

IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

CWP No.23887 of 2011

Date of Decision: 10.03.2015

Mitsubishi Electric Automotive India Pvt. Ltd.

..Petitioner

Vs.

Union of India and others

..Respondents.

**CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA**

Present : Mr. Rohit Jain, Advocate for the petitioner.

Mr. Tajinder Joshi, Advocate for the respondents.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE (Oral)

Rule. Rule returnable forthwith and heard finally.

2. The petitioner has challenged the notice issued under Section 148 of the Income Tax Act, 1961 (for short 'the Act') dated 23.3.2011 (Annexure P-1) issued by respondent No.2-Assistant Commissioner of Income Tax stating that respondent No.2 had reason to believe that the petitioner's income for the assessment year 2006-07 had escaped assessment within the meaning of Section 147 of the Act. The subsequent order dated 9/12.12.2011 (Annexure P-2) dismissing the Objections is also under challenge.

3. At the petitioner's request the reasons for initiating the proceedings under Section 147 were furnished. The relevant reasons read as under:

“The case was finalised under section 143(3) of the Income Tax Act, 1961 vide order dated 20.11.2009 at an income of Rs.172794009/-. It is noticed from the P & L Account that the assessee is making payment of

royalty at Rs.8741302/- for technology transfer and patent license. The assessee has claimed the entire payment as revenue expenditure. In view of the judgment of the Hon'ble Supreme Court in the case of M/s Southern Switch Gears (232 ITR 359) either the full amount or a part of the royalty amount is to be treated as capital expenditure. This has resulted in under assessment of the income to the extent of ₹8741302/- which will be treated as capital expenditure.

The assessee has submitted details of sundry creditors as on 31.03.2006. One of the items of the sundry creditors is 'accrued exchange profit' which has been shown as a negative amount at Rs.1145902/-. No explanation of the assessee is available on record with regard to the nature of this credit amount. Prima facie it appears to be under assessment of income as the assessee company itself is mentioning it as exchange profit.”

4. This is clear case of the notice having been issued only on a change of opinion or rather a difference of opinion. The entire facts pertaining to the issue had been disclosed on each and every stage of the proceedings. Indeed the material in this regard was sought by the Transfer Pricing Officer (TPO) as well as by the Assessing Officer (AO). The relevant material was furnished by the petitioner. The assessment order was clearly passed after taking the same into consideration. The following facts establish the same.

5. The petitioner filed its return of income on 2.11.2006. Alongwith the return of income the petitioner filed its financial statement and assessment was made on 20.11.2009. Appended to the financial statements were the Schedules. Schedule 13 expressly referred to “**Royalty**” of the sum of ₹87,41,302/- for the financial year 31.3.2006. Schedule 14 enumerated the significant Accounting Policies and notes to the Accounts. The relevant part thereof reads as under:

Royalty

“Payment of technical know-how in the form of Royalty for manufacturing of ECUs and Distributors is being accounted for on accrual basis as per the Technology Transfer and Patent License Agreement with Mitsubishi Electric Corporation, Japan.”

Schedule 14 also referred to expenditure in foreign currency. The “**Royalty**” was referred to as Expenditure in foreign currency. Item 13 of Schedule 14 referred to the related party disclosures. The balance outstanding at the year end included “**Royalty**” stocks expenditure payable.

6. Thus, the return of income expressly disclosed the payment of “**Royalty**” as well as the balance “**Royalty**” to be paid.

7. The reference was made to the Transfer Pricing Officer under Chapter X. The petitioner filed Form No.3CEB under Rule 10E. The said Form referred to the particulars in respect of the transactions in intangible property as per Appendix E thereto which in turn referred to the “**Royalty**” payments to the Mitsubishi Electric Corporation, Japan of the sum of ₹87,41,302/-. The petitioner also forwarded to the Assessing Officer and Transfer Pricing Officer the tax audit report for the year 31.3.2006 which referred to the payment for “**Royalty**” and technical fees to Mitsubishi Electric Corporation, Japan.

8. Details were furnished in Enclosure VI thereto which referred to the payment of “**Royalty**” and technical fees to Mitsubishi Electric Corporation, Japan. The payment of “**Royalty**” and Technical Assistance Fees was also referred to in detail in Enclosure 13. This Enclosure was filed before the Assessing Officer and before the Transfer Pricing Officer.

