedings. The assessee vide letter dated 13.09.2006 and 16.10.2006, which are at page 38 to 51 of the paper book, had furnished all the details in response to the questionnaire issued by the Assessing Officer.

In our considered opinion, the notice issued under section 148 of the Act is nothing but mere change of opinion. The issues which have already been considered in the original assessment cannot be reappreciated in reassessment proceedings under the garb of income escaping assessment. If the Assessing Officer has not given any finding after considering the evidence on record, it cannot be said that the income had escaped assessment on account of concealment of assessee. The Hon'ble Supreme Court of India in the case of Kelvinator of India Ltd. (supra) has held that the Assessing Officer has power to reopen the assessment provided there is "tangible material"to come to the conclusion that there was escapement of income from assessment. However, in the present case the Assessing Officer has miserably failed to show that there was any tangible material to hold that there was escapement of income from assessment. The D.R. in support of her contentions has relied on the judgement of the Hon'ble Delhi High Court in the case of Consolidated Photo & Finance Ltd.(supra) and the order of the Viasakhapatnam Bench of the Tribunal in the case of Coastal

Corporation Ltd., In both the aforementioned cases it has been held that the in view of Explanation 1 to section 147 action under section 147 is permissible, even if the Assessing Officer gathered his reasons to believe from the very same record as had been the subject matter of the completed assessment proceedings. In our opinion, the law laid down in the said judgement/order is not applicable in the facts and circumstances of the present case. In the instant case, the Assessing Officer not only examined the documents/evidence originally submitted by the assessee but has asked for further documents. Admittedly, the information was supplied by the assessee, if the Assessing Officer fails to take note of the same or does not appreciate the evidence from all dimensions in the first instance, he cannot be permitted to reopen the assessment under section 147 of the Act to cover up his own folies. Once the entire evidence as required by the Assessing Officer is submitted by the assessee, duty is cast upon the Assessing Officer to take cognizance of the evidence and pass assessment order under section 143(3) of the Act. The Assessing Officer cannot review his own order under the guise of section 148 and reappreciate the evidence which was already before him at the time of original assessment. Therefore, we uphold the order of the CIT(A) and dismiss the appeal of the Revenue.

6. The Revenue in ITA N o.1988/Mds/2011 has impugned the order of the CIT(A) dated 23.09.2011 relevant to the assessment year 2005-06. The assessee had filed return of income on 29.10.2005 declaring total income of ` 4,08,60,91,779/-. Assessment under section 143(3) was completed by the Assessing Officer on 26.12.2008. The Assessing Officer made certain additions/disallowances in the income returned by the assessee and determined the total income of the assessee as `5,36,70,48,238/-. Aggrieved against the assessment order the assessee preferred an appeal before the CIT(A) impugning the assessment order dated 26.12.2008. During the pendency of the appeal before the CIT(A), the Assessing Officer issued notice under section 148 to the assessee on 24.03.2010. The Assessing Officer vide letter dated 25.05.2010 communicated the reasons for reopening of assessment to the assessee. The reasons for reopening of assessment are reproduced hereunder:-

> "It has observed from the manufacturing account that an amount of ` 15,57,94,737/- has been debited as Excise Duty paid on finished goods, whereas it is observed that the sale of the current year has been valued at net off Excise Duty. If the closing stock of this year sold in the next assessment year, the sale figure would be excusive of the Excise Duty which would amount to doubt deduction. Hence the above amount of ` 15,57,94,737/- has to be disallowed and brought to tax. Hence, it is clear that the assessee has not provided all the necessary particulars for the purpose of assessment in this regard.
>
> 2. Also as per Circular No.7/2009 the circular which has been issued with reference to the provisions of section 195 viz. Circular No.23 dated 23.7.1969 circular no.163 dated 29.5.1975 and Circular No.786 dated 7.2.2000 has been withdrawn by the CBDT. Further it has been observed from the Finance Bill 2010-11 that the provisions of section 9 of the Income Tax Act has been amended retrospectively from 1.6.1976 in relation to the A.Y. 1977-78 and subsequent years that the expenditure incurred outside India also deemed to accrue or arise in India in respect of the services

rendered. Based on the above circular of CBDT No.7/2009 and also from Finance Bill 2010-11 that whatever the expenditure incurred by the assessee in foreign currency for the purpose of utilization of services even though the services rendered outside India is taxable. Since the assessee has incurred expenditure in foreign currency to the tune of ` 3,88,92,59,000/- the same has to be allowed only subject to the provisions of section 195 of the Act. Hence, the assessee has not disclosed all the necessary facts for the purpose of allowability of the same in the return of income on the above issue. Thus, the above claim of expenditure in foreign currency shall be disallowed as per the provisions of section 40(a)(i) of the Income Tax Act. Therefore, it is clear that the assessee has not disclosed all the material facts for the assessment year 2005-06 for the purpose of assessment. Hence, I have reasons to believe that the income has escaped the assessment within the purview of section 147 of the Income Tax Act."

7. The Assessing Officer after rejecting the objection of the assessee vide assessment order dated 27.12.2010 passed under section 143(3) read with section 147 determined the total income of the assessee as `4,27,41,97,180/- after making additions on account of disallowance of excise duty on closing stock. Aggrieved against the assessment order, the assessee preferred an appeal before the CIT(A). The assessee impugned the assessment order on two counts:-

i) Validity of reopening of assessment u/s.147; &

ii) Disallowance of excise duty on closing stock.

