

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

+ **WRIT PETITION (CIVIL) NO. 8273 OF 2007**

% **Reserved on : 1st September, 2011.**
Date of Decision : 26th September, 2011.

MINDA HUF LIMITED Petitioner
Through Mr. Ajay Vohra, Ms. Kavita Jha,
Mr. Somnath Shukla, Advocates.

VERSUS

UNION OF INDIA & OTHERS Respondents
Through Mr. Kamal Sawhney, Advocate for
Revenue.

CORAM:
HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

The petitioner-Minda HUF Limited has challenged reassessment proceedings under Section 147/148 of the Income Tax Act, 1961 (Act, for short) initiated vide notice dated 18th April, 2007 for the assessment year 2003-04. They have also prayed for quashing of the order dated 15th October, 2007 passed by the Assessing Officer, the respondent No. 2 herein rejecting the

objections raised by the petitioner to the reassessment proceedings and holding that they were valid grounds for initiation of reassessment.

2. For the assessment year 2003-04, the petitioner had filed their return on 2nd December, 2003 and an assessment order under Section 143(3) was passed on 28th March, 2006. The taxable income was enhanced from Rs.2,78,95,579/- as declared in the original return to Rs.3,18,14,069/- in the assessment order dated 28th March, 2006. We are not concerned with the additions made, which were later on made subject matter of appellate proceedings.

3. After reassessment notice under Section 147/148 of the Act dated 18th April, 2007 was served, the petitioner filed the same return as was originally filed and requested the respondent No. 2 to furnish the reasons recorded for reopening of the assessment.

4. The reasons for re-opening read as under:-

“On going through the assessment record, it is noticed that the assessee in its computation of income deducted Rs.42,73,617/- being amount written back credited to P&I. Account considered separately u/s 41. However, out of this sum, the assessee considered only Rs.32,29,341/- as income u/s 41. Thus,

the excess deduction of Rs.10,44,276/- has escaped assessment.

(ii) Also the assessee had debited Rs.1,21,48,167/- as royalty which included Rs.1,17,21,488/- paid to the joint venture foreign company since these expenses were incurred for enduring benefit of the business and are also covered under intangible asset, the same is needed to be capitalized as intangible assets and depreciation @ 25% is allowable. Hence, Rs.87,91,116/- has escaped assessment. ”

5. The petitioner filed objections relying upon ***ITO versus Lakhmani Mewal Das*** [1976] 103 ITR 437 (SC), ***Allahabad Bank versus CIT*** [1993] 199 ITR 664 (Cal), ***CIT versus Punjab Financial Corporation***, [1990] 183 ITR 438 (P&H) contending, inter alia, that mere change of opinion does not justify, and is not a valid ground to initiate reassessment proceedings. On merits it was stated as under:-

“ In this regard it is respectfully submitted that;

1. During the course of assessment proceedings the company submitted reply on royalty paid. The company deducted and deposited applicable taxes and proof of taxes (Challans) paid was submitted vide letter dated 22nd March 2006 during the course of assessment proceedings.

2. Regarding the amount of profit chargeable u/s 41 in the computation of income, it has been discussed during the course of assessment proceedings and had been told to the Ld AO that the difference in amount was due to provisions of earlier years written back, which were not allowed in the relevant assessment years. The issue was agreed upon by Ld AO.

6. Order sheet in the above file shows that the aforesaid reply/objections dated 11th September, 2007 were taken on record on the same date and the matter was discussed with the assessee's representative.

7. After about a month post the discussion, on 15th October, 2007, the respondent No. 2 passed an order rejecting the objections and recording the following reasons:-

“The contention of the assessee is not accepted on the reasons given below-

If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section, or recomputed the loss or the depreciation allowance or any other

allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Reference in this regard may be made to Explanation 2(c)(i) and (iv) u/s 147 of the I.T. Act i.e.

Explanation 2,-For the(sic) purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(c) where an assessment has been made, but-

(i) Income chargeable to tax has been under-assessed; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Further, the contention raised that details of royalty paid, proof of challans of tax deducted were furnished during the assessment, the assessee had only provided procedural details like proof of TDS deducted and challan thereon. The substantive issue i.e. whether royalty is to be considered as revenue or capital expenditure was not discussed during the assessment proceedings. No such explanation is available on record. Also, the facts of the case laws quoted by the assessee are not similar to the reasons in this case. Hence, reasoning of the Assessing Officer that the income for the AY 2003-04 had escaped assessment is within the meaning of above explanation.

