

IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 4234 & 4235/MUM/2005

(Assessment Year : 1996-97 & 1997-98)

Bajaj Auto Limited,

Bajaj Bhavan, 226-Nariman Point,
Mumbai - 400021

..... Appellant

PAN : AAACB3370K

v/s

DCIT – 3(1)

Room No.607,
6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai – 400020
Maharashtra

..... Respondent

ITA No. 4325 & 4326/MUM/2005

(Assessment Year : 1996-97 & 1997-98)

DCIT – 3(1)

Room No.607,
6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai – 400020
Maharashtra

..... Appellant

v/s

Bajaj Auto Limited,

Bajaj Bhavan, 226-Nariman Point,
Mumbai – 400021

..... Respondent

PAN : AAACB3370K

Assessee by :Ms. Vasanti Patel and Charu Mittal

Revenue by :Shri Sunil A. Umap, CIT-DR

Date of Hearing – 07/11/2024

Date of Order - 11/11/2024

ORDER

PER BENCH

The present cross-appeals have been filed by the assessee and the Revenue challenging the separate impugned orders of even date 11/03/2005, passed under section 250 of the Income Tax Act. 1961 ("the Act") by the learned Commissioner of Income Tax (Appeals)-XXVII, Mumbai, ["*learned CIT(A)*"], for the assessment years 1996-97 and 1997-98.

2. Since the present cross-appeals pertain to the same assessee involving similar issues, therefore, these cross-appeals were heard together and are being decided by way of this consolidated order.

ITA No. 4234/Mum/2005 - Assessee's appeal – A.Y. 1996-97

3. In its appeal for the assessment year 1996-97, the assessee has raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the validity of the re-opening under section 148 of the Act.

2. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in declining to pass a judgement in respect of the action of the Assessing Officer in including excise duty and custom duty while valuing closing stock but allowing the same under section 43B, on the ground that the issue is academic.

3. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in holding that miscellaneous receipts amounting to Rs.48,77,54,342/- comprising of scrap sales, miscellaneous scrap sales and sundry sales, ought to be included in total turnover for the purpose of computing deduction under section 80HHC.

4. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in rejecting the appellant's claim that for the purpose of computation of 'indirect costs' in respect of traded goods exported as per section 80HHC(3)(b), those costs which have been

incurred for the purpose of manufacturing, having no connection with the trading activity carried on by the appellant, ought to be excluded.

5. On the facts and in the circumstances of the case and in law, the appellant submits that 'other expenses' included items that had not been allowed as a deduction in the assessment order and accordingly, in any case, the said items ought not to have been included as part of the indirect costs while computing 'indirect costs' attributable to the export of trading goods for the purpose of deduction under section 80HHC.

6. On the facts and in the circumstances of the case and in law, the appellant submits that while computing 'indirect costs' attributable to the export of trading goods for the purpose of deduction under section 80HHC, the Assessing Officer ought to be directed to exclude expenses attributable to other income and export incentives estimated at 10% thereof.

7. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer and holding that eligible profits for the purpose of deduction under sections 80HH and 80-IA have to be computed after excluding the following incomes:

<i>Particulars</i>	<i>Plant II (Deduction u/s. 80HH)</i>	<i>Plant III (Deduction u/s. 80-IA)</i>
<i>Other Miscellaneous Receipts</i>	<i>4,57,934</i>	<i>41,99,915</i>
<i>Duty Draw Back / Cash assistance</i>	<i>6,95,366</i>	<i>1,40,86,345</i>
<i>Penalty charges</i>	<i>2,200</i>	<i>48,600</i>
<i>Interest</i>		<i>3,123</i>

8. On the facts and in the circumstances of the case and in law, the appellant submits that if at all the aforesaid items are to be excluded then only the net interest and the net cost of raw materials, net of duty drawback received ought to be taken into account while computing the profits of the eligible undertakings. Similarly, recovery of cost through miscellaneous receipts ought to be taken into account while computing profits of the eligible undertakings.

9. On the facts and in the circumstances of the case and in law, the appellant submits that just as only income 'derived from' the undertaking is included in the profits for the purpose of computing deduction under sections 80HH and 80-IA, then, the same norm should also apply to expenditure and accordingly, expenditure which has no direct nexus with the undertaking ought not to be considered.

10. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in including a sum of Rs.4,75, 199/- being sundry credit balances written back under the provisions of section 41(1) of the Act."

4. In its appeal, the assessee has challenged the validity of the reopening of the assessment under section 147 of the Act and has also raised the grounds on merits challenged the additions made by the Assessing Officer ("AO"). Since the ground challenging the reopening of assessment under section 147 of the Act has raised jurisdictional issue, therefore the same is considered at the outset.

