IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'G' MUMBAI

ITA No.2672/Mum/2009
Assessment Year: 2002-2003

GIVAUDAN FLAVOURS INDIA PVT LTD
(FORMERLY QUEST INDIA INTERNATIONAL PVT LTD)
401, AKRUTI CENTER POINT, MIDC CENTRAL ROAD
MIDC ANDHERI EAST, MUMBAI-400093
PAN NO:AAACL1013D

Vs

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-1(3), MUMBAI

ITA No.3324/Mum/2009
Assessment Year: 2002-2003

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-1(3), MUMBAI

Vs

GIVAUDAN FLAVOURS INDIA PVT LTD
(FORMERLY QUEST INDIA INTERNATIONAL PVT LTD)
401, AKRUTI CENTER POINT, MIDC CENTRAL ROAD
MIDC ANDHERI EAST, MUMBAI-400093
PAN NO:AAACL1013D

Pramod Kumar, AM and V Durga Rao, JM

Dated: March 7, 2011

Appellants Rep by: Kanchan Kaushal, Danesh Babana, Shital Bandekar
Respondent Rep by: Pavan Ved

ORDER

Per: Pramod Kumar:

1. These cross appeals are directed against the order dated 23rd January 2008, passed by the CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2002-03.

2. The assessee has filed an application for admittance of an additional ground of appeal. It is submitted that this issue may be taken up first, because in the event of this additional ground of appeal being admitted, and being decided in favour of the assessee, all other grievances raised in the cross appeals will be rendered

infructuous. We will, therefore, begin by taking up assessee's plea for admission of additional ground of appeal.

3. In the additional ground of appeal filed by the assessee, following grievance is raised:

On the facts and in the circumstances of the case and in law, the learned Assessing Officer has legally erred in assuming jurisdiction under section 147 of the Income Tax Act, 1961.

4. It is submitted that the additional ground of appeal pertains to a purely legal ground and all the material facts, necessary for its disposal, are already on record. It is not disputed that this grievance was not raised before the authorities below but reliance is placed on Hon'ble Bombay High Court's judgment in the case of *Inventors Industrial Corporation Ltd Vs CIT (194 ITR 548)* in support of the proposition that "a ground by which the jurisdiction to make assessment itself is challenged can be urged before any of the authority for the first time". A reference is also made to Hon'ble Gujarat High Court's judgment in the case of *PV Doshi Vs CIT (113 ITR 22)* in support of the same legal stand. It is contended that, as held by Hon'ble Supreme Court in the case of *NTPC Vs CIT (229 ITR 383)* the powers of the Tribunal are not really confined to the issues arising out of order of the CIT(A) but also to the questions of law arising from facts which are already on record. It is submitted that we should admit the additional ground of appeal and dispose of the same on merits. Learned Departmental Representative, on the other hand, submits that the assessee had all the opportunities to raise this grievance before the Assessing Officer and before the CIT(A) but he has bypassed these forums and approach the Tribunal directly. It is submitted that while Tribunal may indeed have powers to admit an additional ground of appeal, but there have to be good reasons for assesse not raising such a grievance before the first appellate authority. We are urged to reject the additional ground of appeal.

5. Having regard to the rival submissions and having perused the material on record, we are inclined to admit the additional ground of appeal since, as assessee rightly contends, it is a pure question of law challenging the very assumption of jurisdiction to pass impugned order and merely because the assessee did not raise this grievance earlier the assessee cannot be prevented from raising this grievance now. In view of these facts, and in view if the law laid down by Hon'ble Supreme Court in NTPC's case (supra), we admit the additional ground of appeal and proceed to deal with the same.

