

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

ITA No.	Asst. Year	Appellant	Respondent
625/Hyd/16	2008-09	Mylan Laboratories Ltd., (Being amalgamated company of Astrix Laboratories Limited), HYDERABAD [PAN: AAFCA4120R]	Deputy Commissioner of Income Tax, Circle-16(2), HYDERABAD
662/Hyd/16	2008-09	Deputy Commissioner of Income Tax, Circle-16(2), HYDERABAD	Mylan Laboratories Ltd., (Being amalgamated company of Astrix Laboratories Limited), HYDERABAD [PAN: AAFCA4120R]

For Assessee : Shri K.A. Sai Prasad, AR
For Revenue : Smt. T.H. Vijaya Lakshmi, CIT-DR

Date of Hearing : 27-02-2018
Date of Pronouncement : 27-04-2018

ORDER

PER B. RAMAKOTAIAH, A.M. :

These are cross-appeals by Assessee and Revenue for the AY. 2008-09 against the order of the Commissioner of Income Tax (Appeals)-4, Hyderabad, dated 05-02-2016 on the reopened assessment u/s 147.

2. Brief facts of the case are that assessee, Astrix Laboratories Limited (now amalgamated with Mylan Laboratories Ltd w.e.f 01-04-2014) is engaged in the business of manufacturing of active pharmaceutical ingredients and their intermediates. For the AY. 2008-09, it filed a return of income on 29th November 2008 admitting an income of Rs.12,36,37,010/- under normal provisions of the Income Tax Act [Act] and book profit of Rs.27,57,66,354/- u/s. 115JB of the Act. Since assessee transacted with Associated Enterprises (AEs), the case was referred to Transfer Pricing Officer (TPO), Hyderabad in terms of the provisions of Chapter X of the Act. The TPO vide order u/s. 92CA dated 21-10-2011 after a detailed examination of the international transactions, made an adjustment of Rs. 33,91,00,000/- u/s. 92C of the Act. AO further made an adjustment of Rs 2,85,428/- on account of short income offered vis-a-vis TDS receipts and made a draft assessment order u/s 143(3) r.w.s 92CA of the Act dated 22-12-2011. Assessee thereafter filed objections before the Dispute Resolution Panel (DRP). The DRP issued directions to the TPO/AO for guidance in completing the assessment. A final assessment order was passed u/s 143(3) r.w.s 92CA r.w.s. 144C of the Act dated 30-11-2012 incorporating the directions of DRP and assessed total taxable income at Rs27,84,72,559/-. Assessee filed an appeal on that order which proceedings are separate.

2.1. Subsequently, the AO issued a notice u/s. 148 of the Act dated 28-03-2013. On being requested for furnishing

the reasons, AO stated that the income had escaped assessment by reason of the fact that depreciation claimed by assessee in respect of Intangible assets (Technical Know-how & Drug Master Files (DMFs) acquired from Mylan Laboratories Limited (formerly known as Matrix Laboratories Limited) needs to be disallowed, based on the order for AY. 2006-07 u/s 143(3) dated 31-01-2013 passed in consequence to the revisionary order dated 26-03-2012 as passed by the Commissioner of Income Tax -IV, Hyderabad u/s. 263 of the Act.

2.2. Assessee questioned the re-assessment proceedings u/s. 147 on the ground that the AO had complete information as regards the transaction relating to purchase of intangibles by the assessee, since the TPO while framing order u/s. 92CA dt. 29-10-2010 for the AY. 2007-08 disallowed the depreciation alleging that the payment failed the benefit test. The TPO for the AY. 2008-09 vide order dt. 21-10-2011 u/s. 92CA did not canvas any disallowance. In other words TPO did not follow his own order for the earlier year.