5. As far as the issue relating to the validity of reopening under section 147 of the Act, the brief facts are that for the year under consideration, the assessee filed its original return of income on 29/11/1996 declaring a total income of Rs. 356,88,30,030. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act along with a questionnaire were issued and served on the assessee. The AO vide order dated 23/03/1999 passed under section 143(3) of the Act assessed the total income of the assessee at Rs. 536,05,58,950, after making certain additions/disallowances.

6. Subsequently, after the expiry of 4 years from the end of the relevant assessment year, notice under section 148 of the Act was issued on 28/01/2003. In response to the aforesaid notice, the assessee filed its return of income on 27/02/2003. The AO vide order dated 26/02/2004 passed under section 143(3) r/w section 147 of the Act assessed the total income of the assessee at Rs. 337,59,37,850, after making certain additions/disallowances.

7. In its appeal before the learned CIT(A), the assessee, inter-alia, challenged the reopening of the assessment. However, the learned CIT(A), vide impugned order, dismissed the ground so raised by the assessee by observing as follows: -

"1.6 I have considered the facts of the case and I have also gone through the submissions made by the appellant. In the present, case, the Assessing officer is bound to supply the reasons recorded, if these are asked by the appellant. However, in view of the totality of the facts in the present case, I hold that the assessment was validly reopened and therefore the action of the Assessing Officer is upheld on this point."

Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned Authorised Representative ("*learned AR*"), at the outset, inter-alia, submitted that there is no allegation in the reasons recorded for initiating the reassessment proceedings that income has escaped assessment due to failure of the assessee to disclose fully and truly all material facts.

9. On the other hand, the learned Departmental Representative vehemently relied upon the orders passed by the lower authorities and submitted that proceedings under section 147 of the Act had correctly been initiated by the AO in the present case.

10. We have considered the submissions of both sides and perused the material available on record. In the present case, the return of income filed by the assessee was selected for scrutiny and assessment was concluded vide order passed under section 143(3) of the Act. However, after the expiry of 4 years from the end of the relevant assessment year, notice under

section 148 of the Act was issued to the assessee. While initiating the reassessment proceedings, the AO recorded the following reasons for reopening the assessment: -

"REASONS RECORDED FOR RE-OPENING OF ASSESSMENT

28.1.2003

1. On perusal of the records, it is seen that the excise duty amounting to Rs.432.95 lakhs and customs duty amounting to Rs. 602.17 lakhs was not provided for in valuing the closing stock. This should have been debited to the Profit & Loss Account on accrual basis. As it was deductible on actual payment basis, the said amount not paid to the government account should have been added to arrive at the total income of the assessee. Omission to do so has resulted in under-assessment of Rs. 1035.12 lakhs.

2. The assessee has paid an amount of Rs. 72 lakhs towards commission and incurred an amount of Rs. 182.97 lakhs in foreign currency for other matters, an amount of Rs.304.72 lakhs on advertisement and publicity. Since these expenses are incurred outside India, the same is not allowable if the TDS on the same is not deducted. The allowability of such expenditure without deduction of TDS has resulted in under-assessment of Rs. 559.69 lakhs.

3. The assessee has claimed an amount of Rs.2,42,51,232/- representing prior period expenses. Since the assessee is following mercantile system of accounting, the same is not allowable. This resulted into under assessment of Rs.2,42,51,232/-.

4. The assessee has claimed an amount of Rs.21,02,60,774/- under section 80HH, an amount of Rs.39,92,36,999/- u/s. 80HHC, an amount of Rs.16,03,58,756/- u/s 80-IA. However, while computing the deductions the assessee has not reduced 90% of other income, 90% of technical know-how profits from trading goods. This resulted into excess deduction u/s. 80HH, 80HHC and 80-IA.

I have therefore reason to believe that income chargeable to tax has escaped assessment for A. Y. 1996-97 and therefore the assessment is required to be re-opened in view of Explanation 2 (c) to section 147."

11. As per the assessee, in the aforesaid reasons recorded by the AO there is no allegation of any failure on the part of the assessee to disclose truly and fully all material facts, which is a paramount condition for invoking reassessment proceedings under section 147 of the Act, after expiry of 4

years from the end of the relevant assessment year, in case where an assessment under section 143(3) of the Act has been made.

