

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SHRI G.D. AGARWAL, VICE PRESIDENT  
&  
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.2728/Del/2015  
Assessment Year: 2007-08**

National Small Industries Corpn., Vs ACIT, Circle 16(1),  
NSIC Bhavan, Okhla Indl. Estate, New Delhi.  
Phase-III, New Delhi.  
PAN: AAAC0686N

**Assessee by: Shri M.P. Rastogi, Advocate  
Revenue by: Ms Ashima Neb, Sr. DR**

**Date of Hearing 29.4.2019  
Date of Pronouncement .4.2019**

**ORDER**

**PER K. NARASIMHA CHARY, JM**

Challenging the order dated 3.2.2015 in Appeal No.102/13-14 passed by the Id. Commissioner of Income-tax(Appeals)-IX, New Delhi (for short 'Ld. CIT(A)'), assessee preferred this appeal.

2. Brief facts of the case are that the assessee is a PSU specially formed more than five decades ago for promoting the growth of micro, small and medium industries in India. The company receives specific grants from the central and state governments as well as foreign governments with directions for their use and return of unspent amounts if any. The assessee, therefore, has two types of accounts – one for its

commercial activities and the other promotional activities which are properly disclosed in the accounts. For the Asstt. Year 2007-08, the assessment u/s 143(3) of the Income-tax Act, 1961 (“the Act”) was done by order dated 23.12.2009 and subsequently, in view of audit objection, learned AO proposed to reopen the assessment by issuance of notice u/s 148 of the Act. It is noted in the said notice, on a perusal of record, it was revealed that as per Schedule XIII of the Profit & Loss Account, the assessee received Rs.2950.70 lakhs grant from Government of India for promotional activities out of which a sum of Rs.2463.64 lacs was spent on promotional activities but the learned AO allowed the amount of Rs.487.06 lakhs which was surplus of the grant which resulted in the under assessment of income and short levy of tax of Rs.163.94 lacs.

3. Learned AO reopened the proceedings and made an addition of Rs.487.06 lacs.

4. On appeal, learned CIT(A) upheld the assessment and dismissed the appeal. Hence, the assessee is before us challenging the reopening proceedings as well as the quantum addition.

5. In so far as the challenge to the reopening of proceedings is concerned, it is the submission of the learned AR that audit report is only a piece of information and the learned AO should have applied his mind to the same and the reopening of the proceedings solely basing on the audit report is bad in law.

6. The next contention of the learned AR is that during the assessment proceedings learned AO verified all the particulars involved in the present addition and having satisfied with the correctness of the

claim of the assessee, he allowed the same, and inasmuch as the learned AO verified all the necessary particulars at the time of original assessment, the reasons recorded by the learned AO amounts to change of opinion and in view of the decision of the Hon'ble Supreme Court in the case of Kelvinator India Ltd. (2010) 320 ITR 561, does not permissible under law.

7. Per contra, ld. DR submitted that in view of the decision of Hon'ble Apex Court in the case of CIT vs. P.V.S. Beedies P. Ltd., 237 ITR 13 (SC), reopening of the case on the basis of a factual error pointed out by the audit report is permissible under law. She drew our attention to the fact that out of total grant of Rs.2950.70 lacs, assessee spent only Rs.2463.64 lacs leaving a surplus of Rs.487.06 lacs and it missed the attention of the learned AO and, therefore, this factual error pointed out by the audit party is an acceptable basis for reopening of the assessment.

8. Coming to other limb of the contention, the assessee brought to our notice that in the original assessment order dated 23.12.2009, vide paragraph 5, learned AO considered the financials of the assessee including Schedule VIII "amount payable to Government of India against the surplus in grant". Learned AR submitted that in Schedule VIII, it is clearly shown that a sum of Rs.12,76,17,763/- was the surplus in respect of certain grants and Rs.25,24,759/- was the deficit in respect of certain grants which were brought forward from the previous year whereas a sum of Rs.18,27,65,347/- was the surplus and Rs.89,65,882/- was the deficit that was carried forward from the Financial Year 2006-07. After noticing and examining these figures, ld. AO disallowed a sum of Rs.26,92,243/- towards the international cooperation, modernization

and technology up gradation. He, therefore, submitted that when once the learned AO examined all these aspects at the time of original assessment and had taken a conscious decision in respect of the treatment given to the surplus, it is not open for the revenue to make any addition on that ground by reopening the matter. Ld. AR placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of Honda Siel Power Products Ltd., WP(Civil)No.9036 of 2007 in support of his contention.

9. Per contra, ld. DR submitted that vide para 5 of the order dated 23.12.2009, ld. AO considered only the question of the allowability of the expense on the ground whether it was wholly and exclusively incurred for the purpose of business or not and the treatment of the surplus was not considered by the learned AO.

10. It is the further submission of the learned DR that in respect of other years, for example, as is stated in the letter dated 13.12.2016 by the assessee in respect of Asstt. Year 2014-15, the unspent grant-wise amount was allowed by the learned AO as shown in the balance sheet since such amounts were shown as liability and were not appropriated to profits/reserves and surplus.

11. On this aspect, the submission of the learned AR is that there is consistency in the accounting practice of the assessee and even for the AY 2007-08 also, the amounts were shown as liability in the balance sheet and they are not appropriated by routing them through profit and loss account. He, therefore, invited our attention to the balance sheet of the assessee on 31.3.2007 to show that a sum of Rs.17,37,99,467/- was

shown as the net liability on account of amounts payable to Government of India for surplus in grants.

12. We have gone through the record in the light of the submissions on either side. First coming to the issue of reopening, what is noted by the audit party vide memo dated 15.9.2010 was that the audit scrutiny revealed that as per Schedule XIII of the profit and loss account, the assessee received a sum of Rs.2950.70 lacs grant from Government of India for promotional activities, out of which an amount of Rs.2463.64 lacs was spent leaving behind a surplus of Rs.487.06 lacs which was allowed by the Id. AO resulting in the under assessment of income and short levy of tax. Undoubtedly, this is a factual aspect and in view of the decision of the Hon'ble Apex Court in the case PVS Beedies P. Ltd. (supra), reopening of the case on the basis of factual error pointed out by the audit party is permissible under law. For this purpose, it is irrelevant to consider at this stage the other contentions of the assessee that this aspect was considered by the learned AO at the time of the original assessment. It could be considered at a later point of this order. We, therefore, hold that there is nothing improper for the learned AO to reopen the case on the basis of the factual error pointed out by the audit party.

13. Turning to the other contentions of the assessee and merits of the case as to the reopening, on a perusal of Schedule VIII and amount payable to Government of India against surplus in grants, we find that the assessee had revealed the grants received for various promotional schemes from Government of India during the year under consideration alongside the balance brought forward from the previous year, amount

spent during the year and the amount carried forward to the next year. On a consideration of this statement, the Id. AO had taken a conscious decision that a sum of Rs.26,92,243/- in respect of the international cooperation, modernization and technology up gradation had to be disallowed. It does not inspire confidence in our mind to believe that the Id. AO did not apply his mind to the purport of the statement wherein it is clearly stated that the unspent surplus/deficit from the earlier year was carried forward to the year under consideration in the light of the fresh grants during the year and also that after spending certain amounts for promotional schemes, the assessee carried forward the surplus/deficit to the next year.

14. Further vide letter dated 19.10.2010 submitted to the AO in response to the notice dated 7.10.2010 referring to the audit report, the assessee clearly submitted that since the activity of promoting the small industries is not a profitable activity by itself, the Central and State Govt. Of India give grants to the assessee for the objective of promoting small industries. Sometimes Government of other countries also gives grants for the purpose. Assessee takes the grants received to the credit of the profit and loss account while the expenses are debited to it. It is submitted that the Government gives grants/subsidies to the assessee to be spent on specific purposes and manner with the condition that if not spent, the amount not spent has to be returned. Further, the assessee has to submit, for each grant, a utilization certificate duly certified by a chartered accountant giving the details of receipt and expenses and has to return/refund any amount not actually spent. There were a large number of grants given to the assessee, which is depicted in Profit and Loss account in Schedule XIII under the head "Government Grants" showing

grants received and spent”. It further gives in a separate “Income & Expenditure (Promotional) Account” showing the aggregate grants received/spent/incurred and the balance remaining at the year end. The break-up details of the remaining balances of each grant are also shown in it. Therefore, it is submitted that the amount of the grant not spent at the end of a year is a liability to the Government, which has to be returned to it and not a ‘profit’ which can be distributed as dividends to its shareholders.

15. It can be seen from the assessment orders for the other assessment years, Id. AO did not take such an objection and consistently allowed the claim of the assessee. In respect of Asstt. Year 2014-15, the assessee submitted to the Id. AO that since the assessee receives a large number of grants, it depicts the grant-wise detail about it alongwith the grant-wise amount outstanding to be spent or refunded as on the balance sheet date in a separate Note 9A- as a liability and it is not appropriated to Profits/Reserves and Surplus.

16. The assessee also submitted that the unpaid or unutilized grant as remained on the last date of the accounting year is shown as a liability owed to the Government and when in subsequent year the same is utilized/consumed, the corresponding entry is passed in the profit and loss account by debit and credit thereof.

17. On a perusal of the balance sheet of the assessee which is incorporated at page No.2 in the paper book, we find that in respect of Asstt. year 2007-08 also, the assessee did not appropriate the surplus amount to the profits or reserves and on the other hand, shown as current liability under the head “Amount payable to Govt. of India for Surplus in

Grants note”. Even otherwise also, Schedule VIII at page no.6 of the paper book is not disputed by the learned DR wherein third column relates to the balance of deficit/surplus brought forward from the previous year and the last column relates to the deficit/surplus as on 31.3.2007 which clearly shows that in a routine manner the assessee has been disclosing these aspects and bringing them consistently to the notice of the learned AO whenever they are called for the explanation. But for this particular year under consideration, that too by way of reopening of assessment, learned AO has consistently been accepting the claim of the assessee.

18. In view of this factual situation adverted to above, we are not convinced with the argument of the learned DR that in respect of this particular year under consideration, the surplus/deficit was appropriated to Profit/Reserves and Surplus. In the original assessment proceedings for this year, learned AO considered the aspect as to whether or not the expense of Rs.26,92,243/- relating to the international cooperation, modernization and technology up-gradation was “wholly and exclusively” for the propose of business. We find it difficult to believe that there was no occasion for the learned AO to consider the treatment given to the surplus/deficit the information in respect of which is emanating from this schedule 8.

19. We are, therefore, of the considered opinion that there is consistency in the approach of the ld. AO in the treatment given to the surplus/deficit out of the grants for promotional purposes and this consistency shows that this aspect was considered by the ld. AO during the original assessment proceedings. It is, therefore, clear that the

reasons recorded by the ld. AO show no valid reason than the change of opinion in respect of the stand taken in the original assessment proceedings.

20. It is the settled principle of law laid down by the Hon'ble Apex Court in the case of CIT vs Kelvinator India Ltd. (supra), that mere change of opinion cannot per se be a reason to reopen and for such purpose, the learned AO has no power to review the earlier assessment. We further hold that when the fundamental facts permeating through all these years as to the treatment of surplus/deficit out of the grants for various promotional schemes by the Government of India remain the same, ld. AO is not justified to take an inconsistent stand for this particular year under the guise of proceedings under Section 147 in view of the decision in the case of Radhasoami Satsang, 193 ITR 321 (SC).

21. Viewing from any angle, we do not find any justification for the addition made by the learned AO or to sustain the orders of the orders of the authorities below. We accordingly, while allowing the appeal of the assessee, delete the addition.

22. In the result, appeal of the assessee is allowed.

**Order pronounced in the Open Court on 13<sup>th</sup> May, 2019.**

**Sd/-**  
**(G.D. AGARWAL)**  
**VICE PRESIDENT**  
Dated: 13<sup>th</sup> May, 2019  
VJ

**sd/-**  
**(K. NARASIMHA CHARY)**  
**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

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