Hence the objection raised by the assessee is not accepted and the same is rejected.”

8. It is apparent from the reasons mentioned above that the Assessing Officer did not find any justification or ground to continue with the reassessment proceedings in view of the objection filed for reason No. 2, i.e. amount of profit chargeable under Section 41 of the Act. The order dated 15th October, 2007 does not refer to or meet the contention of the petitioner in respect of reason No. 2. In the original records produced before us there is a written note by the assessee explaining that Rs.10,44,276/- had already been added back in the computation of income for the assessment years 2001-02 and 2002-03, which is apparent from the computations for the said assessment years, copies of which were enclosed.

9. It also appears on this ground No. 2 in the reassessment order dated 5th November, 2007, an addition of Rs.10,44,276/- has been made, inter alia, observing that the assessee had not been able to establish that the aforesaid amount was included in the computation for the earlier assessment years though in the assessment years 2001-02 and 2002- 03, Rs.5,87,617/- and Rs. 17,19,837 respectively were added back as bad and doubtful

debts but their break up was not given. The assessee had to substantiate its claim, as to why this addition should not be made. Thus, in the re-assessment order the addition has been made because the petitioner had failed to substantiate that Rs.10,44,276/- was added back in the earlier years. The reasoning establishes that the Revenue did not have any basis to show and establish whether this amount was, in fact, not added back in the earlier assessment years. There was, therefore, no material and ground to reopen the assessment on account of reason no. 2. The said reason was merely a suspicion without any material and had no foundation or prima facie basis.

10. The petitioner had further stated that the aspect of bad and doubtful debts was examined during the course of the original assessment proceedings and the then Assessing Officer was informed that this amount had been added back and accordingly the Assessing Officer had agreed. It may be noted that in the original assessment proceedings an addition of Rs.7,41,240/- was made on account of bad debts written off.

11. Original records maintained by the Revenue have been produced before us. The original order sheet of the Assessing

Officer is missing and not available. The original assessment records are scanty and almost anything relevant is not available. The return, tax audit report including/encloses thereto, one notice under Section 142(1) and two notices under Section 143(2), in addition to the assessment order, are the only papers/documents available. What happened to the other papers is not stated and no answer is forthcoming from the Revenue.

12. With regard to royalty payment, the petitioner had stated in the objections that during the course of original assessment proceedings the petitioner had submitted a reply on the royalty paid. The respondent No. 2 in the order dated 15th October, 2007 has not adverted to or referred to any reply. It is stated that no such explanation was available on record. The factum that the original record, except for the papers mentioned in paragraph 11 above were missing is not adverted to. The petitioner has placed on record with this writ petition, as Annexure B, a note of royalty payment and it is stated that the said note was furnished during the course of the original assessment proceedings. Reference to the said note is made in paragraph 3(f) of the writ petition. In the counter affidavit/reply

filed to the writ petition, the respondents have not specifically dealt with and denied the allegation that during the course of the original assessment proceedings the petitioner had filed the note on royalty paid and claimed that the payments were revenue expenditure. It may be noted that the counter affidavit/reply has been filed by Ms. Monika Dhami, then Deputy Commissioner of Income Tax, Circle VI(1), New Delhi, who was also the Assessing Officer. Notice under Section 147/148 of the Act was issued on 18th April, 2007 by her and she is also the author of the order dated 15th October, 2007 rejecting the objections filed by the assessee. Thus, there is no specific denial of the fact that during the course of the original assessment proceedings, the assessee had filed the reply- Annexure B before the Assessing Officer on whether or not the payment of royalty were revenue expenditure in nature. It is a well settled principle in law that allegations made in the pleadings must be specifically denied. Absence of specific denial can be construed as acceptance of the fact stated. (See **BSNL versus Abhishek Shukla**, (2009) 5 SCC 368). The said note gives the break up of the agreements entered into for trade and technical assistance in the year 1995-96 with Huf Hulsbeck and Furst, Germany and

in the year 2001-02 with All-Tech S.R.L., Italy . The said note also gives details of the TDS deducted on the payments made (copies of TDS certificates were enclosed). The details of TDS as per the order dated 15th October, 2007 were on record. It is stated that as per the trade and technical agreements, royalty payable was related to sales by the assessee company, hence, it was a revenue expenditure. Reliance was placed on case laws.