2.3. Assessee submitted that since the AO already had the complete information with regard to the depreciation claim made by assessee in respect of DMF & Technical know-how, he cannot revisit the matter once again to rectify the same under the garb of the Sec.147 as it would not be construed as a reason to believe for him to initiate the reassessment proceeding but amount to mere change of the opinion, a

position not permissible under the statute. Assessee relied on the CBDT Circular No. 549 dated 31-10-1989 and Hon'ble Supreme Court's land mark decision in the case of CIT V Kelvinator of India Ltd (2010) (320 ITR 561), where it was held that, *“Reassessment proceedings cannot be based on change of opinion and it cannot be a substitute for Reason to believe u/s. 147 of the Act”*.

2.4. Assessee claimed depreciation of Rs. 17,27,96,203/- on Technical Know-how and Drug Master Files (DMF) @ 25% acquired from Mylan on the WDV of Rs 69,11,84,813/- as on 01-04-2007. The AO did not agree with the tax-payer's submissions and disallowed the depreciation in reassessment proceedings. He applied the analogy relating to AY. 2006-07 i.e adopting the value of DMFs and Technical know-how as Nil in the hands of the assessee.

2.5. AO passed an order u/s 143(3) r.w.s 147 of the Act dt. 30-08-2013. Being aggrieved by the said order, assessee preferred an appeal before the CIT(A). It was submitted that, re-opening of the assessment with a view to follow the revisionary order dated 26-03-2012, passed by the Commissioner of Income Tax u/s. 263 of the Act for the AY. 2006-07, constitutes mere change of opinion, since, the said revisionary order as well as the TPO order relied upon by the CIT are already on record when the order u/s. 143(3) was sought to be passed. Therefore, the re-assessment amounts to mere change of opinion, which is impermissible u/s. 147 r.w.s

148 of the Act. On merits of addition, assessee relied on the order of ITAT in earlier years. The CIT(A) while allowing depreciation on intangibles, refused to intervene in the matter of re-assessment.

3. On the issue of reopening of assessment, Ld. CIT(A) held as under:

"4.3 After carefully considering, it is observed that the Hon'ble ITAT in the appellant's own case vide its order in ITA No.840/Hyd/2012 for the A.Y. 2006-07 dated 16-01-2015 held that, "as AO has passed the assessment order after examining all the facts and evidences and after proper application of mind relating to the transaction of know-how and DMF, the assessment order cannot be revised u/s 263 of the Act by treating it as erroneous and prejudicial to the interests of revenue. In this context, we rely upon the decision of Hon'ble AP High Court in case of Spectra Scrips and Shares Pvt. Ltd., Vs. CIT, 354 ITR 35(AP). In the aforesaid view of the matter, the assumption of jurisdiction u/s 263 of the Act in the present case is neither proper nor justified. Accordingly, we set aside the impugned order of ld. CIT and restore the order passed by AO." Hence, respectfully following the Hon'ble ITAT decision, the decision of the Assessing Officer with regard to reopening of the assessment is confirmed and the ground of appeal is dismissed".

4. In the appeal of assessee, it was the contention that the reopening of assessment after completion of scrutiny on the issues which were verified by the AO is nothing but change of opinion and the counsel for assessee relied on the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd (2010) [320 ITR 561]. Further, referring to the order of the CIT(A), it was submitted that the order of the CIT(A) concluded wrongly while accepting that there is no basis for forming a reason to believe as the orders of the CIT(A) for AY. 2006-07 were set aside by the ITAT.

5. After considering the rival contention, we are of the opinion that Ld.CIT(A) instead of agreeing with assessee on the grounds and allowing the grounds, in our view has wrongly confirmed the order and dismissed the ground. It is true that this issue has been examined in earlier years and also in the impugned assessment year at the time of original assessment. Not only that, Ld.CIT(A) herself has allowed the grounds of assessee on merits which the Revenue is contesting. Since the very basis for reopening the assessment is based on the information already on record and since this was already examined by the AO in the regular proceedings u/s. 143(3), we are of the opinion that the reopening of assessment is not based on any tangible material but only on the change of opinion on the existing material, for which the AO has no power to do so. The principles laid down by the Hon'ble Supreme Court clearly applies to the facts of the case. Therefore, we modify the order of the CIT(A) and allow the grounds of assessee. In a way this issue is also academic since Ld. CIT(A) allowed the assessee contentions on merit.

6. Coming to the grounds of Revenue, Revenue is aggrieved on allowing depreciation on technical know-how and DMFs by the Ld.CIT(A). The order of the CIT(A) is elaborate on the issue and held as under:

“5.3 I have carefully considered the facts of the case and the assessment order. The AO has disallowed the depreciation of Rs. 17,27,96,203/- claimed by the appellant on intangible assets with a reason that by following assessment order for the AY. 2006-07 passed u/s 143(3) rws 263 wherein provisions of Explanation 3 of Section 43(1) of the I.T.Act, 1961 and adopted the value of DMFs and

Technical know-how as Nil in the hands of the assessee company stating that M/s Matrix Laboratories Ltd., is merely imparting/sharing its special knowledge and experience in the file of manufacturing, marketing, selling and distribution of the ARVs only without actual alienation of the property/rights in the DMFs and Technical know-how. In this regard, the appellant's submissions are verified and found strength in the appellant's submissions. The appellant paid this amount to M/s Mylan Laboratories Ltd., and this was already disclosed in their books of accounts. Further, the order of 263 for the AY. 2006-07 was quashed by the Hon'ble ITAT vide its order in ITA No.1306/Hyd/2014 dated 20-01-2015. For the A.Yrs. 2009-10 and 2010-11, the Hon'ble ITAT vide order dated 08-05-2015, held as under:

"The issue involved in this appeal of the assessee is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2009-10 rendered vide its order dated 25-03-2015 passed in ITA No.234/Hyd/2014. A copy of the said order is placed on record before us and perusal of the same shows that the order passed by the learned CIT u/s. 263 for A.Y. 2006-07 on this issue was set aside by the Tribunal vide order dated 16-01-2015 passed in ITA No.840/Hyd/2012 and consequential order passed by the AO u/s 143(3) read with section 263 was also treated by the Tribunal as non-est in the eye of Law vide its order dated 20-01-2015 passed in ITA No. 1306/Hyd/2014. Taking note of these developments, the Tribunal vide order dated 25-03-2015(supra) in ITA No.234/Hyd/2014, deleted the similar disallowance made by the AO on account of assessee's claim for depreciation on intangible assets vide paragraph No.3 which reads as under:

"3. At the outset both the Counsels agreed that the issues are covered. As far as the issue of depreciation contested in assessee's appeal is concerned, the ITAT vide its order in ITA No. 840/Hyd/2012 for A.Y. 2006-07 dated 16-01-2015 has not upheld the proceedings u/s 263. Consequently, assessee's claim of depreciation becomes eligible as it is an intangible asset on which assessee has claimed depreciation on WDV. In view of this, we direct the AO to allow the depreciation as claimed as it is only a consequential claim to the claims in earlier years".

8.1 The issue involved in the appeal of the assessee for the A.Y. 2010-11 thus is squarely covered in favour of the assessee by the decision of the Coordinate Bench of this Tribunal rendered vide order dated 25-03-2015(supra) for A.y. 2009-10 and respectfully following the same, we direct the AO to delete the disallowance 9,71,97,865/- on intangible assets. Assessee's appeal is accordingly allowed".

7. After considering the arguments of the Ld.DR and Ld.AR, we are of the opinion that there is no need to differ from the order of the Ld.CIT(A). Since the Ld.CIT(A) followed the Co-ordinate Bench decision, we hereby uphold the same and reject the grounds of Revenue.

8. In the result, the appeal of Assessee is allowed and the appeal of Revenue is dismissed.

Order pronounced in the open court on 27th April, 2018

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 27th April, 2018

TNMM

Copy to :

- 1. Mylan Laboratories Ltd., (being the amalgamated company of Astrix Laboratories Limited), Plot No. 564/A/22, Road No. 92, Jubilee Hills, Hyderabad.*
- 2. The Dy. Commissioner of Income Tax, Circle-16(2), Hyderabad.*
- 3. CIT(Appeals)-4, Hyderabad.*
- 4. Pr.CIT-4, Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*