12. At this stage, it is relevant to analyse the provisions of the proviso to section 147 of the Act, as it stood during the year under consideration, which reads as follows: -

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

13. Thus, as per the proviso to section 147 of the Act, in a case where the assessment was completed under section 143(3), reassessment under section 147 can be done after the expiry of 4 years from the end of the relevant assessment year, only if income has escaped assessment (i) due to failure on the part of the assessee to make a return under section 139 or in response to the notice issued under section 142(1) or section 148; or (ii) due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. In the present case, from the facts, it is evident that assessment was completed in the case of the assessee under section 143(3) of the Act. Further, notice under section 148 of the Act was issued on 28/01/2003 i.e. beyond a period of 4 years from the end of the relevant assessment year i.e. 1996-97. Therefore, it needs to be examined whether the conditions prescribed in the proviso to section 147 of the Act are satisfied in the present case. There is no dispute that a return

of income was filed by the assessee under section 139(1) of the Act. Further, from the perusal of the reasons recorded for reopening the assessment, as noted above, we find that there is not even an allegation by the AO that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts.

14. In this regard, it is relevant to note the following observations of Hon'ble Jurisdictional High Court in Hindustan Lever Ltd vs R.B.Wadkar: [2004] 268 ITR 332 (Bom.): -

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

15. During the hearing, the learned AR also placed reliance on the decision in assessee's own case in Bajaj Auto Ltd. v/s DCIT, in ITA No. 3425/Mum./2005, etc., for the assessment years 1994-95 to 1995-96, wherein vide order dated 18/06/2009, the coordinate bench of the Tribunal set aside the reassessment proceedings on a similar basis following the afore-noted decision of the Hon'ble Jurisdictional High Court in Hindustan Lever Ltd (supra).

16. Therefore, respectfully following the aforesaid decision of the Hon'ble Jurisdictional High Court, we are of the considered view that reassessment proceedings initiated by the AO are not in conformity with the provisions of the proviso to section 147 of the Act, and thus, are bad in law. Therefore, the same is quashed. Consequently, the assessment order passed under section 143(3) read with section 147 of the Act is also quashed.

17. Since therelief has been granted to the assessee on the aforementioned jurisdictional aspect, the other grounds raised by the assessee in the present appeal on merits are rendered academic and therefore are left open.

18. In the result, the appeal by the assessee for the assessment year 1996-97 is allowed.

ITA No. 4325/Mum./2005 - Revenue's appeal – A.Y. 1996-97

19. In view of our decision rendered in assessee's appeal, the issues arising in Revenue's appeal have been rendered infructuous and therefore the same are dismissed.

20. In the result, the appeal by the Revenue for the assessment year 1996-97 is dismissed.

ITA No. 4235/Mum./2005 - Assessee's appeal – A.Y. 1997-98

21. In its appeal for the assessment year 1997-98, the assessee has raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law, the Commissioner of income tax (Appeals) erred in upholding thereopening under section 148 of the Act.

2. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in declining to pass a judgement in respect of the action of the Assessing Officer in including excise duty and custom duty while valuing closing stock but allowing the same under section 43B, on the ground that the issue is academic.

3. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in including a sum of Rs.23,71,572/- being sundry credit balances written back under the provisions of section 41(1) of the Act.

4. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in holding that miscellaneous receipts amounting to Rs.50,78,91,907/- comprising of scrap sales, miscellaneous scrap sales and sundry sales, ought to be included in total turnover for the purpose of computing deduction under section 80HHC.

5. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in rejecting the appellant's claim that for the purpose of computation of 'indirect costs' in respect of traded goods exported as per section 80HHC(3)(b), those costs which have been incurred for the purpose of manufacturing, having no connection with the trading activity carried on by the appellant, ought to be excluded.

6. On the facts and in the circumstances of the case and in law, the appellant submits that 'other expenses' included items that had not been allowed as a deduction in the assessment order and accordingly, in any case, the said items ought not to have been included as part of the indirect costs while computing 'indirect costs' attributable to the export of trading goods for the purpose of deduction under section 80HHC.

7. On the facts and in the circumstances of the case and in law, the appellant submits that while computing 'indirect costs' attributable to the export of trading goods for the purpose of deduction under section 80HHC, the Assessing Officer ought to be directed to exclude expenses attributable to other income and export incentives estimated at 10% thereof.

8. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer and holding that eligible profits for the purpose of deduction under sections 80HH and 80-IA have to be computed after excluding the following incomes:

<i>Particulars</i>	<i>Plant II (Deduction u/s. 80HH)</i>	<i>Plant III (Deduction u/s. 80-IA)</i>
<i>Other Miscellaneous Receipts</i>	5,04,772	46,23,581
<i>Duty Draw Back / Cash assistance</i>	2,360	17,66,412,
<i>Penalty charges</i>	29,419	17,627
<i>Interest</i>	14,673	1,10,074

9. On the facts and in the circumstances of the case and in law, the appellant submits that if at all the aforesaid items are to be excluded then only the net interest and the net cost of raw materials, net of duty drawback received ought to be taken into account while computing the profits of the eligible undertakings. Similarly, recovery of cost through miscellaneous receipts ought to be taken into account while computing profits of the eligible undertakings.