13. During the hearing of the writ petition because of this controversy, the respondents were asked to produce their original record. In the order dated 22nd September, 2008 it is recorded as under:-

“WP(C) No. 8273/2007

The learned counsel for the petitioner seeks time to examine the record with regard to the aspect as to whether the petitioner had filed the note on royalty which is at page 45 of the paper book during the course of original assessment proceedings. This would be material because according to the learned counsel for the petitioner, the Assessing Officer had examined this issue in detail and then made the assessment order. The assessment is sought to be reopened on the ground that payment of royalty was in the nature of ‘capital expenditure’ and not ‘revenue expenditure’ and that this ‘fact’ had escaped assessment.

The revenue shall produce the original record on the next date also. Interim orders to continue.

Renotify on 03.11.2008.

CM No. 17313/2007 in WP (C) No. 8273/2007

Renotify on 03.11.2008”

14. Thereafter in the order dated 3rd November, 2008 it is mentioned that the petitioner, after conducting inspection of the records, had prepared the affidavit and filed the same. The respondents were again directed to permit inspection of the original assessment records to the petitioner so that the query raised as recorded in the order dated 22nd September, 2008 could be answered properly. Thereafter, on 11th February, 2009 the following order was passed:-

“ In the records that have been produced before us Ms Prem Lata Bansal accepts that the Revenue’s letter dated 27.10.2004 is not available. The only inference that can be drawn is that the complete records have not been brought to Court. We direct that the entire record be produced on the next date of hearing.”

15. In view of the aforesaid discussion, the core issue is a short one. The issue that needs examination is whether the question that royalty payable was in the nature of revenue

expenditure, and not capital expenditure, was examined during the original assessment proceedings. In case the said aspect was discussed/considered, then the petitioner is entitled to succeed as it is now well settled that reassessment proceedings cannot be initiated on a mere change of opinion. (See ***Commission of Income Tax, Delhi versus Kelvinator of India Ltd.*** (2010) 2 SCC 723) In case this aspect was not considered and examined by the Assessing Officer in the original assessment proceedings, there is no question of change of opinion and, therefore, logically and sequentially, the reassessment proceedings have been validly initiated and at this stage, a prima facie view is to be taken, and whether or not finally any addition would be justified and made, is not to be examined.

16. In view of the pleadings before us, failure of the respondents to deny the fact that the reply on royalties payable was filed before the Assessing Officer, we have no option to accept the petitioner's contention. The said aspects have been discussed in paragraph 12 above. The Revenue has not made any attempt to even get in touch with the Assessing Officer who had authored the original assessment order dated 28th March,

2006 and enquired whether or not during the original proceedings, the said aspect has been examined. As noticed above, the records maintained by the Revenue are scanty and only some papers relating to the original assessment proceedings are available. The reassessment notice was issued on 18th April, 2007, after about one year from when the original assessment order of 28th March, 2006 was passed. Thereafter, the order rejecting the objections was passed on 15th October, 2007. In the objections the petitioner had referred to the reply filed during the course of the original assessment proceedings. Nothing prevented the Assessing Officer from examining the said aspect and stating that no reply was filed by the petitioner in the course of the original assessment proceedings. The new Assessing Officer could have also asked and verified facts from the earlier Assessing Officer who had passed the original assessment order, as the documents/papers were missing. On the other hand, a cryptic order was passed without specifically dealing with the said contention and fact stated by the petitioner.

17. In view of the aforesaid discussion, the present writ petition is allowed and Writ of Certiorari is issued quashing the notice under Section 147/148 of the Act dated 18th April, 2007

and the order dated 15th October, 2007 rejecting the petitioner's objections. It is held that the reasons recorded show only a change of opinion and, therefore, the reassessment proceedings are not valid. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

SEPTEMBER 26th, 2011
VKR