

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जी', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य, एवं, राम लाल नेगी न्यायिक सदस्य के समक्ष ।

BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No.26/Mum/2012

(निर्धारण वर्ष / Assessment Year: 2004-05)

Tower Watson India Pvt. Ltd. (Formerly Watson Wyatt India Pvt. Ltd.) Solitaire Corporate Park, Bldg. No. 5, 1 st Floor, Andheri Kurla Road, Andheri (E), Mumbai- 400 093.	Vs.	The Dy. CIT Range 8(3), Aayakar Bhavan, M.K.Road, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG2955K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./ITA No.4523/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2007-08)

Tower Watson India Pvt. Ltd. (Formerly Watson Wyatt India Pvt. Ltd.) Solitaire Corporate Park, Bldg. No. 5, 1 st Floor, Andheri Kurla Road, Andheri (E), Mumbai- 400 093.	Vs.	The Dy. CIT Range 8(3), Aayakar Bhavan, M.K.Road, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG2955K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारित की ओर से / Assessee by : Shri. M.Subramanian
राजस्व की ओर से / Revenue by : Shri. O.P.Meena

सुनवाई की तारीख / **Date of Hearing** : **17/08/2016**
घोषणा की तारीख/**Date of Pronouncement** **16/11/2016**

आदेश / O R D E R

PER RAM LAL NEGI, JM

These two appeals have been preferred by the assessee against order dated 31/10/2011 and 17/04/2013 passed by the Ld. CIT(A)-18 Mumbai, pertaining to the Asst. years 2004-05 & 2007-08 respectively, whereby the Ld. CIT(A) dismissed the appeals filed by the assessee against assessment orders. Since both the appeals pertain to the same assessee and the issues involved are common, the same were clubbed and heard together and are being disposed of by this common order for the sake of convenience.

ITA No. 26/M/2012 A.Y. 2004-05

2. Brief facts of the case are that the appellant company engaged in the business of Consultancy Services in Human Resources Development, filed its return of income for the relevant A.Y. declaring a loss of Rs. 2,09,45,426/-after claiming deduction of Rs. 1,28,86,816/-as unrealized Foreign Exchange gain. The case was scrutinized u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act'), assessing the loss of Rs 1,73,55,454/-. The assessee preferred appeal before the first appellate authority against the said order which was partly allowed. The department filed appeal against the order passed by the first appellate authority on the issue of disallowance of bad debts of Rs. 8,62,631/-u/s 36(1)(vii), however, the department's appeal was dismissed by the ITAT vide its order dated 22/06/2009. The assessment was thereafter reopened after recording the following reasons:-

“On verification of case records, it was observed that the assessee has accounted gain of Rs. 1,28,86,816/- on account of foreign exchange fluctuation. However in the computation the same has been claimed as deduction as the same was not realized. Since gain on account of foreign exchange fluctuation is accounted in the books following accepted accounting principles on accrual basis, the same is taxable as revenue income. It has been stated that gains or losses arising out of fluctuation in foreign exchange is accounted for on actual payment/realization. Also foreign exchange gain has been reduced from loan liability. Provision of Section 43A is also not applicable in this case as the gain/loss is on purchase of depreciation assets. The irregular allowance of deduction towards unrealized foreign exchange gain resulted in under assessment of income.”

3. Accordingly, notice u/s 148 of the Act was issued and the assessee was asked to file return of income within 31 days of the receipt of the notice. However, no return was filed in response to said notice. During the course of re-assessment proceedings, copy of reasons for reopening its case for assessment year 2004-05 was provided to the assessee company whereupon the company furnished its explanation. After taking into consideration the explanation of the assessee, the A.O relying on the various judgments of the Hon'ble Supreme Court and High Courts made addition of foreign exchange gain to the tune of Rs. 1,28,86,816/- to the income of the assessee company and determining the total income of the assessee at Rs. (-) 53,31,269/-.

4. The assessee filed appeal against the re-assessment order before the Ld. CIT(A), who after hearing the assessee dismissed the appeal and confirmed the findings of the A.O. The assessee has filed the present appeal against the impugned order passed by the Ld. CIT(A) on the following effective grounds:-

“1. The learned Commissioner of Income Tax (Appeals)-18 has erred in not allowing our appeal for wrongly reopening the assessment proceedings u/s 147 of IT Act, 1961 by the Assessing Officer.

2. The learned Commissioner of Income Tax (Appeals)-18, Mumbai has erred and has failed to consider our submissions. The

Unrealized Foreign exchange gain of Rs. 1,28,83,816/- has been wrongly added to the Income for the Financial Year 2003-04 (Asst. Year 2004-05).”