The CIT(A) vide order dated 23.9.2011 partly allowed the appeal of the assessee. The CIT(A) held that the assessee had provided for excise duty on closing stock in accordance with the Accounting Standard 2 issued by the Institute of Chartered Accountants of India. The same does not have any effect on the profits since the amount of excise duty provided is also added to the value of closing stock. The CIT(A) discarded the view of the Assessing Officer that since the sale is net of excise duty, the debit towards excise duty in the profit and loss account cannot be allowed. To fortify his decision the CIT(A) relied on the judgement of the Hon'ble Bombay High Court in the case of CIT Vs. Lokenete Balasabeh Desai SSK Ltd. reported as (2011) TIOL 398 HC MUM-IT.

8. Aggrieved against the order of the CIT(A) dated 23.9.2011 the Revenue has preferred second appeal before the Tribunal. Smt. Anupama Shukla appearing on behalf of the Revenue submitted that the assessee has not incorporated the value of excise duty in the value of closing stock which is in violation of the provisions of section 145A of the Act. The D.R. contended that the assessee while showing inventory as net of excise duty debits excise duty payable on the difference of stock only to offset the increase in the value of stock under section 145A. She further contended that closing stock of the current year is sold in the next assessment year. The sale figure would be exclusive of excise duty which would amount to double deduction.

9. On the other hand, Shri S.Hariharan, Authorized Representative of the assessee submitted that the assessee is impugning the order of the CIT(A) in Cross Objection (C.O.No.43/Mds/2012) on the

ground that the Assessing Officer had no jurisdiction to reopen the assessment on the basis of change of opinion. He further contended that notice under section 148 was served on the assessee after expiry of time limit mentioned in the Act. The assessee had filed the return of income under section 139 within due date and had produced all the relevant documents with regard to notice served by the Department under section 143(2). Therefore, the reopening of assessment by the Assessing Officer is without jurisdiction. In order to support his contentions, he relied on the judgement of the Hon'ble Supreme Court of India in the case of CIT Vs. Kelvinator of India Ltd. reported as (2010) TIOL 06-SC-IT-LB .

10. On the issues raised by the DR, the Authorized Representative submitted that there would be no double deduction as mentioned by the DR and there is no question of further addition in the inventory. The A.R. submitted that there was substantial increase in the cost of finished goods as on 31.3.2005 as compared to 31.03.2004. On closing stock the excise duty has been provided as per Accounting Standard 2 issued by the Institute of Chartered Accountants of India. Due to substantial increase in closing stock, additional excise duty has been provided. In the Tax Audit Report for the assessment year 2005-06 it has been certified that the provision for excise duty for the financial year ending on 31.3.2005 has been made before the filing of income tax return. This complies the requirement of section 43B of the Act. In order to support his contentions, the AR relied on the judgement of the Hon'ble Bombay High Court in the case of Lokenete Balasabeb Desai SSK Ltd. (supra), wherein it has been held that excise duty on closing stock once provided should be allowed. The Authorized Representative has referred to letter dated 8.8.2008 addressed to ACIT which is at page 48 of the paper book. The said letter was sent by the assessee in reply to the queries during the course of original assessment, wherein the details of domestic as well as export sales in number of units, and also in values was mentioned as explanation to query raised by the Assessing Officer in regard to the closing stock.

11. We have heard the submissions made by the respective parties and have also examined the orders passed by the authorities below. We are in consonance with the view taken by the CIT(A) on the issue of excise duty and closing stock. As has been rightly pointed out, the assessee had provided for excise duty on closing stock in accordance with Accounting Standard 2 issued by the Institute of Chartered Accountants of India. The assessee in its letter dated 18.8.2008 has categorically stated that the amount of `23,02,99,484/- appearing in annexure 10B of Tax Audit Report represents excise duty provision on the closing stock of finished goods as on 31.3.2005. This amount was paid before the clearance of goods from the factory prior to the date of Tax Audit Report as certified by the Tax Auditors. An amount of `15,57,94,737/- was debited in the profit and loss account under the head "Manufacturing & Other Expenses". This amount represents difference between opening provision of excise duty on stock as on 1.4.2004 and the excise duty on closing stock as on 31.3.2005. The Assessing Officer has erred in coming to the conclusion that since the sale is net off excise duty, the debit towards excise duty in the profit and loss account cannot be allowed. With regard to compliance of the provisions of section 43B is concerned, the assessee had stated that the amount of excise duty debited in the profit and loss account has been paid in the next year before the due date of filing of return and therefore, disallowance on this ground is not warranted. The case of the assessee is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Lokenete Balasaheb Desai SSK Ltd. (supra). Therefore, the appeal of the Revenue is

dismissed being devoid of merits.

12. The Cross Objections have been filed by the assessee impugning the order of the CIT(A) relevant to the assessment year 2005-06 on the issue of jurisdiction. The cross objections have been filed by the assessee with the delay of 57 days. The assessee has not filed any application for condonation of delay. Since, no reasons whatsoever have been furnished by the assessee for filing the Cross Objections beyond the period of limitation, the Cross Objections of the assessee are dismissed being barred by limitation.

13. In the result, both the appeals of the Revenue and the cross objections of the assessee are dismissed for the reasons mentioned above.

Order pronounced in the open court on Tuesday, the 25th day of September, 2012 at Chennai.

Sd/-	Sd/-
(Abraham P.George)	(Vikas Awasthy)
Accountant Member	Judicial Member

Chennai,
Dated the 25th September, 2012.

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Copy to: (1) Appellant (4) CIT(A)
(2) Respondent (5) D.R.
(3) CIT (6) G.F.