9. Thus, the information regarding the payments and technical fees was expressly referred to in all the documents filed before the Assessing Officer and before the Transfer Pricing Officer. What is more important, however, is the fact that the Transfer Pricing Officer by his order dated 31.8.2009 (Annexure P-9) referred to the fact that a Reference has been received by him from the Assessing Officer to determine the arm's length price in respect of the international transactions. One of the transactions related to “**Royalty**” payment at 5% sales in the sum of ₹81 lacs. Thus, even the order of the TPO expressly referred to

“**Royalty**” payment. It cannot, therefore, be said that the TPO was not aware of and had not taken into consideration the “**Royalty**” payments.

10. Added to this is the fact that a questionnaire dated 30.10.2009 (Anneuxre P-14) had been served by Assessing Officer prior to the assessment order. Items 20 and 24 of the questionnaire read as under:

20. “Details with documentary proof of royalty paid alongwith copy of technology Transfer and Patent License agreement with Mitsubishi Corporation Japan.

24. Give the details of TDS deducted by you during the year and file the copies of TDS/TCS return, Reconcile with the TDS deducted expenditure wise.”

11. The queries were replied to by the petitioner's letter dated 16.11.2009. The relevant part thereof reads as under:

20. “Detail of royalty paid alongwith copy of Technology transfer agreement is enclosed herewith for your reference & verification.(page 148-173)

24. Detail of month-wise TDS deducted and deposited alongwith copy of TDS/TCS returns. (page 179-200).”

12. It is established, therefore, that the Assessing Officer and Transfer Pricing Officer were not only aware of the payment of Royalty but had taken the same into consideration at every stage. The Assessing Officer infact expressly called for the said information. It cannot be held, therefore, that the Assessing Officer was not aware of the “**Royalty**” and had not taken the same into consideration before passing the assessment order under Section 143 of the Act. It is also important to note that proceedings had been initiated under Section 154 of the Act by the issuance of a notice dated 24.3.2011. However, the same were dropped holding that it was a debatable issue which would be apparent from the affidavit filed by D.C.I.T. Dated 20.11.2014 in the present case.

13. The impugned notice under Sections 147 and 148, therefore, are

clearly based only on change of opinion which is not permissible.

14. It is sufficient to refer to the judgment of the Supreme Court in ***Commissioner of Income Tax Vs. Kelvinator of India Ltd.(2010) 320 ITR 561 (SC)***. The Supreme Court held as under:

“On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz. that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989 power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But assessment has to be based on fulfillment of certain preconditions and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of “change of opinion” as an inbuilt test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in section 147 of the Act. However, on receipt of representations from the companies against omission of the words “reason to believe”, Parliament reintroduced the said expression and deleted the word “opinion on the ground that it

would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated October 31, 1989 (1990 182 ITR (St.) 1, 29), which reads as follows:

“7.2 Amendment made by the Amending Act, 1989 to reintroduce the expression 'reason to believe' in section 147.-- A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same.”

15. The learned counsel appearing on behalf of the respondents relied upon a judgment of a Division Bench of this Court dated 2.4.2013 in **Trident Limited Vs. Union of India and others CWP No.22119 of 2011** to contend that as an aspect had not been referred to in the assessment order, it cannot be said that relevant facts were taken into consideration by the Assessing Officer.

16. The judgment is clearly distinguishable. In that case the learned Judges found that it could not be held at that stage that the assessment order had disclosed all the facts and that the Assessment Officer was satisfied with the explanation submitted. The decision, therefore, was based on the facts of that case. The Division Bench noticed for instance that the opinion was submitted by the Assessing Officer on the same day on which the assessment order was finalised and that there was no discussion in the entire order pertaining to the issue. The judgment is not an authority for the proposition that merely because the assessment order does not refer to a particular aspect it necessarily follows that the Assessing Officer had not considered the case while passing the assessment order. In the case

before us it is established beyond doubt that the relevant facts were not only disclosed but had been sought and considered at every stage by the Transfer Pricing Officer and by the Assessing Officer.

17. In the circumstances, the writ petition is allowed and the Rule is made absolute in terms of prayer 'a'. The notice dated 23/24.3.2011 (Annexure P-1) and the order dated 9/12.12.2011 (Annexure P-2) are quashed. In view thereof, it is not necessary to grant the other reliefs. There shall be no order as to costs.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

(G.S.SANDHAWALIA)
JUDGE

10.03.2015
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