5. Before us the Ld. Counsel for the assessee submitted that reopening of present case is bad in law as the original assessment was completed after examining the issue regarding unrealized foreign exchange gain. Specific query in this regard was raised during the assessment proceedings and reply thereto was submitted accordingly. Relying on the ratio laid down by the Hon'ble Delhi High Court in *Kelvinator of India Ltd., 256 ITR 1 (Del)* the Ld. Counsel submitted that reassessment proceedings cannot be initiated on a mere change of opinion, completed assessment can be reopened only when there is a tangible material available with the AO to form a belief that taxable income has escaped assessment and that the reasons recorded in this case do not indicate application of mind and reason to believe that income escaping assessment which are the basic elements required for reopening of assessment order. The Ld. Counsel further submitted that unutilized Foreign Gain/loss is basically a notional gain/loss on revaluation of foreign loan taken, Foreign Debtors and Creditors on the date of Balance Sheet. The individual foreign loans, Foreign Debtors and Creditors are not affected by this notional gain/loss. The assessee company has been following a consistent method in all the assessment years. In AY 2001-02, AY 2002-03 and AY 2005-06, when there was an unrealized foreign exchange loss, the company did not treat the same as expense. Accordingly, in the AYs 2003-04 and 2004-05, when there was an unrealized foreign exchange gain, the company did not consider the same as income. Since the loss has not been considered as expense, the gain cannot be considered as income. The loss or gain is notional and not real therefore, the same could not be added to the income of the assessee.

6. On the other hand the Ld. DR relying on the findings of the Ld. CIT(A) submitted that principal of estoppel is not applicable to the proceedings under Income Tax Act and the A.O has rightly reopened the assessment. Since the Ld. CIT(A) has confirmed the action of the AO in accordance with the ratio laid down by the Hon'ble Supreme Court in *CIT vs. Woodward Governor India Pvt. (2009) 312 ITR 254 (SC)*, the order under challenge is neither illegal nor beyond jurisdiction.

7. We have heard the rival submissions and also perused the documents on record including the cases relied upon by the parties in support of their respective contentions. We notice that during the original assessment proceedings u/s 143(3) of the Act., the A.O asked the assessee to furnish details regarding foreign exchange loss vide letter dated 28th July 2006 (Para 21 item 14). In response thereof the assessee furnished the details of unrealized foreign exchange gain (unrealized) for the A.Y. 2004-05 as annexure 14 to letter dated 25.9.2006. We further notice that the assessee company has been following a consistent method. In AYs 2001-02, 2002-03 and 2005-06 when there was an unrealized foreign exchange loss, the company did not consider the same as expense and in the AYs 2003-04 and 2004-05 when there was an unrealized foreign exchange gain the company did not treat the same as income. The foreign exchange loss for the AYs 2001-02, 2002-03 and 2005-06 were disallowed by the assessee in the computation of income and the same were reversed on the first day of next financial year. Similarly, there was unrealized foreign exchange gain for the AY 2003-04 which was not considered as income in the computation of income. The issue regarding foreign exchange gain/loss was not raised by the AO in all these years and the assessment orders were passed u/s 143(3) of the Act.

8. From the contents of reasons for reopening of assessment order it can be inferred that the A.O has changed his opinion after passing original

assessment order. As per the provisions of the Act, the AO can reassess the income which has escaped assessment to re-compute the loss or the depreciation allowance or any other allowance if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year subject to the provisions of section 148 to 153 of the Act. In the light of the aforesaid provisions it can be said that discovery of new and important matter or knowledge of fresh facts which were not available at the time of original assessment would constitute reason to believe that any income chargeable to tax has escaped. But in the present case since no new material has come on record or no new information has been received. So, the action of the AO is not based on 'reason to believe' within the meaning of section 147 of the Act. Therefore, it amounts to mere fresh application of mind to the same set of facts or mere change of opinion which does not provide jurisdiction to the AO to initiate proceedings under section 147 of the Act.

9. In *M.J. Pharmaceuticals Ltd. Vs DCIT (2008) 297 ITR 119* the Hon'ble jurisdictional High Court has held that when the question as to whether for determining total income under section 115JB of the Act, the book profit has to be increased by the amount of provision for deferred taxation made by the assessee in P&L account, was specifically raised by the AO at the time of assessment proceedings and the AO passed the assessment order accepting the explanation given by the assessee, the said assessment cannot be reopened for considering the very same issue unless the AO has some material to form the opinion that income chargeable to tax has escaped assessment. In *Kelvinator of India Ltd., 256 ITR 1 (Del)* the Hon'ble Delhi High Court has held that reassessment proceedings cannot be initiated on a mere change of opinion and completed assessment can be reopened only when there is a tangible material available with the AO to form a belief that taxable income has escaped assessment. In the present case, since the AO has passed the assessment order taking into consideration the explanation of the assessee regarding

unrealized foreign exchange gain in question, it can be concluded that reopening is not based on the reason to believe within the meaning of section 147 of the Act. In view of the ratio laid down by the Hon'ble Supreme Court and High Court discussed, we are of the considered opinion the action of AO is illegal and not sustainable under law. Hence, the same is declared void. Since the assessment order itself is not sustainable in law, the question of confirmation of the said order by the Ld. CIT(A) does not arise. We, therefore, set aside the impugned order passed by the Ld. CIT(A) and allow the first ground of appeal of the assessee. Since, we have allowed the first ground of the appeal, we do not consider it necessary to decide ground No 2 of the appeal on merits.

ITA No. 4523/M/2013 A.Y. 2007-08

The facts of the case and the issues involved in the present case are identical to the case of the assessee for the assessment year 2004-05 aforesaid (except the amount involved) and since we have decided the identical issue in favour of the assessee, we also allow the present appeal of the assessee on the same reasoning.

In the result, the assessee's appeal for the assessment year 2004-05 and 2007-08 are allowed.

Order pronounced in the open court on 16th November, 2016

Sd/-
(RAJENDRA)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 16/11/2016

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**

Pramila