6. The relevant material facts are like this. In this case, the original assessment under section 143(3) was completed on 29th March 2005. However, the assessee was served a reassessment notice under section 148 on 30th March 2007. When assessee required the Assessing Officer to provide reasons for so reopening the assessment, the assessee was informed, vide letter dated 1st May 2007, following reasons for reopening the assessment under section 148:

The assessment of Quest International (India) Limited for AY 2002-03 was completed under section 143(3) on 29th March 2005 determining total income at Rs NIL under the normal provisions and Rs 9,22,68,000 under section 115JB of the Income Tax Act 1961.

Under the provisions of the Income Tax Act, not being in the nature of capital expenditure, laid out wholly and exclusively for the purpose of business is allowable while computing income under the head profits and gains of business.

During scrutiny assessment, income under the normal provisions of the Act was held as 'nil' after allowing current year's depreciation to the extent of Rs 14,48,00,987 and unabsorbed depreciation (current year) of Rs 3,07,57,548 was allowed to be carried forward.

It is seen that the assessee company has acquired the business, on going concern basis, from M/s Hindustan Lever Limited at a purchase consideration of Rs 10,300 lakhs. In addition to this, the assessee company has paid Rs 351.61 lakhs to M/s Hindustan Lever Limited as interest, on delayed payment of purchase consideration, for the period 1/4/01 to 28/6/1 and the interest paid is treated as revenue expenditure. As interest is on account of delayed payment of acquisition cost of ongoing concern, it should have been treated as capital expenditure.

As per the provisions of the Income Tax Act, the valuation of purchase of goods and sale of goods and inventory shall be inclusive of any tax, duty, cess actually paid by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

It is also seen from Annexure 13 to Tax Audit Report that the assessee company is following exclusive method of accounting for CENVAT/MOCVAT credit in the books of accounts and is also not considering for valuation of inventory. Further CENVAT credit unutilized is taken directly to balance sheet (asset side) under the head 'loans and advances'. The assessee company has unutilized credit of Rs 23,61,517 as on 31/3/2002.

As the unutilized CENVAT/MODVAT credit is available as irreversible credit available with the assessee on account of duty paid on raw material which in terms is a part of the profit/ income of the assessee as such and should have been considered while computing the taxable income.

I have, therefore, reasons to believe that income chargeable to tax in the case of the assessee for the assessment year 2002-03 has escaped assessment within the meanings of section 147 of the Income Tax Act, 1961.

7. Learned counsel submits that the above grounds of reopening the assessment are not good in law, and, therefore, a reopening of assessment, based on these grounds, cannot be sustained. He points out that as far as allowability of interest deduction is concerned, not only that the assessee had made full disclosure of all the material facts, but also specific questions were raised by the Assessing Officer which have been satisfactorily answered by the assessee. Our attention is invited to schedule 15 to the profit and loss account where interest paid on purchase consideration is shown exceptional item and proper disclosure is made in respect of the same. Our attention is also invited to notes on accounts, where disclosure about the interest payment and management fees payment to Hindustan Leaver Limited has been made. Learned counsel then invites our attention to the fact that, as evident from letter dated3rd March 2005, the Assessing Officer specifically requisitioned "nature and details of payment of management fees and interest" and required the assessee to furnish "copies of ledger account where these transactions are reflected". All these details

were duly furnished by the assessee, and copy of the submission was also placed before us at pages 91 to 98 of the paperbook. The fact that these submissions were placed before the Assessing Officer, during the original assessment proceedings, showed that the Assessing Officer applied his mind to all the relevant facts and yet did not make the disallowance. All this, according to the learned counsel, shows that the reopening of assessment is merely on account of change of opinion. It is submitted that a mere change of opinion of the Assessing Officer, on the same facts and without any new material coming to light, cannot justify the reassessment proceedings. It is pointed out that a reopening of assessment, for the aforesaid reason, is not sustainable in law. As regards the second issue, i.e adjustment on account of MODVAT/CENVAT in the valuation, it is submitted that the method followed by the assessee is tax neutral and, therefore, even if this method is incorrect, that error per se cannot be a valid reason for reopening the assessment. It is also submitted that all the related facts were put before the Assessing Officer, by way of disclosure in the income tax computation and attachments to the income tax return, as note. It is submitted that there is no new material before the Assessing Officer, and it is a simply case of change of mind by the Assessing Officer on the same set of facts and without any new material coming to the light. We are thus urged to quash the impugned reassessment order itself.

8. Learned Departmental Representative submits that merely because the assessee has filed certain details, it cannot be inferred that the Assessing Officer has taken a conscious decision on the same. He points out that there is nothing in the assessment order to indicate that the Assessing Officer has taken a decision in respect of any of the issues on which reassessment is reopened. It is submitted that when the Assessing Officer has not considered these aspects of the matter, it is clear that opinion has not been formed and when opinion is not formed, there cannot be any question of a change of opinion. According to learned Departmental Representative, a change of opinion presupposes an opinion having been formed but no opinion is formed on the issues on which reassessment proceedings are initiated. As for the question of CENVAT and MODVAT adjustment in valuation, learned Departmental Representative fairly accepts that there may be no tax implications of the same, and that he cannot demonstrate any, but he hastens to add that this aspect of the matter is not relevant at the stage of reopening the assessment where all that is to be seen is whether or not prima facie there is an escapement of income. All those aspects of the matter are relevant at the stage of framing the assessment order, and we need not be guided by those factors in the adjudication on correctness of reopening the assessment proceedings. We are thus urged to confirm the reopening of assessment and decline to interfere on this issue. In rejoinder, learned counsel for the assessee broadly reiterates his submissions.

9. Having regard to the rival submissions and having perused the material on record, we see merits in the plea of the assessee. As observed by Hon'ble Supreme Court in the case of *CIT Vs Kelvinator of India Ltd (320 ITR 561) =* ***(2010-TIOL-06-SC-IT)***, one has to give a schematic interpretation to the words "reason to believe" failing which, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. A reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as was contended on behalf of the Department before Hon'ble Supreme Court, in the garb of re-opening the assessment, review would take place which is not permissible under scheme of reassessment under the Income Tax Act. Their Lordships have observed that "One must treat the concept of "change of opinion" as an in-built test to check abuse of

power by the Assessing Officer" and, therefore, even after 1st April 1989n" Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment". As regards the question of interest disallowance, all the relevant facts were before the Assessing Officer, specific issued were raised during the original assessment proceedings and the submissions made by the assessee placed on record, and yet the Assessing Officer decided not to make any disallowance. There were no new facts before the Assessing Officer which could justify the reopening. On these facts, it was nothing more than change of mind by the Assessing Officer, and a reopening of assessment on the basis of change of opinion, in view of Hon'ble Supreme Court's judgment in Kelvinator's case (supra), is not permissible in law. As for the second reason, we have noted that it is tax neutral and, unless the condition of satisfaction about income having escaped assessment is satisfied, there cannot be any reopening of assessment. The finding of income having escaped assessment is a precondition for reopening the assessment. ". Hon'ble Bombay High Court, in the case of *Prashant S. Joshi v. ITO (230 CTR 232)* has observed : "The AO must have reasons to believe that such is the case (i.e. any income chargeable to tax has escaped assessment for a particular year) before he proceeds to issue notice under s. 147" and that "the reasons which are recorded by the AO are the only reasons which can be considered when formation. Clearly this condition is not satisfied. In view of these discussions, both the grounds of reopening the assessment are not sustainable in law. We, therefore, quash the reassessment proceedings.

10. As the reassessment proceedings are quashed, the correctness of additions made in the course of reassessment proceedings is entire an academic question. All other grounds of appeal deal with those additions and, therefore, all these grounds of appeal are dismissed as infructuous.

11. In the result, appeal of the assessee is allowed in the manner indicated above, and appeal of the Assessing Officer is dismissed as infructuous.

(Pronounced in the open court today on 7.3.2011.)