IN THE INCOME TAX APPELLATE TRIBUNAL

"E" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA no.5256/Mum./2015
(Assessment Year : 2007–08)

TML Drivelines Ltd.
(Successor to H V Transmission Ltd.)
3rd Floor, Nanavati Mahalaya
18, Homi Modi Street
Hutatma Chowk, Mumbai 400 001
PAN – AAACH7625P

……. Appellant

v/s

Dy. Commissioner of Income Tax
(OSD) Circle–2(1), Mumbai

……. Respondent

ITA no.5257/Mum./2015
(Assessment Year : 2010–11)

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……. Appellant

v/s

Dy. Commissioner of Income Tax
(OSD) Circle–2(1), Mumbai

……. Respondent

Assessee by : Shri Rajan Vora
Revenue by : Shri Nikhil Tiwari

Date of Hearing – 22.01.2018	Date of Order – 31.01.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeals by the same assessee are against two separate orders passed by the learned Commissioner (Appeals)–4, Mumbai, for the assessment years 2007–08 and 2010–11.

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2. In grounds no.1 and 2, assessee has raised legal and jurisdictional issues challenging the validity of the assessment order passed under section 143(3) r/w section 148 Income Tax Act, 1961 (for short *"the Act"*).

3. Brief facts relating to the issues in dispute are, the assessee an Indian company is engaged in manufacture of automobile parts. For the assessment year under dispute, assessee filed its return of income on 30th October 2007 declaring total income of ₹ 72,82,77,921. Subsequently, assessee filed a revised return of income on 29th September 2008, declaring total income of ₹ 72,06,36,526. The return of income filed by the assessee was subjected to scrutiny and an assessment order under section 143(3) was passed on 30th December 2009, determining the total income at ₹ 72,14,69,760. Subsequently, the Assessing Officer noticing that certain receipts as per TDS certificates were not offered to tax by the assessee and further,

interest expenses claimed and allowed were relating to capital work–in–progress, which, otherwise should have been disallowed, formed a belief that income assessable to tax has escaped assessment and accordingly re–opened the assessment under section 147 of the Act by issuing a notice under section 148 of the Act on 29th March 2012. After complying to the notice under section 148 of the Act, the assessee requested the Assessing Officer to communicate the reasons for re–opening of assessment which were communicated to the assessee by the Assessing Officer on 12th February 2013. After receiving the reasons for re–opening of assessment the assessee on 11th March 2013, raised objections in writing before the Assessing Officer against the re–opening of assessment under section 147 of the Act and made submissions why the issues on which the Assessing Officer re–opened the assessment do not actually result in escapement of or under assessment income, therefore, there is no necessity of initiating proceedings under section 147 of the Act. As it appears, the Assessing Officer while completing the assessment under section 143(3) r/w section 147 of the Act dealt with the objections raised by the assessee and dismissed them and simultaneously proceeded to complete the assessment under section 143(3) r/w 147 of the Act by making addition of an amount of ₹ 1,97,20,195 on account of unreported sales which resulted in determination of total income at ₹ 73,50,18,911.

Being aggrieved of the assessment order so passed, assessee preferred appeal before the first appellate authority, inter–alia, on the ground of validity of re–opening of assessment u/s 147 of the Act.

4. The assessee challenged the validity of the assessment order passed under section 143(3) r/w 147 of the Act before the first appellate authority on various grounds including on the grounds of non–issuance of notice under section 143(2) of the Act and non–disposal of the objections raised by the assessee before completing the assessment. The first appellate authority while dealing the aforesaid two aspects held that since, the assessee availed full and proper opportunity by participating in the assessment proceedings, in terms of section 292BB of the Act the defect, if any, due to non–issuance of notice under section 143(2) stands cured. Even, with regard to non–disposal of the objections raised before completion of assessment the learned Commissioner (Appeals) did not agree with the contentions of the assessee. Accordingly, he upheld the validity of the assessment order passed under section 143(3) r/w section 147 of the Act.

