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

+ ITA 149/2011 & ITA 150/2011

% **Date of Decision : 3rd February, 2012.**

CIT Appellant
Through: Mr.N.P.Sahni, Advocate

versus

MUNJAL SHOWA LTD Respondent
Through: Ms.Kavita Jha, Mr.Somnath
Shukla and Mr.Vijay Kumar
Punna, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

1. The Revenue has preferred these appeals for the assessment years 2000-01 and 2001-02 against the order dated 16.02.2010 of the Income Tax Appellate Tribunal ('tribunal', for short) in ITA No.4461/Del/2009 and 1704/Del/2007 in the case of Munjal Showa Ltd.
2. By the impugned order, the Tribunal has struck down the reassessment proceedings initiated u/s 147/148 of the Income Tax Act, 1961 ('Act', for short) on the ground of change of opinion. For the



assessment year 2000-01, it has also been held that the respondent-assessee had fully and truly disclosed all material facts and, therefore, the bar/stipulation in the proviso protects the respondent assessee.

3. As full details have not been set out in the impugned order, we have, with the assistance of the learned counsel for the parties, examined the contentions raised. Learned counsel for the respondent has filed a paper book in this Court which is taken on record.

4. For the assessment year 2000-01, the respondent/assessee had filed a return declaring income of Rs.12,99,85,610/- on 29.11.2000. This return was processed on 14.05.2001 and the returned income was accepted. Subsequently, notice u/s 143(2), dated 27.11.2001, was issued and Assessing Officer passed an assessment order dated 31.01.2003. The assessment order is brief and we have referred to the contents thereof in the subsequent paragraphs of this order.

5. For the assessment year 2001-02, the respondent had filed their return of income on 28.10.2001, disclosing income of Rs.17,63,93,104/-. The aforesaid income includes capital gains of Rs.11,76,471/-. The return was processed u/s 143(1) on 23.05.2002 on the returned income. Thereafter, the return was taken up for scrutiny by issue of notice u/s 143(2) dated 11.10.2002. Assessment order u/s 143(3) was passed on 20.02.2004. The income was assessed at Rs.17,52,16,710/- including capital gains. The assessment order is brief but it specifically refers to the admissible expenses and depreciation etc. The questionnaire issued by the Assessing Officer during the course of the original assessment



proceedings, and the reply submitted by the assessee, have been referred to below.

6. The assessments were reopened vide notices dated 29.03.2007 and 13.07.2005 for the assessment year 2000-01 and 2001-02, respectively. The reasons for reopening have not been stated in the assessment order and the appellate orders but they have been produced before us. For the sake of convenience we are reproducing relevant portion of the reasons of reopening recorded for the two years of the assessment:-

“Reasons recorded for re-opening the assessment of M/s Munjal Showa Ltd. for A.Y. 2000-01 u/s 147 of the I.T. Act, 1961.”

1. *The assessee filed its return of income on 28.11.2000 declaring an income of Rs. 12,99,85,610/-.*

2. *The assessment u/s 143(1) in this case was made on 31.01.2003 at Rs. 12,99,85,610/-.*

3. *the assessee has debited a sum of Rs. 2,86,74,323/- under the head of royalty and Rs. 10,73,766/- under the head technicians fee in the P & L a/c ending 31.3.2000. 25% of the royalty expenses should be considered as capital expenditure in view of the Supreme Court judgment in Southern Switchgear Ltd. 232 ITR 359 (SC) as it gives rise to enduring benefit which can be enjoyed by the assessee over a number of years. Under the terms of the technical collaboration, the royalty is payable at 3% of the ex-factory sales price of the products carried out by the manufacturing*



*facility invoiced by the licensee less certain other cost for a period of ten years from the date of the agreement or period of seven years from the start of the commercial production whichever is earlier. The assessee has paid a royalty for acquisition of an exclusive and indivisible privilege of manufacturing and selling the products. The assessee is also entitled to **continue the manufacture and sale of the products with the know how provided by the licensor upon expiration of the agreement.** The assessee is also entitled for **royalty fee right and license to use the trademarks** within the territory. The acquisition of such a right may be treated partly towards capital and partly towards the revenue.*

4. *Therefore, I have reason to believe that on account of failure on the part of the assessee to disclose truly and fully all material facts necessary for its assessment for that year. The income chargeable to tax has escaped assessment within the meaning of Section 147 of the I.T. Act, 1961 because of the wrong claim of royalty of Rs. 7437022/- as revenue expenditure.”*

“Reasons recorded for re-opening assessment of M/s Manjal Showa Ltd. A.Y. 2001-02 u/s 147 of the I.T. Act, 1961.

1. *The assessee filed its return of income declaring total income of Rs. 17,63,93,184/- on 28.10.2001. The assessment in this case was completed u/s 143(3) on 20.2.2004 at Rs.*



17,52,16,710/-.

2. *The assessee had debited an amount of Rs. 3,32,45,117/- in its P&L a/c as royalty. This royalty was paid to a foreign company M/s Showa Corporation of Japan in lieu of technical knowhow/assistance from them. The assessee has debited it as a revenue expenditure though it gives rise to benefit/advantage which is enduring in nature.*

3. *the assessee company had entered into an agreement with the foreign company of Japan M.s Showa Corporation to receive technical assistance for the manufacture of shock absorbers and right to sell products. As per the different sections of the Technical Collaboration Contract from 11.3.1997 to 10.3.2002 between the Licensor M/s Showa Corporation of Japan and the Licensee M/s Munjal Showa Ltd., the assessee was to receive technical knowhow including those designs, drawings, standards specifications and all other technical data, information and knowledge relating to Products design and/or the **manufacturing technology** of the Products or the Parts and all documents, whether original or copies, containing any such drawings, standards, specifications and technical data, information or knowledge relating to the **manufacturing technology**. Under the terms of the technical collaboration, the royalty is payable at 2% of the ex- factory sales price of the products carried out of the manufacturing facility invoiced by the licensee*



less certain other cost for a period of five years.

4. *The assessee has paid a royalty for the acquisition of an exclusive privilege of manufacturing and selling the products. The acquisition of such a right may be treated partly towards capital and partly towards revenue as it gives rise to enduring benefit to the assessee. The Hon'ble Supreme Court in the case of **Southern Switch Gear Ltd. vs. CIT reported in 232 ITR 359** and Hon'ble Madras High Court in the same case reported in 148 ITR 272 held that 25% of such royalty expenses constitutes capital expenditure as it gives rise to the assessee a benefit which is of enduring nature and thereby constituting a capital asset.*

5. *Following the above judgment, 25% of the total royalty expenses of Rs. 3,32,45,117 which comes to Rs. 83,11,279/- should have been shown as capital expenditure being spent towards acquisition of capital asset. The assessee has shown this expenditure as revenue expenditure instead of capital expenditure and thereby claiming excess deduction of Rs. 83,11,279/- and consequently under showing the income to the extent of Rs. 83,11, 279/-.*

6. *Therefore, I have reason to believe that on account of failure on the part of the assessee to truly and fully disclose material facts necessary for its assessment, for that year, the income chargeable to tax amounting to Rs. 83,11,279/- has escaped assessment within the meaning of Section 147 of the I.T. Act, 1961*



because of claiming of revenue expenditure of Rs. 83,11,279/- which should have been disclosed as capital expenditure.”

7. At the outset we may note that it is accepted by the Revenue that paragraph 2 of the reasons recorded for the assessment year 2000-01 incorrectly records that the return of income was processed u/s 143(1) on 31.01.2003. As notice above, a regular assessment order u/s 143(3) was passed on 31.01.2003.

8. For the assessment year 2000-01, the tribunal has set aside the order on two ground- (i) change of opinion, and (ii) there was no failure or omission on the part of the respondent assessee to fully and truly disclose material facts.

9. In the assessment order u/s 143(3) dated 31.01.2003, for the assessment year 2000-01, the Assessing Officer had recorded as under:-

“During the course of assessment proceedings various details such as details of depreciation claimed, expenditure incurred in foreign currency, details of loans and advances given and taken, confirmations from sundry creditors exceeding Rs.50 lacs, expenses of flex fluctuation, copies of TDS certificates on royalty and technical fee payments repairs and maintenance, insurance payments etc. were called for and after examination placed on file. With these remarks, total income of the assessee is computed as under:-



10. The total royalty amount paid during the year in question to the foreign partner was Rs. 2,86,74,523/-. The respondent assessee has filed the profit and loss account wherein royalty has been specifically shown in Schedule 13 in a separate heading, “manufacturing and other sale expenses”. This fact is also admitted in the reasons to believe itself. Reading of the assessment order along with profit and loss account elucidates and indicates that the expense/question of payment of royalty was examined before the assessment order u/s 143(3) dated 31.01.2003 was passed. The assessee had, therefore, clearly and specifically disclosed the royalty amount paid. There was no failure or omission on the part of the respondent assessee to disclose the head and the quantum thereof. Even TDS certificates and other details were filed. The Revenue has not been able to indicate and state, the specific failure or omission on the part of the respondent assessee to disclose fully and truly the material facts. Once material facts were disclosed, it was for the Assessing Officer to infer whether or not legally and as per law, the amount was capital expenditure or revenue expenditure. It is not the requirement and mandate of the statute that the assessee should disclose the law to the Assessing Officer. The legal position and the law have to be applied by the Assessing Officer. As noticed below, the question of royalty payment in earlier years was made subject matter of addition on the ground that it was capital in nature and subsequently, the Revenue had accepted the stand of the respondent assessee that the royalty paid to the joint venture partner was revenue in nature.



11. For the assessment year 2001-02, the Assessing Officer had raised a specific query vide letter dated 02.09.2003, which reads as under:-

“Royalty: Description of royalty received; Name, address and amount, period for which royalty is payable & copy of contract.”

12. In response to the said query the assessee had submitted a reply dated 17.07.2003, inter alia, stating as under:-

“Detail of Royalty expenses is attached as per annexure ‘F’ your Hon’our has desired to know about the nature of royalty payment amounting to Rs.3,32,45,117/- during the year under consideration. In this connection, it may be submitted that the assessee company has entered into a Technical Collaboration contract with Showa Corporation, Japan (Foreign Company). In terms of Article 7 of the said agreement the foreign company has to provide us with all technical information assistance and services necessary for the manufacture of the product subject to the payment of the consideration pursuant to article 19 of the agreement. Now the consideration for technical assistance as per article 19 is “Royalty” which the assessee company is paying to the foreign company for the product manufactured and assembled. On the face of it, it is a revenue expenditure related to the production and has been claimed and allowed as such by the department right from the beginning. It may be added that the deduction of royalty is allowed by the department subject to the provision of section



40(a)(i).”

13. By another letter dated 11.02.2004 the assessee had submitted a copy of technical and financial collaboration agreement. It is certain that the Assessing Officer in the assessment year 2001-02 had specifically gone into the question of payment of royalty. A query was raised and was answered with the explanation given by the assessee. A copy of the agreement was furnished.

14. It is noticeable that the respondent/assessee has been making payment of royalty since the assessment year 1994-95 onwards. For this purpose it has been entering into agreements with the foreign partner. These agreements were for a fixed stipulated periods but identical. They are similar in nature and have more or less identical clauses with few minor differences which are not relevant for the present issue. For the assessment year 1994-95, the Revenue had disallowed the payment of royalty and held that it was capital expenditure and not revenue expenditure. The respondent/assessee had succeeded before the tribunal vide decision dated 09.01.2009. The Revenue's appeal being ITA No. 56/2009 has been dismissed by a detailed order of a Division Bench, after examining the relevant clauses of the then agreement. It has been held



that the royalty paid was, in fact, revenue and not capital expenditure. It has been stated that this decision has been accepted by the Revenue. We fail to understand why, despite this matter being settled in the previous assessment years, the Revenue feels compelled to stir up the same dispute in subsequent assessment years.

15. In view of the aforesaid discussion, we are clearly of the view that the present case falls in the category of change of opinion as at the time of original proceedings the Assessing Officer examined and gone into the question of royalty. Even if there was any legal error or illegality the same cannot be rectified and be made the subject matter of reassessment proceedings u/s 147/148 of the Act. The Supreme Court in the case of ***CIT vs. Kelvinator of India Ltd.*** (2010) 2 SCC 723 has observed as under:-

“5. 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 fulfilment 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 1-4-1989), 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-1-4-1989, 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.

6. 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 reassessment has to be based on fulfilment of certain precondition 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.

7. 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 1-4-1989, 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.”

16. The aforesaid observations are apposite and applicable to the facts of the present case. Accordingly, we do not find any substantial question of law arise in the present appeals and the same are dismissed. No costs.

SANJIV KHANNA, J

R.V.EASWAR, J

FEBRUARY 03, 2012

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