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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 519/2016

AVTEC LIMITED

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor, Ms. Ananya Kapoor, Mr. Sumit Lal Chandani and Ms. Soumya Singh, Advocates.

versus

DY. COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Ashok K. Manchanda, Senior Standing Counsel.

WITH

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W.P.(C) 522/2016

AVTEC LIMITED

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor, Ms. Ananya Kapoor, Mr. Sumit Lal Chandani and Ms. Soumya Singh, Advocates.

versus

DY. COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Ashok K. Manchanda, Senior Standing Counsel.

AND

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W.P.(C) 761/2016

AVTEC LIMITED

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor, Ms.

Ananya Kapoor, Mr. Sumit Lal Chandani and Ms.
Soumya Singh, Advocates.

versus

DY. COMMISSIONER OF INCOME TAX Respondent
Through: Mr. Ashok K. Manchanda, Senior
Standing Counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR

ORDER
30.05.2017

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Dr. S. Muralidhar, J:

1. These are three writ petitions by Avtec Limited which challenge the notices dated 31st March, 2015 issued to it by the Respondent Deputy Commissioner of Income Tax, Circle-1 [hereinafter referred to as the Assessing Officer ('AO')] under Section 148 of the Income Tax Act, 1961 and the order dated 11th January, 2016 passed by the AO disposing of the Petitioner's objections thereto.
2. The aforementioned notices were issued seeking to reopen the assessments of the Petitioner for Assessment Years ('AYs') 2008-09, 2009-10 and 2010-11.
3. The background facts are that the Petitioner is engaged in the business of manufacturing and selling of automobiles, power trains and power shift transmissions along with their components.

4. The Petitioner entered into a Business Transfer Agreement ('BTA') with Hindustan Motors Ltd. ('HML') on 19th February, 2005. In terms thereof the Petitioner took over the business from HML. Expenses in the sum of Rs. 84,38,357 pertaining to professional and legal charges were paid in relation to the taking over of the business from HML including drafting and due diligence and other contracts reimbursed to HML and ACTIS India and South Asia Fund by a separate agreement dated 9th February, 2005. These expenses were considered as capital expenses and allocated to the block of assets. Depreciation was accordingly claimed for AY 2006-07.

5. During the course of assessment for AY 2006-07 a specific query was raised in respect of the above claim for depreciation and a reply dated 5th December, 2008 was furnished in that regard. While completing the assessment for AY 2006-07, the claim for the above depreciation on the professional charges paid was disallowed by the assessment order dated 24th December, 2008.

6. The Assessee then took the said assessment order for the AY 2006-07 in appeal to the Commissioner of Income Tax (Appeal) ['CIT (A)']. After the CIT (A) dismissed the appeal, the Petitioner went before the Income Tax Appellate Tribunal ('ITAT') which restored the matter to the file of the AO for a fresh examination.

7. Although Mr. Ashok Manchanda, learned Senior Standing Counsel for the Revenue contends that he has no instructions on what transpired before the AO thereafter as regards AY 2006-07, Mr. Salil Kapoor, learned counsel for the Petitioner states that the said disallowance was deleted by the AO in

view of what transpired in the later AYs.

8. As far as AY 2007-08 was concerned, the AO again disallowed depreciation following his earlier order for AY 2006-07. However when the matter went in appeal at the instance of the Assessee, the CIT (A) by an order dated 6th September, 2013 (for AYs 2007-08) deleted the disallowance by holding as under:

" It is seen from the assessment order that the assessing officer has disallowed capitalization of the legal and professional charges by placing reliance on Article 13.4 of the Business Transfer Agreement according to which the seller (HML) shall bear all the cost and expenses (including professional fees and cost of advisors and counsel) in relation to this agreement. The Assessing officer there after refers to Section 43(1) wherein 'actual cost' is defined and Section 43(2) where in the word 'paid' is defined. The Assessing Officer held that since the liability to pay the professional and legal charges as per the agreement was that of the Hindustan Motors Limited therefore in view of the provision of section 43 these charges of Rs.84,38,357/- cannot be claimed by the appellant as the liability of the appellant.

It is observed that the fact of incurring of legal and professional charges of Rs. 84,38,357/- by the appellant are not in dispute. These charges are essentially for effecting the takeover of the business units of Hindustan Motors. Since the payment is for perfecting the profit earning apparatus of the appellant therefore it is a logical corollary that the same has to form part of the actual cost of the acquisition of the assessee. Accordingly, the capitalization of such expenses is allowed on which the claim of depreciation is also directed to be allowed."

9. The order of the CIT (A) for 2007-08 was taken up in appeal by the Revenue to the ITAT. After that appeal was dismissed, the Revenue

approached this Court. However, since the monetary effect was below the permissible limit in terms of the extant circular, the Revenue's appeal was not entertained. In other words, the order of the CIT (A) for AY 2007-08 allowing the claim for depreciation became final.

10. The Petitioner filed its return of income for 2008-09 on 29th September, 2008. The said return was picked up for scrutiny and the assessment was completed by the AO passing an assessment order under Section 143(3) of the Act on 28th December, 2010 assessing the income at Rs. 23,76,81,420 against the returned income at Rs. 18,17,45,456 after making various additions.

11. The impugned notices dated 31st March, 2015 were issued by the AO under Section 148 of the Act seeking to reopen the proceedings for AY 2008-09, 2009-10 and 2010-11. By an order dated 18th December, 2015, a copy of the reasons was furnished to the Petitioner. These reasons were communicated in the prescribed proforma. In Column No. 11 under the caption "reasons for the belief that income has escaped assessment", it was stated as under:

"The brief facts of the case are as follows: M/s Avtec Ltd has claimed depreciation of Rs.7,16,299/- on professional charges capitalized amounting to Rs.46,68,571/-allocated to various block of assets which is not allowed as per the provision of section 43(1) of IT Act, 1961 as not included in actual cost as per provision of section 43(1) and 43(2) since the article 13.4 of the Business Agreement dated 19.02.2005 between Hindustan Motor ltd. (Seller) and Avtec Ltd. (Purchaser) which read thus:

"13.4 Expenses

The seller shall bear all the costs and expenses (including

professional fees and costs of the advisors and counsel) in relation to this Agreement and the transactions contemplated herein, including in relation to all documents which are to be executed in accordance with the terms hereof".

Since the seller i.e. Hindustan Motor Ltd. bore all the cost and expenses including professional fees therefore depreciation on professional charges capitalized to various blocks amounting to Rs.7,16,299/- is not allowed as per the provision of section 43(1) of IT Act, 1961.

In view of the above, I have reason to believe that due to failure on the part of the assessee to disclose all the material facts truly or fully, income of Rs.7,16,299/- have escaped assessment.

In view of above proceedings u/s 147 is to be initiated to assessed the income chargeable to tax which has escaped assessment (total amount of Rs.7,16,299/- as discussed above on account of assessee's failure to disclose fully or truly all material facts necessary for its assessments for AY 2008-09.

Necessary sanction of issue of notice u/s148 may kindly be granted."

12. Identical reasons were furnished for AYs 2009-10 and 2010-11. As already noted the Petitioner's objection to the reopening was disposed of by the AO by the impugned orders dated 11th January, 2016 which has also been challenged. A notice under Section 142(1) of the Act was issued on the same date.

13. Writ Petition (C) Nos. 519, 522 and 761 of 2016 were filed by the Petitioner challenging the three notices dated 31st March, 2015 and the orders dated 11th January 2016 of the AO disposing of the Petitioner's objections. The writ petitions were heard on 1st February, 2016. The Court

stayed further proceedings pursuant to the aforementioned notices dated 31st March, 2015 and orders dated 11th January, 2016. The interim orders have continued since.

14. Mr. Salil Kapoor, learned counsel for the Petitioner submitted that the reopening of the assessment was bad in law as it failed to satisfy the jurisdictional requirements under the proviso to Section 147 of the Act for two of the AYs i.e., AY 2008-09 and 2009-10. As far as the reopening of the assessments for the said two AYs, it was incumbent on the Revenue to demonstrate that there was a failure on the part of the Petitioner in making a full and true disclosure of all material facts. He submitted that in fact there was no failure at all on the part of the Assessee to disclose fully and truly all material facts. From AY 2006-07 onwards, the Revenue was aware of the claim for depreciation made by allocating the aforementioned expenses to the block of assets and treating them as capital expenses and claiming depreciation thereon.

15. Mr Kapoor further pointed out that in the subsequent years i.e., AYs 2011-12 and 2012-13 the same claim for depreciation has already been allowed. He submitted that there had to be fresh material to justify the reopening of the assessment. In the present case, he submitted that the reopening was based on a mere change of opinion on the same material that was already available with the Revenue. Even for AY 2010-11, there was no basis for forming reasons to believe that income had escaped assessment. *Inter alia* he placed reliance on the decision of the Full Bench of this Court in ***Commissioner of Income tax v. Kelvinator of India Ltd. [2002] 123***

taxman 433 (Del) (FB) and the consequential judgment of the Supreme Court in *Commissioner of Income tax, Delhi v. Kelvinator of India Ltd. [2010] 187 taxman 312 (SC)*. Reliance was also placed on the decisions of this Court in *Mohan Gupta (HUF) v. Commissioner of Income Tax [2014] 366 ITR 115 (Del)* and *Commissioner of Income tax v. Orient Craft Ltd. [2013] 354 ITR 536 (Del)* which was affirmed by the Supreme Court by the dismissal of the Special Leave Petition filed by the Revenue on 20th January, 2014.

16. In reply, Mr. Ashok Manchanda, learned counsel for the Revenue, submitted that although the Petitioner may have disclosed the BTA and the fact of claiming depreciation by allocating the professional legal charges etc. as capital expenses to the block of assets for claiming depreciation thereon for AY 2006-07 and 2007-08, no such disclosure was made at the time of assessment for the AYs 2008-09, 2009-10 and 2010-11. According to him, in none of the three AYs did the Petitioner mention in its return filed or during the assessment that this was a disputed claim and was disallowed by the AO for AYs 2006-07 and 2007-08. In the assessment orders for these three AYs, therefore, there is no discussion in relation to this issue. It inadvertently escaped the attention of the AO. Having already made similar additions for the earlier two AYs 2006-07 and 2007-08 there was no reason for the AO to not disallow the depreciation on the above basis in the AYs in question.

17. Mr. Manchanda submitted that it was the Assessee's mentioning before the ITAT during the hearing of the appeal for AY 2007-08 that there were

no additions made on this issue that became the fresh source of information for the Department. He submitted that the Petitioner had failed to mention in the 'Schedule of Depreciation' that the costs/written down value of certain assets included such amounts which were not of capital nature or their admissibility was otherwise disputed. Had there been such a mention by the Petitioner, it would not have escaped the notice of the AO.

18. Mr. Manchanda stated that he was not aware whether in AYs 2011-12 and 2012-13 the claim for depreciation had been allowed. In any event according to him the rule of consistency required the AO to follow what was done for AYs 2006-07 and 2007-08. On merits he submitted that there was no question of allowing such a claim for depreciation in terms of Section 35D of the Act which placed restrictions. Expenses like professional legal charges and contract drafting charges etc. could not be capitalised with capital assets like plant and machinery and this was not eligible for depreciation.

19. In the present case, the Court finds that the reasons for reopening the assessment for AYs 2008-09 and 2009-10 proceeded on the basis that the Assessee had failed to make a full and true disclosure of material facts concerning the claim for depreciation. This cannot be accepted for the simple reason that there was a history of litigation around such claim beginning in AY 2006-07. The mere fact that the incumbent AO dealing with the returns of the Assessee was different from the AO who dealt with there for the AYs 2006-07 and 2007-08 will not excuse the AO from examining the history of the case.

20. On its part, it was not necessary for the Assessee to enclose a copy of the BTA every year and explain the basis for the claim of depreciation. In any event, the assessments for AYs 2008-09 and 2009-10 were completed under Section 143 (3). There was no fresh material to disclose. On this aspect, there was no change in the circumstances. Therefore, there was no failure by the Assessee to make a full and true disclosure of all material facts relevant to the assessment.

21. Mr. Manchanda sought to emphasize that each AY was different and, therefore, the AO was not obliged to look into the previous records. The Court is unable to agree with this approach of the AO. If the AO was seeking to invoke Section 148 of the Act for AYs 2008-09 to 2010-11 it was incumbent on him to ascertain the status of the identical claim in the earlier AYs. After all he was seeking to reopen an assessment only on the aspect of the claim of depreciation. On this very aspect the Revenue had for AY 2006-07 taken the matter up to the ITAT and the matter had been remanded to the AO. For AY 2007-08, the CIT (A)'s order allowing the claim had attained finality. These facts could not have escaped the attention of the AO. In any event, there was no fresh material that the AO came across to warrant reopening of the assessments for AYs 2008-09 and 2009-10. The plea that the AO inadvertently allowed the claim for depreciation for AYs 2008-09, 2009-10 and 2010-11 cannot in the circumstances be accepted.

22. The Supreme Court in *Commissioner of Income tax v. Kelvinator of India Ltd.* (*supra*) while affirming the decision of the full Bench of this Court on the interpretation of Section 147 of the Act observed thus:

“...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 re-open assessments on the basis of “mere change of opinion”, which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of “change of opinion” is re-opening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, 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...”

23. In the present case, the tangible material that the AO came across for the AYs in question that warranted the reopening of the assessments is not clear from the 'reasons to believe' recorded by the AO. The reasons merely record the fact that HML had borne the costs and expenses including professional fee and, therefore, the capitalisation of those expenses to the various block of assets was not allowable under Section 43(1) of the Act. After recording the above statement, the AO adds: “I have reason to believe that due to failure on the part of the assessee to disclose all the material facts truly or fully, income of Rs.7,16,299 have escaped assessment.” This does not satisfy the requirement of law that the reasons to believe should, where the reopening is after the expiry of four years from the end of the FY, specifically state in what manner there was a failure by the Assessee to make a full and true disclosure of material facts. That, again, will have to be preceded by spelling out the tangible fresh material that led the AO to come

to that conclusion. None of this is found in the reasons to believe recorded by the AO in the case on hand. The necessity for tangible material to be present to trigger the reopening was emphasised in *Commissioner of Income tax v. Orient Craft Ltd. (supra)*.

24. The repeated assertion by Mr. Manchanda that the claim for depreciation for AYs 2006-07 and 2007-08 was disallowed by the AO is not entirely correct. It overlooks the history of the litigation around the claims for those AYs with both ending in the Assessee ultimately succeeding on the point after the remand to the AO by the ITAT for AY 2006-07 and the level of the CIT (A) for AY 2007-08 . Mr. Manchanda has also not been able to counter the submission that for AYs 2011-12 and 2012-13 the same claim for depreciation has been allowed.

25. For all of the aforementioned reasons, the writ petitions are allowed and the notices dated 31st March, 2015 and the consequential orders dated 11th January, 2016 passed by the AO disposing of the Petitioner's objections are hereby set aside. No order as to costs.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 30, 2017

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