5. Learned Authorised Representative reiterating the stand taken before the first appellate authority submitted that the Assessing Officer has passed the assessment order without issuing any notice under section 143(2) of the Act which is mandatory for completing the

assessment under section 143(3) r/w section 147 of the Act. He submitted, non–issuance of notice under section 143(2) is a jurisdictional error which cannot be cured even after participation of the assessee in the assessment proceedings, as, in the absence of notice under section 143(2), the Assessing Officer lacks jurisdiction to make an assessment. In support of such contention, he relied upon the following decisions:–

i) Hotel Blue Moon v/s ACIT, 321 ITR 362 (SC);

ii) CIT v/s Mohammad Khaleeq Commercial Taxes, 86 CCH 362 (All.);

iii) Kuber Tobacco Products Ltd. v/s DCIT, 117 ITD 273 (Del.);

iv) PCIT v/s Silver Line, 383 ITR 455 (Del.);

v) Salman Khan, ITA no.2362 of 2009, dated 01.12.2009 (Bom.);

vi) CIT v/s Salman Khan, ITA no.2362 of 2009, dated 01.12.2009;

vii) Kanchanjunga Impex Pvt. Ltd. v/s ITO, 45 CCH 81 (Mum.);

viii) PCIT v/s Shri Jai Shiv Shankar Traders Ltd., 383 ITR 448 (Del.).

6. Further, the learned Authorised Representative submitted, after receiving the reasons recorded, the assessee vide letter dated 11th March 2013 has raised objections against the initiation of proceedings under section 147 of the Act. He submitted, without disposing off the objections of the assessee independently before completion of assessment, the Assessing Officer dealt with the objections of the assessee in the assessment order itself. He submitted, by not

disposing off the objections raised by the assessee before completing the assessment the Assessing Officer has committed serious lapse which invalidates the assessment order. In support of such contention, he relied upon the following decisions.

i) GKN Drive Shafts India Ltd. v/s ITO, 259 ITR 019;

ii) KSS Petrons Pvt. Ltd. v/s ACIT, ITA no.224 of 2014 dated 03.01.2016;

iii) Jayanthi Natarajan v/s ACIT, W.P. no.1905 of 2017 and W.M.P. no.1925 of 2017 dated 14.09.2017;

iv) Dockendale Shipping Co. v/s ADIT, 51 CCH 55 (Mum.).

7. The learned Departmental Representative submitted, issuance of notice under section 143(2) is not mandatory under the scheme of the Act and absence in issuance of notice under section 143(2) of the Act by the Assessing Officer does not invalidate the assessment order passed under section 143(3) r/w 147 of the Act. In support of such submission, he relied upon the decision of the Hon'ble Delhi High Court in case of CIT v/s Madhya Bharat Energy Corp. Ltd., ITA no.950/2008, judgment dated 11th July 2008. Further, learned Departmental Representative submitted, assessee's objections regarding non–issuance of notice under section 143(2) of the Act cannot be entertained, since, the assessee has not raised such objection within a period of one month from the date of completion of assessment in terms of section 124(3) of the Act.

8. In rejoinder, the learned Authorised Representative submitted, the decision of the Hon'ble Delhi High Court in case of Madhya Bharat Energy Corp. Ltd. (supra) cannot be considered to be laying down the correct proposition of the law as the said decision has not considered the decision of the Hon'ble Supreme Court in case of Hotel Bluemoon Ltd. (supra). Further, he submitted, the Hon'ble Delhi High Court in a subsequent decision in case of PCIT v/s Jai Shiv Shankar Traders Pvt. Ltd., 383 ITR 448 (SC) taking note of its own decision in case of Madhya Bharat Energy Corp. Ltd (supra) held that non–issuance of notice under section 143(2) of the Act invalidates the assessment order and section 292BB of the Act cannot cure the defect. He submitted, in any case of the matter, the provisions of section 292BB of the Act will not apply to the impugned assessment year.

9. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. It is worth mentioning, the challenge to the impugned assessment order by the assessee is primarily on the following two planks.

i) Non–issuance of notice under section 143(2) of the Act; and

ii) Non–disposal of objections raised by the assessee before completion of assessment.

10. As could be seen, the learned Commissioner (Appeals) has rejected assessee's objection against non–issuance of notice under section 143(2) of the Act, primarily on the reasoning that, since, the assessee has availed full and proper opportunity by participating in the assessment proceedings, the defect, if any, due to non–issuance of notice under section 143(2) of the Act gets cured in view of section 292BB of the Act. In our view, there is a basic flaw in the aforesaid reasoning of the first appellate authority as section 292BB of the Act which was introduced to the statute by finance Act, 2008 w.e.f. 1st April 2008, will have prospective effect, hence, will not be applicable to the impugned assessment year. This view has been expressed by different High Courts, including, the Hon'ble Jurisdictional High Court in case of Salman Khan (supra). In fact, the Tribunal, Delhi Special Bench in case of Kuber Tobacco Products Ltd. (supra) has expressed similar view. As far as the decision of the Hon'ble Delhi High Court in case of Madhya Bharat Energy Corp. Ltd. (supra) relied upon by the learned Departmental Representative is concerned, in our view, will not help the Department in any way as the Hon'ble Delhi Court in a later judgment delivered in case of Jai Shiv Shankar Traders Pvt. Ltd. (supra) after taking note of the decision of CIT v/s Madhya Bharat Energy Corp. Ltd., held that failure of the Assessing Officer in re–assessment proceedings to issue notice under section 143(2) of the

Act, prior to finalizing the re–assessment order cannot be condoned by referring to section 292BB of the Act. The Hon'ble High Court held that failure by the Assessing Officer to issue a notice to the assessee under section 143(2) of the Act in course of the re–assessment proceedings is fatal to the order of re–assessment. The other decisions relied upon by learned Authorized Representative also express similar view. Therefore, in terms of the ratio laid down in the decisions referred to above, it has to be held that non–issuance of notice under section 143(2) of the Act by the Assessing Officer invalidates the order passed under section 143(3) r/w 147 of the Act. As far as the submissions of the learned Departmental Representative that assessee should have raised the objection against non–issuance of notice under section 143(2) within a period of one month as per section 124(3) of the Act, we do not find merit in such submissions of the learned Departmental Representative as the said provision basically deals territorial jurisdiction of the Assessing Officer.

11. Even otherwise also, the impugned assessment order cannot be sustained on the ground of non–disposal of objections raised by the assessee against the initiation of proceedings under section 147 of the Act. Undisputedly, after receiving the reasons for re–opening of assessment, the assessee on 11th March 2013, raised an objection before the Assessing Officer against the initiation of proceedings under

section 147 of the Act. A perusal of the said objection, a copy of which is at Page–169 of the paper book, would reveal that the assessee has made submissions factually reconciling the difference in TDS as well as on the allowability of interest expenditure, the issues on which the Assessing Officer re–opened the assessment. After pointing out to the Assessing Officer that there is no escapement of income or under assessment on either of the issues as alleged by the Assessing Officer in the reasons recorded, the assessee requested the Assessing Officer to drop the proceedings initiated under section 147 of the Act as the proceedings are bad–in–law. However, as is evident from facts on record, the Assessing Officer did not dispose off the objections of the assessee prior to completion of the assessment under section 143(3) r/w section 147 of the Act. On the contrary, while completing the impugned assessment, the Assessing Officer simultaneously disposed off the objection of the assessee. In our view, the non–disposal of assessee's objections independently before completion of the assessment under section 143(3) r/w section 147 of the Act is against the ratio laid down by the Hon'ble Supreme Court in case of GKN Drive Shaft India Ltd. (supra). The Hon'ble Jurisdictional High Court in case of KSS Petron Pvt. Ltd. (supra) has held that non–disposal of objections raised against the re–assessment proceedings prior to completion of assessment invalidates the assessment order, hence,

the assessment order has to be quashed. Therefore, following the law laid down by the Hon'ble Supreme Court and Hon'ble Jurisdictional High Court referred to above, we have no hesitation in holding that the impugned assessment order passed under section 143(3) r/w 147 of the Act is not only invalid due to lack of jurisdiction for non–issuance of notice under section 143(2) but also invalid due to non–disposal of objections raised by the assessee against re–assessment proceedings prior to completion of the assessment. In view of the aforesaid, we quash the assessment order passed under section 143(3) r/w section 147 of the Act for the impugned assessment year. Resultantly, the order of the first appellate authority is set aside. Grounds no.1 and 2 are allowed.

12. In view of our aforesaid decision on the legal issues, grounds raised on merits having been reduced to mere academic importance do not require adjudication.

13. In the result, assessee's appeal is partly allowed.

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14. In ground no.1, assessee has challenged disallowance made under section 14A r/w rule 8D.

15. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee in the relevant previous year has earned exempt income by way of dividend amounting to ₹ 50,95,000. Mentioning that funds utilized for earning exempt income and employment of borrowed capital in such investment is not ascertainable, the Assessing Officer proceeded to compute disallowance under section 14A as per the method prescribed under rule 8D and quantified the disallowance at ₹ 45,41,909 comprising of indirect interest expenditure of ₹ 30,70,591 and administrative expenditure of ₹ 14,71,318. Being aggrieved of the disallowance made as aforesaid, assessee preferred an appeal before the first appellate authority.

16. Before the first appellate authority, assessee contended that that since own funds are much more than the investment made, disallowance of interest expenditure is not proper. Further, it was submitted, investment made in Tata Liquid Super High and Birla Cash plus are capable of earning dividend whereas the other investments made in growth oriented funds are capable of earning taxable income. Further, it was submitted, the borrowed funds were utilized for specific purpose and without establishing nexus between the borrowed funds and investments made disallowance of interest expenditure should not be made. In this context, the assessee furnished a working of actual

disallowance which could be made under section 14A which worked out to ₹ 1,52,295. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record found that as per the Balance Sheet of the assessee own funds were ₹ 26,884.03 lakh, whereas investment in fixed assets and capital work in progress is of ₹ 28,981.04 lakh which according to the first appellate authority indicate that assessee did not have own funds to make the investment. However, he found that in assessee's own case, for assessment year 2009–10 the learned Commissioner (Appeals) after considering the submissions of the assessee that borrowed funds were utilized for specific purposes like import of fixed assets and purchase of intellectual property rights directed the Assessing Officer to examine the claim of the assessee and exclude the interest paid on the borrowed funds if assessee's claim is found to be correct. Consistent with the view taken by the first appellate authority in assessment year 2009–10, the learned Commissioner (Appeals) directed the Assessing Officer to verify the facts relating to assessee's claim of utilization of borrowed funds for specific purpose and accordingly re–calculate disallowance of interest expenditure. Further, as regards disallowance of administrative expenditure, the learned Commissioner (Appeals) directed the Assessing Officer to examine the working of disallowance submitted by the assessee in the course of

appeal proceedings and accordingly decide the issue. So far as assessee's claim of availability of own fund which can be presumed to have been utilized for investment purpose, the learned Commissioner (Appeals) observed, in the absence of actual details to indicate that investments were made out of own funds assessee's claim cannot be accepted and accordingly directed the Assessing Officer to obtain necessary details from the assessee regarding utilization of funds, either interest free or interest bearing, in investments and accordingly calculate the disallowable expenditure.

17. Learned Authorised Representative submitted, the learned Commissioner (Appeals) having directed the Assessing Officer not to disallow interest expenditure if borrowed funds were utilized for specific purpose like purchase of fixed assets, etc., his observations on the issue of utilization of interest free funds in investment activities were uncalled for and without any basis. The learned Authorised Representative submitted, a direction may be issued to the Assessing Officer not to disallow interest expenditure if borrowed funds are found to be utilized for specific purpose and further to exclude from the average value of investment the investments which have not given rise to any exempt income in the relevant previous year for computing disallowance under section 14A r/w rule 8D.

18. The learned Departmental Representative relied upon the observations of the first appellate authority.

19. We have considered rival submissions and perused material on record. As could be seen, a specific contention was raised by the assessee in the preceding as well as impugned assessment year that borrowed funds were utilized for the specific purpose for which such loans were taken, such as, purchase of fixed assets, payments towards acquiring intellectual property rights, etc. Considering the aforesaid submissions of the assessee, the first appellate authority in both the years have directed the Assessing Officer to verify claim of the assessee and if assessee's claim with regard to utilization of borrowed funds was found to be correct not to disallow any interest expenditure. We do not find any reason to interfere with the aforesaid direction of the first appellate authority. Further, we also agree with the direction of the first appellate authority to examine and consider assessee's working of disallowance of expenditure at ₹ 1,52,295, considering the fact that such working was furnished by the assessee before the first appellate authority for the first time. Notably, before us, the learned Authorized Representative has submitted that some of the investments are in growth oriented funds and do not give rise to exempt income. Therefore, such investments should be excluded from the average value of investment for computing disallowance under rule 8D(2). In

principle, we agree with the aforesaid submissions of the learned Authorized Representative. We direct the Assessing Officer to exclude from the average value of investment the investments which are not capable of yielding exempt income and the investments which have not yielded any exempt income in the impugned assessment year for computing disallowance under rule 8D(2). Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue. Ground no.1 raised by the assessee is allowed for statistical purposes.

20. In ground no.2, assessee has raised the issue of short credit of TDS amounting to ₹ 5,82,040.

21. Having heard the submissions of the parties, we direct the Assessing Officer to verify assessee's claim with regard to TDS credit and decide the issue after providing due opportunity of being heard to the assessee.

22. In grounds no.3 and 4, assessee has challenged the levy of interest under sections 234B and 234C of the Act.

23. Levy of interest under the aforesaid provisions being consequential in nature, the Assessing Officer is directed to give

consequential effect while re–computing the income of the assessee in view of our orders as aforesaid.

24. In the result, assessee's appeal is allowed for statistical purposes.

25. To sum up, assessee's appeal for A.Y. 2007–08 is partly allowed and appeal for assessment year 2010–11 is allowed for statistical purposes.

Order pronounced in the open Court on 31.01.2018

Sd/-	**Sd/-**
G. MANJUNATHA	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31.01.2018

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai