

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 992/DEL/2014
[A.Y 2006-07]

The Dy. C.I.T,
Circle 18 (1),
New Delhi.

Vs.

M/s Yamaha Motor India Sales
Pvt. Ltd., 1st Floor
The Great Eastern Centre
70, Nehru Place,
Behind IFCI Tower New Delhi

[PAN : AAACY 2505 K]

ITA No. 1095/DEL/2014
[A.Y 2006-07]

M/s Yamaha Motor India Sales
Pvt. Ltd., 1st Floor
The Great Eastern Centre
70, Nehru Place,
Behind IFCI Tower, New Delhi

Vs.

The Dy.C.I.T,
Circle 18 (1),
New Delhi.

[PAN : AAACY 2505 K]

[Appellant]

[Respondent]

Date of Hearing : 16.10.2018
Date of Pronouncement : 22.10.2018

Assessee by : Shri Ved Jain, Adv

Revenue by : Shri Sanjay I. Bara, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two cross appeals by the assessee and Revenue are preferred against the very same order dated 06.01.2014 framed u/s 143(3) r.w.s 144C(4) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2011-12. Both these appeals were heard together and are being disposed of by this common order for the sake of convenience and brevity.

ITA No. 1095/DEL/2014 [Assessee's appeal]

2. In addition to the challenge of the disallowance, the assessee has also challenged the reopening of the assessment u/s 147 of the Act. Since this goes to the root of the matter, we will first address to the challenge of reopening of the assessment.

3. The facts on record show that the original assessment was framed u/s 143(3) of the Act vide order dated 30.12.2008.

4. Subsequently, vide notice dated 14.09.2011, the Assessing Officer sought to reopen the assessment. The reasons recorded for reopening of assessment read as under:

"Reasons recorded for re-opening u/s 147/148 of the IT Act, 1961 in the case of M/s. Yamaha Motor India Sales Pvt. Ltd. for the assessment year 2006-07 are as under

1. During the year the assessee had claimed depreciation on goodwill amounting to Rs. 27,03,40,000/- treating it as intangible asset. As per accounting standards goodwill was not considered as an intangible asset for the purpose of amortization. Further, goodwill cannot be considered as any other business or commercial right and depreciation cannot be allowed.

Section 32 of the IT Act, provided that from 1st April 1999, depreciation would be allowed on tangible assets which include copyrights, patents, technical know-how, franchise charges and iy other commercial rights. Intangible assets, therefore, cannot include goodwill, stock change membership fees, intellectual property rights or investment in shares

2. The assessee had claimed and allowed advertisement expenses of Rs. 23,31,91,930/-to the P&L A/c. Advertisement expenditure was incurred by the assessee company on behalf of Yamaha Motor Co., Japan on

reimbursable basis. Out of the above advertisement expenses the assessee already reimbursed Rs. 10,97,55,358/- and balance of Rs. 11,50,38,160/- shown under the head loan and advances recoverable toward⁰ reimbursement . As the advertisement expenditure was incurred on behalf of Yamaha Motor Co., Japan the same should have been disallowed."

5. Before us, the ld. AR for the assessee vehemently contended that the issues, which prompted the Assessing Officer to reopen the assessment were specifically considered by the Assessing Officer during original assessment proceedings by raising specific queries to which the assessee has not only furnished specific reply, but also relevant supporting evidences.

6. We find that vide notice dated 4.7.2008 issued u/s 142(1) of the Act, which is exhibited at pages 155 to 160 of the paper book, the Assessing Officer had raised, inter alia, the following queries:

"Point 7

Give nature and details of the expenses claimed in the P & L A/c in respect of the following expenses:

(a) Give breakup of salary persons wise with designation for persons drawing more than 10 lacs yearly. Gratuity and other such payments be given separately.

(b) Loss on Foreign Exchange Fluctuation - Give evidence of the loss and where the loan/amount on which the loss is claimed was utilized. Have you made payment for this loss? If no then it is notional loss and therefore is contingent in nature. Hence, it cannot be allowed Give a note justifying the claim.

(c) Traveling and conveyance. Give break-up of inland traveling .If foreign Traveling Expenses have also been claimed give details separately for Air ticket boarding Lodging, purpose and dates of visits and evidence of work done on the foreign visit.

- a) Legal and Professional charges
- e) Advertisement and Sales Promotion
- f) After Sales Service - Give full details with basis of claim.
- g) Rent, Rates and Taxes."

Point 18

P 18 Are you covered by the provisions of Arms Length Pricing? If yes then supportive evidence for international transactions shown in Form No.3CEB. Give a note that you have complied with the requirement of section 92 of the IT Act. Also explain the ;correctness of method adopted by you for calculating 'arms length pricing."

7. Vide reply dated 29.08.2008, the assessee pointed out that details of advertisement and sales promotion shall be provided on the next date of hearing and in reply to Point No. 18, the assessee stated that during the year under consideration, the only international transaction entered into by the assessee was in the form of financial support received from parent company towards advertisement and other sales promotion expenses amounting to Rs. 10,97,55,358/-. Copy of form No. 3CEB was also supplied. Vide reply dated 10.10.2008, the assessee furnished details of advertisement and sales promotion expenses. Such details are exhibited at pages 238 to 255 of the paper book and the relevant extract of the audited report is at pages 111 and 113 of the paper book. The analysis of international transactions, undertaken by the assessee, are exhibited at pages 114 to 118 of the paper book, and the same read as under:

Nature of Transaction	Amount as recorded in the books of account (in Rs.)	Amount computed as per arm's length (in Rs.)	Method used for justification
Financial support received from associated enterprise towards advertisement activities	10,97,55,358/-	10,97,55,358/-	Financial support received from the associated enterprise on no profit/loss basis.

8. In so far as other issue relating to the claim of depreciation on good will treated as intangible asset is concerned, we find that this issue is by now well settled in favour of the assessee and against the revenue by the decision of the Hon'ble Supreme Court in the case of CIT Vs. Smith Securities Ltd. 348 ITR 302.

9. Considering the facts of the case in totality, we are of the view that the Assessing Officer, during the course of original assessment proceedings, had made specific queries to which the assessee not only gave specific replies, but the reply of the assessee was well supported by the evidences/details. In our considered opinion, if the action of the Assessing Officer is accepted, then it would confer arbitrary power upon the Assessing Officer to reopen the proceedings on the slightest pretext. We are also of the considered opinion that mere change in the opinion would not confer jurisdiction upon the Assessing Officer to initiate a proceeding u/s 147 of the Act.

10. A perusal of the reasons for reopening shows that there was no new tangible material evidence which prompted the Assessing Officer to issue notice for reopening of the assessment. For this proposition, we derive support from the decision of the Hon'ble Jurisdictional High

Court of Delhi in the case of Kelvinator of India Ltd 256 ITR 1 which was affirmed by the Hon'ble Supreme Court in 320 ITR 561.

11. In his reasons for reopening the assessment, the Assessing Officer had observed that the assessee had claimed and allowed advertisement expenses of Rs. 23.31 crores out of which the assessee was reimbursed Rs. 10.97 crores and balance of Rs. 11.50 crores has been shown under the head "Loan and Advance" recovered towards reimbursement. This observation of the Assessing Officer for reopening the assessment is factually incorrect. Advertisement and Publicity expenses are at Rs. 10.66 crores and selling and distribution expenses are at Rs. 24.76 crores. The balance of advertisement and publicity expenses is covered by financial support of Rs. 10.97 crores received from AE Yamaha Motor Company, Japan. It appears that the Assessing Officer has taken the figure from the balance sheet.

12. Exhibit 56, Schedules to the Accounts Schedule 5 "Loans and Advances" showing Rs. 1339.90 lakhs, the details of the same are at page 197 of the paper book and in the bifurcation, the assessee has to receive Rs. 11.50 crores from Yamaha Motor Company, Japan as

amount recovered towards reimbursement of advertisement expenses and other financial support provided by Yamaha Motor Company, Japan. This amount has never been claimed as expenditure by the assessee. Thus, it can be seen that the Assessing Officer had proceeded to reopen the assessment on wrong assumption of facts in so far as claim of advertisement expenditure are concerned and wrong assumption of law in so far as claim of depreciation is concerned. In any case, there was no new tangible material evidence brought on record by the Assessing Officer. Assessment was reopened only on the basis of details available on record and wrongly interpreted by the Assessing Officer.

13. On such, we are of the considered opinion that reopening is bad in law. We accordingly quash the reopening proceedings and accordingly, the assessment order so framed is also quashed.

14. Since we have quashed the assessment, we do not find it necessary to dwell into the merits of the case.

15. In the result, the appeal of the assessee in ITA No. 1095/DEL/2014 is allowed and that of the Revenue in ITA No. 992/DEL/2014 is dismissed.

The order is pronounced in the open court on 22.10.2018.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 22nd October, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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