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

+ **W.P. (C) No. 758/2016**

HONDA CARS INDIA LTD.

..... Petitioner

Through: Mr. Deepak Chopra, Advocate with
Mr. Amit Shrivastava, Advocate.

Versus

DEPUTY COMM. OF INCOME TAX & ANR. Respondents

Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel with Mr. Sanjay Kumar, Advocate

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

10.08.2017

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1. The Petitioner, Honda Cars India Limited, has filed this petition under Article 226 of the Constitution of India challenging a notice dated 31st March, 2014 issued by the Respondent, Deputy Commissioner of Income Tax, Circle-1 (hereafter Assessing Officer - 'AO') under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the assessment in the Assessment Year ('AY') 2009-10 as well as the consequential order dated 11th January 2016, passed by the AO, rejecting the objections filed by the Petitioner to the re-opening of the assessment.

2. While directing notice to be issued in this petition on 29th January 2016, this Court directed that further proceedings pursuant to the impugned notice and order shall remain stayed. That interim order has continued till date.

3. The background facts are that the Petitioner is a subsidiary of Honda Motors Company Ltd. Japan ('Honda Japan') which is stated to be a leading manufacturer and distributor of automobiles, motorcycles and power products. The Petitioner purchases raw material, spare parts, capital goods etc. from Honda Japan. The Petitioner manufactures cars in India under a Technical Collaboration Agreement with Honda Japan. The Petitioner states that it pays royalty to Honda Japan for the use of the technology.

4. In the AY 2009-10, the Petitioner filed its return of income, declaring a total income of Rs. NIL owing to 'brought-forward unabsorbed losses'. The return was accompanied by audited balance sheet, tax audit report and Form 3CEB. On 19th March, 2011, the Petitioner filed a revised return of income.

5. The return was picked up for scrutiny and a questionnaire was issued to the Petitioner by the AO. The Petitioner gave a detailed response to the questionnaire. Thereafter, a draft assessment order under Section 143(3) read with Section 144C of the Act was passed by the AO on 22nd March, 2013 computing the total income of the Petitioner at Rs. 1665,09,05,642/-.

6. On 31st March 2014, the AO issued a notice to the Petitioner under Section 148 of the Act seeking to reopen the assessment for AY 2009-10. On 22nd December 2015, the AO provided the Petitioner with the following reasons for reopening the assessment:

“The disallowance u/s 14A with respect to the income which is not includible in the total income under the Act through over sight remained to be disallowed.

Similarly excess depreciation of Rs.6,24,30,536/- claimed @ 15% by the assessee and allowed in the assessment order in respect of electrical installation instead of eligible 10% has caused escapement of income to that extent.

The TDS credit has been allowed in excess of Rs.68,964/- than admissible as per credit reflected in ITD System.

Section 43B of the Income Tax Act provides that any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, a deduction shall be allowed only in computing the income in the previous year in which such sum is actually paid by him.

Subsequent to assessment on verification of records it is seen that as per computation the assessee had deducted expenses of Rs.1,98,06,804/- on account of payment made to approved gratuity fund related to earlier years. Whereas as per 3CD report clause 21(i)(a) annexure 8A, the amount of Rs.1,79,53,799/- on account of gratuity was actually paid during the previous year by the assessee. Thus the liability of only Rs.1,79,53,799/- was allowable as deduction to the assessee. This resulted in under assessment of income to the tune of Rs.18,53,005/-.”

7. The Petitioner submitted its detailed objections to the reopening of the assessment by a letter dated 11th January, 2016. These were rejected by the AO by the impugned order dated 11th January, 2016.

8. This Court has heard the submissions of Mr. Deepak Chopra, learned counsel for the Petitioner, as well as Mr. Rahul Chaudhary, the learned Senior Standing Counsel for the Revenue.

9. Since the reopening has been sought to be done within a period of 4 years

from the end of the financial year in which the assessment was made, the Revenue has to demonstrate that there was tangible material for the AO to form a reason to believe that any income chargeable to tax has escaped assessment. In other words, the formation of the AO's 'reason to believe' should not be based on a mere change of opinion.

10. The first reason for the reopening of the assessment is that under Section 14A the expenditure in respect of the income not includible in the total income, is to be disallowed.

11. It is seen that, during the course of assessment proceedings, the AO, in the detailed questionnaire issued by the Petitioner, required the Petitioner to furnish details of income which did not form part of the total income. In its reply dated 24th January 2013, the Assessee explained that it had neither earned any exempt income nor incurred any expense to earn the exempt income. It was further pointed out that, in the appeal filed by the Petitioner against the original assessment order dated 22nd March, 2013 for AY 2010-11, the Commissioner of Income Tax (Appeals) ['CIT (A)'] had deleted the disallowance made by the AO on account of Section 14A of the Act. Consequently, it is pointed out by the Petitioner that there was no basis for the reason to believe that the expenditure in respect of the exempt income under Section 14A should be disallowed.

