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

+ W.P.(C) 1936/2014

HONDA CARS INDIA LTD. (FORMERLY- M/S.

HONDA SIEL CARS INDIA LTD.Petitioner

Through: Mr. Harpreet Singh Ajmani,
Ms. Mansvini Bajpai & Ms.
Ankul Goyal, Advs.

versus

DEPUTY COMM. OF INCOME

TAX & ANR.

.....Respondents

Through: Mr. Anurag Ojha, SSC

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+ W.P.(C) 9092/2014

HONDA CARS INDIA LTD.Petitioner

Through: Mr. Harpreet Singh Ajmani,
Ms. Mansvini Bajpai & Ms.
Ankul Goyal, Advs.

versus

DEPUTY COMM. OF INCOME

TAX & ORS.

.....Respondents

Through: Mr. Anurag Ojha, SSC.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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06.08.2024

1. These two writ petitions which pertain to **Assessment Years**¹ 2006-07 and 2007-08 call in question the action of reassessment as initiated by the respondents in terms of notice dated 26 March 2013 [WP(C) 1936/2014] and 29 March 2014 [WP(C) 9092/2014] issued

¹ AY



under Section 148 of the **Income Tax Act, 1961**².

2. As we view the order dated 12 March 2014 disposing of the objections which had been preferred by the writ petitioners, the reassessment was based on the following reasoning:

“2. It was noticed from the statements of the employees/ expatriates recorded and information obtained during the survey and post survey proceedings that the non-resident parent company, M/s Honda Motor Japan (HMJ) and other affiliate companies had a business connection and a Permanent Establishment in India as per the provisions of section 9(1)(vii) of the I.T. Act and the relevant tax treaties. It was also seen from Form No. 3CEB report that the assessee company (HCIL) made a number of various kinds of payments to the parent company and other affiliate companies/ associated enterprises. The assessee company made such payments totalling Rs. 1057,30,04,248/- during the financial year 2005-06 relevant to A.Y. 2006-07. The above said payment’s represented business/ trading receipts in the hands of the recipient companies and since the recipient companies had a business connection and a PE in India, the assessee was liable to deduct tax thereon u/s 195 of the I.T. Act which the assessee had failed to do. As the assessee had failed to deduct tax u/s 195 of the I.T. Act on the above said payments, the provisions of section 40(a)(i) were clearly attracted and the amount of Rs. 1057,30,04,248/- claimed as expenditure was liable to be disallowed u/s 40(a)(i) of the I.T. Act.”

3. For the purposes of evaluating the challenge which stands raised, we deem it appropriate to notice the facts as obtaining in WP(C) 1936/2014. It is disclosed from the record, that for the concerned year the petitioner had submitted a Return of Income on 08 October 2007 and assessment was concluded in terms of Section 143(3) of the Act on 30 March 2014.

4. Aggrieved by the additions which were suggested in the assessment proceedings, the petitioner had preferred an appeal which came to be partly allowed by the **Commissioner of Income Tax (Appeals)**³ on 28 February 2011. The aforesaid order of the CIT(A)

² Act

³ CIT(A)



was subjected to further challenge before the **Income Tax Appellate Tribunal**⁴ and where the balance disallowances also came to be deleted in terms of the judgment rendered by the Tribunal on 22 July 2011.

5. After the conclusion of the original assessment proceedings, a survey proceeding was conducted under Section 133A on 24 June 2010 and it is only thereafter that the impugned reassessment notices came to be issued.

6. The petitioners have placed before us a subsequent order dated 10 December 2018 passed under Section 201(1) of the Act and covering the entire period comprising Financial Years 2004-05 to 2011-12. In the aforesaid order as framed, the following significant findings have come to be returned:

“Other Honda Group entities (other than HTAS) do not have a permanent establishment (“PE”) in India

The assessee has earlier submitted that each Honda overseas affiliate entity is separate legal entity and it cannot be said that the facts are similar to each Honda entity. It was further submitted that Asian Honda Motor Co. Ltd. Thailand ("ASH") and other AEs neither have the presence in the form of employees nor have any physical presence in the form of offices. In its reply dated 10.10.2018 assessee further submitted as under:

The Hon'ble Apex Court in a set of Special Leave Petitions (SLPs) filed by foreign affiliates of

Honda Group has held that affiliates do not have a PE in India. Copy of Apex Court decision is placed on record. The relevant extract of the order is as follows:

“In view of the fact that the Dispute Resolution Panel has found that there is no permanent establishment in India, the judgment of the High Court is set aside and the appeals are allowed accordingly.”

