

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Writ Petition Nos.3354 & 3355 of 2015

And

M.P.Nos.1 & 1 of 2015

Reserved on 01-04-2015

M/s.Mobis India Limited,
Rep. by its Director
Mr.Kyo Bin Ha

...Petitioner in Both Writ Petitions

Vs.

Deputy Commissioner of Income Tax,
Large Tax Payer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai-600 101.

...Respondent in Both Writ Petitions

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, for the issuance of a writ of Certiorari, to call for the records in PAN AAECM3018M, dated 31.12.2014 relating to the Assessment years 2008-09 and 2009-10 respectively and quash the same.

For Petitioner : M/s.Dr.Anitha Sumanth

For Respondents : Mr.Pramod Kumar Chopda and
Mr.Rajkumar Jabak

COMMON ORDER

Aggrieved over the Notices of demand issued by the respondent under Section 156 of the Income Tax Act, 1961 (in short, 'the Act'), in and by which, after completing the re-assessment for the years 2008-09 and 2009-2010 respectively, demanding sum of Rs.20,70,18,160/- and Rs.49,29,42,170/- towards tax, the petitioner has come forward with these two writ petitions.

2. The petitioner is a company engaged in the business of manufacture and assembly of automobile parts/components. It is a wholly owned subsidiary of M/s.Hyundai Mobis Company Ltd., Korea. During financial year 2007-08, the petitioner acquired the Customer Care Parts (in short, CCP) business from Hyundai Motor India Ltd. by virtue of a Business Transfer Agreement dated 26.4.2007 (in short, BTA) whereunder, the company purchased the fixed assets, current assets, current liabilities, dealer and vendor network, goodwill, material contract including supply and sales contracts, leasehold properties, after service parts business personnel, operation associated with the assets and such other rights or tangible and intangible properties relating to the CCP business for a total consideration of Rs.425,25,00,000/-.

3. According to the petitioner, for the assessment year 2008-09, return of income was filed on 30.9.2008 declaring a total loss of an amount of Rs.17,58,19,692/- and book profit under Section 115 JB of the Act, of an amount of Rs.55,38,41,237/- along with complete and detailed financials and a statement of Memo of income setting out the methodology for computation thereof. In so far as the BTA comprised of various assets in respects of which, the petitioner was entitled to depreciation and hence claimed depreciation on vendor and dealer network, amount to a sum of Rs.75,09,65,951/-. The details of depreciation were duly disclosed in the financials/tax audit report annexed along with the return of income.

4. However, it appears that the Revenue has objected the same, stating that the claim of the petitioner towards the value of Dealer network at Rs.1,63,96,03,802/- and Vendor network at Rs.1,364,260,000 and the depreciation on the same at 25%, do not come under the category of intangible assets since the Dealer network or Vendor network is not in the nature of commercial rights under intangible assets. Therefore, the depreciation claimed by the assessee for Rs.75,09,65,951/- on Vendor network and Dealer network was proposed not to be allowed and thereby, the respondent formed reason to believe that the income has escaped assessment and accordingly, resorted to re-opening of the assessment under Section 147 of the Act after obtaining the approval of the Commissioner of the Income Tax on 6.3.2014 and a notice, dated 10.3.2014 under Section 148 of the Act was issued.

5. Likewise, for the assessment year 2009-10 also, the claim of the petitioner towards depreciation at Rs.56,32,24,463/- on Vendor network and dealer network was proposed to be withdrawn by resorting to re-opening of the assessment under Section dated 147 of the Act and a notice, dated 5.2.2014 under Section 148 of the Act was issued.

6. These proceedings were questioned in these writ petitions.

7. Ms. Anitha Sumanth, learned counsel appearing for the petitioner has made the following contentions, viz.,

- i) that there is a violation of procedure for re-opening of assessment since no written reasons for reopening of assessment were furnished to the petitioner;
- ii) that there is no failure on the part of the petitioner to disclose fully and truly all material facts for the relevant assessment years in respect of depreciation on vendor and dealer network as well as the existence of goodwill;
- iii) that there is no tangible material for the respondent to form a 'reason to believe' that the income has escaped assessment and the impugned proceedings have been initiated notwithstanding the consideration of the issues raised by the respondent in the first instance itself, which amounts to a change of opinion and hence, not tenable in law;
- iv) that the respondent did not have the jurisdiction to initiate proceedings for reopening the assessment since the issue of depreciation on vendor and dealer network was already considered at the time of original assessment and the petitioner in pursuant to notice under Section 142(1), had placed all details including the furnishing of BTA before finalization of the original assessment proceedings;
- v) that the impugned re-assessment was based on an objection by the internal audit party on the interpretation of law, which is impermissible since audit objection cannot form the basis of a reassessment;
- vi) that though there is a statutory appeal as against the impugned proceedings, however, the petitioner is entitled to invoke writ jurisdiction under Article 226 since the impugned proceedings are patently erroneous, arbitrary and contrary to the settled law;
- vii) that as regards the reopening of the assessment for the assessment year 2008-09 is concerned, it was initiated beyond four years despite the fact that there was no failure on the part of the petitioner in disclosing material facts.

8. In support of her contentions, the learned counsel relied upon the following decisions; viz.,

- a) "GKN Drivershafts (India) Ltd., versus Income Tax Officer and others" reported in (259 ITR 19), wherein, it has been held as under:

"However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the

proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years."

- b) "Fenner (India) Ltd. Versus DCIT (2000)241 ITR 672 (Mad)" wherein, it has been held as under:

"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment. "Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding under Section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice."

- c) "CIT v Kelvinator of India (2010) 2 SCC 723" wherein, it has been held as under:

"The concept of "change of opinion" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income Tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989."

