

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2018

CORAM:

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

Writ Petition No.11371 of 2016
and WMP No.9819 of 2016

Orders reserved on 11.01.2018	Orders pronounced on 24.01.2018
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M/s.Mobis India Limited, rep. by its
Director, Mr.Ha Kya Bin, S/o.Chung Il Ha,
G-1, SIPCOT Industrial Park,
Irrungattykottai, Sriperumbudur Taluk,
Kanchipuram District-602 117. ... Petitioner

Vs.

Deputy Commissioner of Income-tax,
Large Tax Payer unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extention,
Chennai-600 101. ... Respondent

Petition filed Under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records in PAN: AAECM3018M dated 16.03.2016 on the file of the respondent relating to the assessment year 2010-11, quash the same.

For Petitioner : Mr.Sandeep Bagmar

For Respondent : Mrs.Hema Murali Krishnan,
Senior Standing Counsel

O R D E R

The petitioner has filed this writ petition challenging the proceedings of the respondent dated 16.03.2016, by which the petitioner's objections to the reopening of the assessment under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2010-11 were rejected.

The petitioner is a company engaged in the manufacture and assembly of automobile parts/components and wholly owned subsidiary of M/s.Hyundai Mobis Company Ltd. The petitioner during the financial year 2007-08, acquired the Customer Care Parts (in short "CCP") business from Hyundai Motor India Ltd., by a Business Transfer Agreement dated 26.04.2007, 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/-. The petitioner filed a revised return of income on 26.09.2011, for the assessment year 2010-11 declaring income of Rs.2,204,060,950/-.

2. Apart from other claims made, the petitioner claimed that they are entitled for depreciation on vendor and dealer network amounting to Rs.43,29,00,068/- and the details of depreciation were disclosed in the tax audit report annexed with the return of income. On submission of the return, an intimation under Section 143 (1) of the Act was issued accepting the return filed. Thereafter, the return was selected for scrutiny and notice under Section 143 (2) of the Act was issued on 02.07.2013, calling upon the petitioner to appear before the respondent and furnish various details in connection with the assessment. In response to the notice, the petitioner appeared before the respondent and during the course of assessment proceedings, the petitioner was advised that it is legally entitled to avail depreciation on goodwill as per the provisions of the Income Tax Act. Therefore, the petitioner filed representation dated 05.04.2013, putting forth a claim for allowance of depreciation on goodwill which according to the petitioner was inadvertently omitted to be claimed while filing the return of income. Subsequently, submissions were made on various dates along with written submissions, which were filed before the assessing officer to justify their claim for entitlement of depreciation on vendor and dealer network and goodwill. The assessment was completed under Section 143 (3) of the Act by order dated 31.03.2014 determining the tax payable at Nil. Subsequently, an intimation was issued for rectification of certain errors and accordingly, Order of Rectification under Section 154 of the Act was passed on 29.05.2014, by which the petitioner was granted a refund. Subsequently, another rectification order was passed on 11.08.2014, granting an additional refund. While so, the petitioner received a notice under Section 148 of the Act dated 27.03.2015, wherein the respondent alleged that he had reason to believe that there was escapement of income and called upon the petitioner to file a return of income in this regard. The petitioner vide

representation dated 05.05.2015, sought for reasons based on which, reopening proceedings have been initiated. The petitioner also filed a return in pursuance of notice under Section 148 of the Act on 23.04.2015, reiterating the position that there has been no escapement of income and the return of income filed originally on 26.09.2011 was in accordance with law. While so, the petitioner came to know that there was an audit objection raised by the audit party of the Comptroller and Auditor General (in short "CAG") based on which, the assessing officer called for an explanation on the claim for depreciation on dealer and vendor network and goodwill, which were explained by the assessee that they are covered under intangible assets as per Explanation 3 to Section 32(1) of the Act.

The petitioner filed an application under the Right to Information Act, 2005 requesting furnishing of details with regard to assessment years 2008-09 and 2009-10 and on receiving the reply, the petitioner would state that the assessing officer had accepted and even justified the allowance of depreciation on intangible assets and submitted his rejoinder to the objections raised by the CAG. Therefore, the petitioner would state that the impugned re-assessment proceedings is based on an audit objection raised in the earlier years and not based on an independent view of the assessing officer and such reopening is impermissible in law. The petitioner responded to the notice issued under Section 142 (1) of the Act and placed all materials and details including the Business Transfer Agreement and stated before the respondent that he lacks jurisdiction to initiate the impugned reopening proceedings.

3.Further, it was pointed out that the reassessment did not emanate from any material on record, but was merely based on a change of opinion of the assessing officer. These contentions were raised by the petitioner in their objections to the reopening. However, those objections have been rejected by order dated 16.03.2016, which is impugned in this writ petition.

4.Mr.Sandeep Bagmar, learned counsel for the petitioner pointed out that the impugned reassessment proceedings is a clear case of change of opinion and there was no tangible material available with the respondent to reopen the assessment for the assessment year 2010-11. It is pointed out that in respect of reopening of the assessment for the years 2008-09 and 2009-10, without following the procedure prescribed by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd v. ITO reported in (2003) 259 ITR 19, assessment orders were directly passed, which were challenged by the petitioner by filing Writ Petition Nos.3345 & 3355 of 2015, which were dismissed by a common order dated 04.08.2015, observing that the petitioner has to file an appeal as against the assessment orders and challenging the said order, the petitioner preferred Writ Appeal

Nos.1023 & 1024 of 2015 and the Hon'ble Division Bench has granted an order of interim stay.

5.It is submitted that when the scrutiny assessment was completed under Section 143(3) of the Act resulting in an assessment order dated 31.03.2014, the assessing officer had already issued notices for reopening the assessments for the assessment years 2008-09 and 2009-10 vide notice dated 15.12.2014, and though such reopening proceedings were pending, for the assessment year 2010-11, the assessing officer considered the matter and allowed the claim for depreciation on goodwill and dealer vendor and network has been specifically discussed and after referring to the decisions of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited reported in [2012] 348 ITR 302 (SC) and in the case of Areva T and D India Ltd. v. Deputy Commissioner of Income-Tax reported in [2012] 345 ITR 421 (Del.), the assessment was completed.

6.It is submitted that so far as the decision in the case of Smifs Securities Ltd. (supra) is concerned, they pertain to goodwill and the decision of the Delhi High Court in Areva T and D India Ltd. (Supra) analyses is more wider including the vendor and dealer network and this clearly shows that the claim for depreciation was considered and decided by the assessing officer in the scrutiny assessment. Thus, the reasons assigned by the respondent vide communication dated 07.05.2015, for reopening the assessment for the year 2010-11 is clearly a case of change of opinion.

7.Further, it is pointed out that when the CAG raised an audit objection for the assessment year 2008-09 on the claim for depreciation, the assessing officer put forth his submissions before the CAG stating that it is not a case for reopening. Despite such stand taken by the assessing officer on the objections of the audit party, the assessing officer had to necessarily issue rectification proceedings. Therefore, it is submitted by the learned counsel for the petitioner that the impugned proceedings are liable to be set aside, as it is clearly a case of change of opinion and the assessing officer cannot reopen the proceedings based upon an audit objection and in terms of the decision in Smifs Securities Ltd. (supra) the claim of depreciation as allowed by the assessing officer in the scrutiny assessment dated 31.03.2014 is proper and the reopening proceedings deserve to be set aside. In support of such contention, the learned counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax v. Kelvinator of India Ltd. reported in [2010] 320 ITR 561(SC) with particular reference to the aspect of change of opinion.

8. With regard to audit objections, the learned counsel for the petitioner relied upon the decisions of the Hon'ble Supreme Court in *Indian & Eastern Newspaper Society v. Commissioner of Income-tax* reported in [1979] 119 ITR 996(SC) and in *M/s. Larsen & Tubro Ltd. v. State of Jharkhand and ors.* in Civil Appeal No.5390 of 2007 dated 31.03.2017 arising out of sales tax law.

9. Mrs. Hema Muralikrishnan, learned Senior Standing Counsel for the respondent objected to the very hearing of the writ petition by this Court on the ground that the appeals are pending before the Hon'ble Division Bench in W.A.Nos.1203 & 1204 of 2015 in respect of the assessment orders passed for the assessment years 2008-09 and 2009-10 and therefore, the writ petition should await the decision of the Hon'ble Division Bench.

10. Further, it is submitted that the question of granting depreciation does not arise, as there is no asset. When there is no such intangible asset, it cannot be taken into consideration that there can be no assessment, there can be no written down value and depreciation cannot be granted in the vacuum. The assessing officer in the order of assessment for the year 2008-09 dated 31.12.2014, has held that there is no asset and the question of granting depreciation does not arise and the petitioner was not successful in challenging the same before the Writ Court and the Division Bench has only granted the stay of the order and that does not mean that the assessment order dated 31.12.2014, for the assessment years 2008-09 and 2009-10 stood effaced.

11. Further, the learned Senior Standing Counsel submitted that it is not a case of change of opinion and the assessing officer ought not to have allowed the claim of depreciation, which is not a claim at the time of filing of return of income and was claimed during the assessment proceedings.

12. Further, by referring to the counter affidavit, the learned Senior Standing Counsel sought to justify the impugned proceedings. In the counter affidavit, it has been stated that the assessing officer at the time of making the original assessment, failed to appreciate certain facts about the eligibility of assets and failed to apply his mind on the validity of the claim in the course of assessment proceedings and the claim made by the petitioner is devoid of merits.

13. Further, it is reiterated that the outcome of the validity of the assessment orders for the assessment years 2008-09 and 2009-10 would impact the present proceedings and therefore, they should await the decision in the challenge to those proceedings, which is pending before the Hon'ble Division Bench.

14. Heard the learned counsel for the parties and carefully perused the materials placed on record including the counter affidavit filed by the respondent.

15. Before I venture to consider as to whether the impugned reopening is a case of change of opinion or not, it would be necessary to point out that the reasons for reopening as furnished by the assessing officer vide communication dated 07.05.2015, pertains to claim for depreciation with regard to dealer and vendor network. However, the counter affidavit filed by the respondent proceeds solely on the claim for depreciation on goodwill, which was not the reason for reopening of the assessment. There is no reasonable explanation given by the respondent for such a discrepancy, which is a manifest error and the counter affidavit in this regard deserves to be rejected.

16. The second aspect to be considered is whether the Court should await the decision of the Hon'ble Division Bench, wherein the validity of the assessment orders for the years 2008-09 and 2009-10 are being tested. It is seen that the writ petition challenging those assessment orders were dismissed on the ground that the petitioner has to avail the alternate remedy of appeal. The primary ground of challenge to those assessment orders is by contending that the procedure required to be followed as per the dictum of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd (supra) has not been adhered to. Apart from that, there appears to have been contentions raised on other legal issues. There cannot be a dispute to the legal proposition that each assessment year is an independent year of the other. In fact this legal position has been conceded by the respondent in page 3 of the counter affidavit, wherein he has stated that the issue was not contested in the earlier years would not by itself mean that the issue should never again be contested for any other year, as each year is an independent year and therefore, the same cannot be applied generally.

17. Thus, the respondent has understood this legal aspect correctly and if applied to the facts of the case, the validity of the impugned reopening proceedings can be considered independently de hors the fact that the challenge to the assessment orders for the assessment years 2008-09 and 2009-10 is pending before the Hon'ble Division Bench. Therefore, this Court proceeds to consider the correctness of the impugned proceedings. The reason for reopening is with regard to admissibility of the claim for depreciation on dealer and vendor network. Whether this aspect was considered by the assessing officer in the scrutiny assessment under Section 143(3) of the Act and a speaking order has been passed or is there is sufficient indication in the assessment order to conclude that the issue was dealt with and relief was granted or not granted, if a notice under Section 148 is issued, would it amount to a

change of opinion. On a reading of the reasons for reopening as furnished vide communication dated 07.05.2015, it is seen that there was no fresh material available with the assessing officer for reopening. Thus, in the absence of any tangible fresh material, the reopening of an assessment after four years cannot be done.

18.As pointed out by the learned Senior Counsel in Kelvinator of India Ltd. (supra), reopening could be done if two conditions are fulfilled as required under Section 147 of the Act and that the assessing officer has reason to believe that income has escaped assessment would confer jurisdiction to reopen the assessment and after Section 147 stood amended, the power to reopening is much wider.

19.The Hon'ble Supreme Court pointed out that a schematic interpretation to the words "reason to believe" has to be given failing which, 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. It was further pointed out that there is a conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has power to reassess and such reassessment is to be based on certain pre-conditions. Further, 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.

20.Now, we turn to the scrutiny assessment order for the year 2010-11 to ascertain as to whether the claim for depreciation on the vendor and dealer network was considered by the assessing officer. It is not in dispute that such claim for depreciation, (i.e.,) on the goodwill and vendor network was not claimed while filing the revised return of income. However, in the course of assessment proceedings, this plea was raised before the assessing officer. Pursuant to which, the assessing officer issued notice dated 21.02.2014, calling upon the assessee to show cause as to why depreciation claimed on vendor and dealer network should not be disallowed as the said assets do not qualify as intangible assets. The petitioner submitted a detailed response to the said notice vide their reply dated 28.02.2014, apart from referring to their business module; the terms and conditions of the manner of acquisition of the CCP business; the relevant clause of the business transfer agreement; factors considered by the company for determining the valuation of the dealer network; valuation of the dealer network; valuation of the vendor network; rationale for payment of consideration for dealer and vendor network; valuation of goodwill; factors considered and the rationale for valuation of goodwill; acquisition of material contracts; acquisition of

leasehold properties; acquisition of skilled employees; acquisition of various process; independence of the CCP business segment from that of the car sales business segment, etc in the dealer network; establishment of ownership and control of the company over the assets acquired under the BTA; tangible benefits to the company on acquisition of the vendor and dealer network and goodwill. Thereafter, the petitioner proceeded to refer to the relevant provisions of the Income Tax Act and placed reliance on the decisions in Smifs Securities Ltd. (supra) and in Areva T and D India Ltd. (supra). The assessing officer took up the case for consideration and has passed an order on 31.03.2014. Paragraph 4 of the said order refers to the depreciation claimed on goodwill and the officer proceeds to take note of the submissions made by the petitioner and the various judicial precedents in particular Smifs Securities Ltd. (supra) and Areva T and D India Ltd. (supra). Ultimately, the assessing officer states that on a careful consideration of the submissions of the assessee, his claim is found to be acceptable, more so, in view of the judicial pronouncement in Smifs Securities Ltd. (supra) and in Areva T and D India Ltd. (supra). Paragraphs 4.2 and 4.3 of the assessment order dated 31.03.2014 (AY 2010-11) clearly shows that the assessing officer had independently applied his mind and accepted the claim for depreciation both for vendor and dealer network and goodwill. Thus, it is not solely based upon what was done in the previous assessment years as contended by the learned Senior Standing Counsel for the Revenue.

21. In Smifs Securities Ltd. (supra), one of the questions, which arose for consideration is as to whether the goodwill is an asset within the meaning of Section 32 of the Act and as to whether the depreciation of goodwill is allowable under the said Section. The Hon'ble Supreme Court after taking note of the factual position in the said case, held that in the process of amalgamation, the assessee/Company had acquired a capital right in the form of goodwill because of which the market worth of assessee/Company stood increased and this finding was upheld by the Income Tax Appellate Tribunal and was affirmed by the Supreme Court.

22. In Areva T and D India Ltd. (supra), one of the questions, which arose for consideration before the Hon'ble Division Bench of the Delhi High Court was whether the know-how, business contracts, business information, etc., acquired as a part of slump sale described as goodwill, were not entitled for depreciation under Section 32(1)(ii) of the Act and the question was answered in favour of the assessee holding that specified intangible assets acquired in slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under the said Section. The operative

portion of the order reads as follows:

"13. In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act, it is seen that such rights need not answer the description of "know-how, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., know-how, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and know-how, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the

absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares and Stocks Ltd.(supra) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act."

23.Thus, the assessing officer while completing the assessment under Section 143(3) of the Act took into consideration both the aforementioned decisions and considered what would be "business or commercial rights of similar nature". The assessing officer was fully justified in holding that the vendor and dealer network rights and the goodwill acquired by the petitioner pursuant to the Business Transfer Agreement dated 26.04.2007, would qualify for depreciation under Section 32 of the Act.

24.Thus, I find that the assessment was completed after considering the claim for depreciation after seeking for clarification from the petitioner and thereafter, the assessment was completed. Thus, the reasons assigned by the respondent to reopen the assessment is nothing but a clear case of change of opinion. It is pertinent to note that when reopening proceedings were initiated pursuant to the audit report of the CAG, the assessing officer had the conviction to stand by what decision he had taken. This could be seen from the information secured by the petitioner under the Right to Information Act. Though this pertains to the earlier assessment years, I find that the response given by the assessing officer to the Director General of Audit, vide proceedings dated 05.12.2013, is elaborate and he had stated on what basis the depreciation shall be liable. However, for reasons best known the assessments have been reopened that to after there was a change of officer. In this regard it is beneficial to take note of the decision in Indian & Eastern Newspaper Society (supra), wherein the Hon'ble Supreme Court referring to an audit report of the internal audit party of the Income Tax Department held as follows:

"13.....In every case, the Income Tax officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably

believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax officer.

20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual, we hold that the opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961."

25. Recently, in the case of M/s. Larsen & Tubro Ltd. (supra), the Hon'ble Supreme Court in a case arising out of a proceedings under the Bihar Finance Act, 1981, and the Central Sales Tax Act, 1956, examined as to what would be the meaning of the expression "information" and held as follows:

"27. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after bearing on the assessment. We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re-opening of assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor assessing authority proceeded, were same. The question still is as to whether in the present case, the assessing authority was satisfied or not.

29) From a perusal of the last paragraph of the aforementioned report of the audit party, it is clear that the Assessing Officer was of the opinion

that as the goods had not been transferred to appellant-Company but had been consumed, so it does not come under the purview of taxation. In other words, the Assessing Officer 20 <http://www.itatonline.org> was not satisfied on the basis of information given by the audit party that any of the turnover of the appellant-Company had escaped assessment so as to invoke Section 19 of the State Act. From the above, it also appears that the assessing officer had to issue notice on the ground of direction issued by the audit party and not on his personal satisfaction which is not permissible under law."

26.The decision in M/s.Larsen & Tubro Ltd. (supra), would apply with full force to the case on hand, as it is manifestly clear that the assessing officer had to issue the impugned reassessment notice on the ground of direction issued by the audit party.

27.Thus, this Court being fully satisfied that the impugned reopening of the assessment is contrary to law, the question of directing the petitioner to avail alternate remedy of appeal before the Commissioner of Income Tax does not arise, especially when the case is one of change of opinion. (vide PVP Ventures Ltd. vs. ACIT reported in [2016] 65 taxmann.com 221 (Mad.))

28.For all the above reasons, this writ petition is allowed and the impugned proceedings are quashed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-ix)

//True Copy//

Sub Assistant Registrar

abr
To

The Deputy Commissioner of Income-tax,
Large Tax Payer unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extention,
Chennai-600 101.

+1cc to Mr.SANDEEPBAGMAR Advocate, S.R.No. 5435

+1cc to Mr.HEMA MURALIKRISHNAN, Advocate, S.R.No. 5670

orders made in
Writ Petition No.11371 of 2016

SSD (CO)
TR(15/02/2018)