The Supreme Court relied on the Hon'ble DRP order which held that other Honda affiliate entities do not have a PE in India, considering that no expatriate has been deputed by the affiliates to

⁴ Tribunal



HCIL. Thus, DRP held that they do not have any income chargeable to tax in India and hence, there is no liability to deduct TDS u/s 195

Further, we wish to submit that the department has not filed an appeal against the above DRP directions and accepted the position that other Honda affiliate entities are not having PE in India (even when DRP order was appealable). Also, post DRP directions, the Ld. AO has held that there is no PE and hence, no income chargeable to tax in India in case of other Honda affiliate entities for other A Y and also dropped the 148 proceedings in case of rest of the other Honda affiliate entities.

The DRP orders in placed on record. Since the payees do not have PE in India, the income is not chargeable to tax in India as per the provisions of DTAA. Thus, in absence of any taxable income, there is no liability for payer to deduct tax as held by Hon'ble SC in case of GE India Technology Centre vs CIT (2010)(10 SCC 29) has held that unless the payees are held to be taxable in India payer cannot be held responsible for not deducting appropriate taxes.

Honda Trading Asia Co. Ltd. ("HTAS") does not have a PE in India

Assessee further submitted as under:

Based on the facts and circumstances of the case, we submit that HTAS does not have a PE in India. From a plain reading of Article 5 of India Thailand tax. treaty, it is clear that in order to constitute a PE, there must be a fixed place of business available to the assessee, through which the business of assessee is wholly or partly carried on,

Further assessee submitted that no employee has been seconded from HTAS In Ind/a and hence there cannot be a question of HTAS having a fixed place PE in India. Hon'ble ITAT while deciding the matter of assessee for AY 2009-10 and AY 2010-11 on 40(a)(i) issue, it has been held that HTAS does not have PE in India. Given the above, HTAS does not have PE in India and accordingly, business income not chargeable to tax. Without prejudice to the above, it is submitted that no attribution can be made to HTAS (even if it has a PE in India), once arm's length principle ("ALP") has been satisfied. Reliance in this regard is placed on the ruling of Hon'ble Supreme Court in case of HTAS itself (Honda Motor Co., Ltd, Japan vs. Assistant Commissioner of Income-tax, Civil appeals no. (s) 2833 of 2018), wherein it has been held that:

"it has been held that once arms's length principle has been satisfied. there can be no further profit attributable to a person even if it has a permanent establishment in



India.

Since the impugned notice for the reassessment is based only on the allegation that the appellant(s) has permanent establishment in India, the notice cannot be sustained once arm's length procedure has been followed."

It is also submitted that all the payments in respect of impugned transactions made by HCIL to HTAS are made at ALP for FY 2004-05 to FY 2010-11 and therefore, the issue of PE is academic and as per the judgement no income can be attributed to the alleged PE and hence no income is taxable in India. Accordingly, HCIL is not required to deduct TDS from the payments made to HTAS. Since HCIL was not under an obligation to deduct tax from payments made to HTAS, the question of treating HCIL as an assessee in default under section 201 of the Act does not arise and thus we request you to drop the proceedings.

Since HTAS does not have a PE in India, the income is not chargeable to tax in India as per the provisions of DTAA. Thus, in absence of any taxable income, there is no liability for payer to deduct tax as held by Hon'ble SC in case of GE India Technology Centre vs CIT (2010)(10 SCC 29) has held that unless the payees are held to be taxable in India payer cannot be held responsible for not deducting appropriate taxes.

After considering the assessee's submission carefully it has come to noticed that there has been significant legal development in the matters of HMJ and its affiliates since 2010. On the basis of Findings of the ITAT order ITA Nos.2056 & 3229/Del/2014 for A.Y.2009-10 it can be concluded that all transactions between HCIL and HMJ and its affiliates had been determined at arm's length basis.

"TPO has passed the order after the surveys were conducted on the assessee. If the AO had certain additional material facts, he could have brought it to the notice of the TPO and asked for afresh report. In our view, this argument of the Ld. D.R. is erroneous, as the revenue wants to take a stand that the transactions between the assessee and its AE are not at arm's length for the limited purpose of denying the benefit of the non-discrimination article in the DTAA to the assessee and not for making any additions under the transfer pricing provisions. Year after year, the transfer pricing officer has given a finding that the transaction between the assessee and the AE are at arm's length. The Id. DR, without specifically pointing out as to what is the difference between the arm's length price and the price at which the transactions have taken place between the assessee and the AE and without quantifying the excess/shortage in the price, seeks to invoke Article 9(1). In our view, such an arrangement is



devoid of merit and hence we dismiss the same."

The Ld. DR relies on the judgment of the jurisdictional Delhi High Court in the case of Jansampark Advertising & Marketing (P) Ltd. (supra) and pleads that the Tribunal should set aside the matter to the AO/TPO to re-adjudicate the issue as to whether the transactions between the A.E. and the assessee are at arm's length or not. We do not think that the facts and circumstances of the case warrants such an action by the Tribunal. The Transfer Pricing Officer passed his order on 29 January, 2013, whereas the surveys were carried out on 24.02.2010 and 19th December, 2012. No specific defects are pointed out, either in the TP report or in the order of the Transfer Pricing Officer and only general submissions are made before us in this regard. Hence, this contention is also dismissed as devoid of merits."

Relying on the decision of Hon'ble ITAT in the cases of Samsung Electronics Co. Ltd. Vs. DCIT wherein the facts of the Samsung is squarely applies to the facts of the HMJ, It is concluded there is no fixed place PE of the assessee constituted through the expatriated employees.

"At the best, the statements and other material relied upon by the revenue show that by way of the seamless communication between the Indian subsidiary and the assessee, the expatriate employees were only discharging the duties of the subsidiary company towards the holding company. Whatever the benefits that are derived by the Indian subsidiary by such communication are offer to tax in India. We therefore find that the activities spoken by the expatriate employees in their statements are in the nature of reporting required in the course of discharge of the functions of the subsidiary company towards the holding company, and such activities do not constitute a PE under Article 5(4)(d), (e) and (f) of the DTAA.

From a reading of Art.5 of the DTAA, we understand that in order to constitute a PE, there must be a fixed place of business available to the assessee, through which the business of assessee is wholly or partly carried on. In the preceding paragraphs we held that what the expat employees are doing is only the discharge of the functions of subsidiary towards the holding company, which is for the benefit of the business of the subsidiary to make the GBM understand the priorities and preferences of the Indian customers by providing India specific Information to GBM's which in turn then carry out research and development to develop India specific products. By no stretch of imagination could it be



said that it is in furtherance of the business of the assessee dehors the business of the subsidiary.

In the absence of proof as to any management activity of the assessee being conducted in India or that it is established that the decisions relating to the products to be manufactured, pricing in the domestic markets, or the decisions relating to the launch of such products in India is taken by the assessee, we find it difficult to agree with the authorities below that through the expatriate employees the assessee has been conducting the business of assessee in India. Further, except stating that 10% of the remuneration of these employees has to be assumed as the income of the assessee, absolutely there is no evidence that is placed on record by the assessing officer to show that by way of business through these expatriate and seconded employees, the assessee derived any business income in India.

For these reasons, we are of the considered opinion that there is neither any business conducted by the assessee in India through the expatriated employees nor any income is derived by them though the activities of the employees. Consequently we hold that there is no fixed place PE of the assessee constituted through the expatriated employees. Issue is, therefore, answered in favour of the assessee."

After considering all the facts it has come to the notice that except the Honda Car Japan all other affiliates do not have Permanent Establishment in India. But reliance in this regard is placed on the Hon'ble Supreme Court ruling in the case of Honda Motor Co. Ltd. Japan Vs. Assistant Commissioner of Income Tax, Civil appeals no.(s) 2833 of 2018 wherein it has been held:

"it has been held that once arm's length principle has been satisfied, there can be no further profit attributable to a person even if it has a permanent establishment in India."

On perusal of details filed by the assessee and position of law, it is found that all transactions are done at arm's length, so HCIL should not be treated as an assessee-in-default in respect of payment made by it to HMJ and its affiliates under section 201 of the Act."

7. Viewed in the aforesaid light, it is manifest that there would exist no justification for the continuation of the reassessment proceedings which stand impugned in the instant writ petitions.
8. These two writ petitions shall, accordingly, stand allowed. The



impugned notice dated 26 March 2013 [WP(C) 1936/2014] and 29 March 2014 [WP(C) 9092/2014] under Section 148 and impugned assessment order dated 30 March 2014 [WP(C) 1936/2014] under Section 143(3)/147 are hereby quashed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 6, 2024/kk