After the amendment, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. Hence, after April 1, 1989, the Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief. Decisions of the Delhi High Court in *Cit v. Kelvinator of India Ltd.* (2002) 256 ITR 1 (FB) and *CIT v. Eicher Ltd.* (2007) 294 ITR 310 affirmed."

9. With these contentions, the learned counsel sought for setting aside the impugned proceedings.

10. Heard the learned counsel on either side and perused the entire documents available on record.

11. The main purpose for initiating the proceedings for reopening the assessment is that the issue regarding depreciation claim on dealer network and vendor network was not dwelt with during the original assessment under Section 143(3) of the Act. Accordingly, notice under Section 148 was issued since the respondent had a reason to believe that the income has escaped assessment.

12. A perusal of the record, it appears that after issuance of notice u/s 148, dated 10.03.2014 for the Assessment Year 2008-09, the petitioner filed its return of income. Subsequently notice u/s 143(2) for AY 2008-09 dated 05.08.2014 was issued. The Petitioner's authorized representative as well as the AGM Finance, appeared before the Respondent on 11.08.2014 and 27.10.2014 and the case was discussed. The petitioner was directed to submit details in respect of issue of allowance of depreciation on dealer network & vendor network and Goodwill. For the Assessment year 2009-10 notice u/s. 148 along with reasons for reopening both dated 05.02.2014 was sent. In response to the same, the petitioner filed a letter dated 28.02.2014 stating that, return filed on 30.09.2009 is to be taken as a return in response to notice u/s. 148. Since, the return has to be filed electronically, the petitioner was directed to file the return of income electronically under notice u/s. 142(1) dated 06.08.2014. In response to the same, the petitioner filed the return of income electronically on 30.08.2014. Thereafter notice u/s. 143 (2) dated 10.09.2014 was issued. The Petitioner's authorized representative as well as the AGM Finance, appeared before the Respondent and the case was discussed. The Petitioner

was directed to submit the details in respect of issue of allowance of depreciation on dealer network & vendor network and Goodwill. It is further stated that the petitioner vide letter dated 07.11.2014 made separate submission for each of the Assessment years in pursuant to the above notices on the claim of depreciation on dealer network & vendor network and Goodwill, being the basis of reopening, thus even after knowing the reasons for reopening of the assessment for both the assessment years, the petitioner did not file any objection to the issuance of notice u/s 148. Thereafter the Petitioner's representatives appeared on 10.11.2014 and once again details in respect of issue of allowance of depreciation on dealer network & vendor network and goodwill and other details relating to reopening of the assessment was called for. The Petitioner filed letter dated 19.11.2014 seeking adjournment to furnish details as they were in process of collecting the additional information and documents. The Petitioner thereafter filed letter dated 20.11.2014 that they are the only designated/authorized stockists of after sales service parts and accessories for Hyundai cars in India. The Petitioner's representative appeared for hearing on 8.12.2014 and followed by another hearing on 11.12.2014. After considering the submissions along with the records of the Petitioner and the materials on record, the Respondent passed the impugned orders on 31.12.2014 for both assessment years.

13. Therefore, the as rightly contended by the learned counsel for the respondent that the Petitioner did not file any objections to the reasons for the reopening of the above assessments. Thus in the absence of any objection to the reopening, the question of disposing the objections by passing a speaking order before proceeding with the assessment as contemplated by the Apex Court in the case of GKN Driveshafts does not arise. On the other hand the Petitioner having participated in the re-assessment proceedings in pursuant to issuance of notices u/s 143(2), the impugned orders were passed u/s 143(3) read with section 147 in accordance with law. In this regard, it is worthwhile to refer to the decision of this Court, in the case of "DR. C.M.K. Reddy vs. Settlement Commission and Ors" reported in 306 ITR 403 by following the decisions of the Apex Court in "Jai Narain Parasrampuriah vs. Smt. Pushpa Devi Saraf" (2006) 7 SCC 756 and held as follows:

"Having so participated and obtained an adverse order, now it is not open to him to turn around and contend that in the absence of the report of the CIT under s. 245D(1), the order non-suited the petitioner for settlement is a procedural irregularity and liable to be set aside. The same is hit by the principle of acquiescence."

14. Further, it is not in dispute that as against the impugned proceedings, the petitioner is having efficacious remedy of appeal under Section 246A of the Act before the Commissioner of Income Tax (Appeals) and without exhausting the same, the petitioner has approached this Court and hence, I am of the view that the present writ petitions are not maintainable. In this context, it is worthwhile to refer the decision reported in "CIT -Vs- Chhabil Dass Agarwal" reported in (2014) 1 SCC 603, wherein, the Hon'ble Supreme Court has held that when a statutory forum is created by law for redressal of grievances, writ petition should not be entertained ignoring said statutory dispensation. In para 19, 20 and 21, the Hon'ble Supreme Court has held as under:

"19. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titagarh Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

"20. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act

as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case."

"21. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15. For the foregoing discussion, the Writ Petitions fail and they are dismissed. No costs. Consequently, connected MPs (if any) are closed. The petitioner is at liberty to avail the statutory remedy of appeal provided under Section 246A of the Act within a period of two weeks from the date of receipt of a copy of this order. On such approach, the appellate authority is directed to entertain the appeal without insisting upon the limitation period.

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

Suk

To

Deputy Commissioner of Income Tax,
Large Tax Payer Unit-II, सतयमेव जयते
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai-600 101.

1 CC to Mr.Pramod Kumar Chopda, Advocate SR.No. 40343

2 CCs to M/s.Dr.Anitha Sumanth, Advocate SR.No. 40148

W.P.NO.3354 & 3355 OF 2015

GJ (CO)
PSI (14.08.2015)