12. The Court notices that in the AO's order dated 11th January, 2016 disposing of the Petitioner's objections apart from setting out Section 147 of the Act, there is no discussion of the objections raised by the Petitioner. That order is virtually a non-speaking order.

13. Mr. Rahul Chaudhary relied on the Explanation 2 (c) (i) to Section 147 of the Act to urge that income chargeable to tax which had been under-assessed would be deemed to be income that had escaped assessment. While Explanation 2 (c) (i) does introduce a deeming fiction, it does not relieve the AO of showing that such income has in fact been under-assessed. The AO is obliged to indicate the tangible material on the basis of which he has formed the reason to believe that expenditure in relation to exempt income by the Assessee during the year in question must, in terms of Section 14A of the Act, be disallowed. If indeed there has been no exempt income during the AY in question and that explanation of the Assessee should be accepted by the CIT(A), it is incumbent on the AO to explain on what basis he infers that some expenditure from the alleged income has actually to be disallowed. This appears to be a clear case of non-application of mind. Further, considering that the assessment took place under Section 143(3) of the Act and a specific query was raised in this regard by the AO, revisiting the same issue on the basis of the same material was not justified. Consequently, the first reason for reopening the assessment appears not to be sustainable in law.

14. The second reason is that excess depreciation was claimed by the Petitioner @ 15% in respect of the electrical installation instead of at the eligible rate of 10% and, therefore, excess depreciation ought to be disallowed. Here again, the explanation offered by the Assessee that the electrical installation was part of the plant and machinery and could not operate independent of it was not even adverted to by the AO in the order

dated 11th January, 2016 which disposed of the objections. It is argued that the Petitioner was eligible for depreciation under the block of plant and machinery. Reliance was placed on the decision of the Punjab and Haryana High Court in *CIT v. Oswal Woollen Mills Ltd., (2007) 289 ITR 261*.

15. Here again, the AO has failed to indicate the basis for forming reason to believe that income has escaped assessment. This appears to be based on mere change of opinion. As is the case with the first reason, Explanation 2(c)(iv) to Section 147 would not come to the aid of the AO unless the basis for forming such reason to believe is indicated in the reasons for reopening the assessment.

16. The third reason given is that excess credit of tax deducted at source had been allowed in the sum of Rs. 68,694/-. The Assessee, in the objections to the reopening of the assessment, explained that there was a mismatch in the amount of tax deducted at source claimed in the return and that appearing in Form 26AS. Consequently, the assumption of jurisdiction under Section 148 of the Act, in this regard, was not warranted. Without prejudice to his submission, the Petitioner pointed out that it had claimed TDS @ Rs. 122,53,966/- on the basis of Form 16A received by it from various deductors. However, the Petitioner disclosed all the sources of its income.

17. Again, these objections were not dealt with by the AO in the order dated 11th January, 2016 rejecting the objections. The Court finds that nothing has been indicated by the AO in the reasons for reopening the assessment that should explain the basis for forming reasons to believe that income had escaped assessment.

18. The next reason provided by the AO for reopening the assessment is that the Assessee had claimed expenses of Rs. 1,98,06,804/- on account of payment made to approved gratuity fund related to earlier years whereas, in Form 3CD under Clause 21(i)(a) Annexure-8A, the amount shown on account of actual gratuity paid during the AY in question was Rs. 1,79,53,799/-. It is, accordingly, stated that the excess deduction of Rs.18,53,005/- should be disallowed.

19. The Petitioner, in its objections, pointed out that the above reason was based on the original income tax return and not the revised return filed by the Petitioner in which the Petitioner had claimed Rs. 1,98,317/- instead of Rs. 1,98,06,804/- on account of gratuity paid during the AY in question.

20. Obviously, the AO failed to note the changed figures in the revised return. This, being an instance of non-application of mind by the AO, could not constitute a valid reason to believe that income had escaped assessment.

21. The entire set of reasons provided by the AO appears to be based only on suspicion and not on any tangible material. Clearly, on the basis of the existing material, there has been a mere change of opinion by the AO. None of the reasons for re-opening of the assessment could be said to be valid.

22. For the aforementioned reasons, the Court finds that both the notice dated 31st March, 2014 issued to the Petitioner under Section 148 of the Act as well as the consequential order dated 11th January, 2016 passed by the AO rejecting the Petitioner's objections thereto require to be, and are hereby

set aside. The writ petition is allowed in the above terms with no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 10, 2017
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