10. On the facts and in the circumstances of the case and in law, the appellant submits that just as only income 'derived from' the undertaking is included in the profits for the purpose of computing deduction under sections 80HH and 80-IA, then, the same norm should also apply to expenditure and accordingly, expenditure which has no direct nexus with the undertaking ought not to be considered."

22. Similar to its appeal for the assessment year 1996-97, the assessee in the present appeal has challenged the validity of the reopening of the assessment under section 147 of the Act and has also raised the grounds on merits challenged the additions made by the Assessing Officer ("AO"). Since the ground challenging the reopening of assessment under section 147 of the Act has raised jurisdictional issue, therefore the same is considered at the outset.

23. At the outset, we find that there is no allegation in the reasons recorded for initiating the reassessment proceedings for the assessment year 1997-98 that the income has escaped assessment due to the failure of the assessee to disclose fully and truly all material facts. The reasons recorded by the AO for reopening the assessment are reproduced as follows:

"REASONS RECORDED FOR RE-OPENING OF ASSESSMENT

1. On perusal of the records, it is seen that the excise duty amounting to Rs.748.88 lakhs and customs duty amounting to Rs.235.69 lakhs was not provided for in valuing the closing stock. This should have been debited to the Profit & Loss Account on accrual basis. As it was deductible on actual payment basis, the said amount not paid to the government account should have been added to arrive at the total income of the assessee. Omission to do so has resulted in under-assessment of Rs. 984.57 lakhs.

2. The assessee has paid an amount of Rs. 88.50 lakhs towards commission and incurred an amount of Rs. 220.21 lakhs in foreign currency for other matters, an amount of Rs. 106.33 lakhs on advertisement and publicity. Since these expenses are incurred outside India, the same is not allowable if the TDS on the same is not deducted. The allowability of such expenditure without deduction of TDS has resulted in under-assessment of Rs.714.59 lakhs.

3. While computing the deduction u/s 80HHC, 90% of interest amounting to Rs.98,50,47,927/- was reduced instead of 90% of Rs. 107,90,65,119/-, which is actually credited to the Profit & Loss Account. This resulted into under-assessment of Rs.39,15,250/-.

4. The assessee has claimed an amount of Rs.86,86,887/- representing prior period expenses. Since the assessee is following mercantile system of accounting, the same is not allowable. This resulted into under assessment of Rs. 86,86,887/-.

5. The assessee has claimed an amount of Rs.27,26,49,511/- under section 80HH, an amount of Rs.26,12,91,607/- u/s. 80HHC, an amount of Rs.16,85,96,335/- u/s 80-IA. However, while computing the deductions, the assessee has not reduced 90% of other income and profits from trading goods. This resulted into excess deduction u/s. 80HH, 80HHC and 80-TA.

I have therefore reason to believe that income chargeable to tax has escaped assessment for A.Y. 1997-98 and therefore the assessment is required to be re-opened in view of Explanation 2 (c) to section 147."

24. From the facts, it is further evident that assessment was completed in the case of the assessee under section 143(3) of the Act vide order dated 10/03/2000. Further, notice under section 148 of the Act was issued on 28/01/2003 i.e. beyond a period of 4 years from the end of the relevant assessment year i.e. 1997-98. There is also no dispute that a return of income was filed by the assessee under section 139(1) of the Act. Thus, we are of the considered view that our conclusion/findings as rendered in assessee's appeal for the assessment year 1996-97 shall be applicable *mutatis mutandis* to the present appeal.

25. Therefore, we are of the considered view that reassessment proceedings initiated by the AO are not in conformity with the provisions of the proviso to section 147 of the Act, and thus, are bad in law. Thus, the same is quashed. Consequently, the assessment order passed under section 143(3) read with section 147 of the Act is also quashed.

26. Since therelief has been granted to the assessee on the aforementioned jurisdictional aspect, the other grounds raised by the assessee in the present appeal on merits are rendered academic and therefore are left open.

27. In the result, the appeal by the assessee for the assessment year 1997-98 is allowed.

ITA No. 4326/Mum./2005 - Revenue's appeal – A.Y. 1997-98

28. In view of our decision rendered in assessee's appeal, the issues arising in Revenue's appeal have been rendered infructuous and therefore the same are dismissed.

29. In the result, the appeal by the Revenue for the assessment year 1997-98 is dismissed.

30. To sum up, the appeals by the assessee for the assessment years 1996-97 and 1997-98 are allowed, while the appeals by the Revenue are dismissed.

Order pronounced in the open Court on 11/11/2024

Sd/-
OM PRAKASHKANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 11/11/2024

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai