THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25.09.2014

+ **W.P.(C) 13896/2009 and CM No. 15790/2009**

ORACLE INDIA PVT LTD ... Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr M.S. Syali, Senior Advocate with Mr Mayank Nagi, Mr Harkunal Singh, Mr Tarandeep Singh and Mr Tarun Singh

For the Respondents : Ms Prem Lata Bansal, Senior Advocate with Mr Naman Nayak.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The notice dated 30.03.2009 under Section 148 of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') and the order dated 23.11.2009 rejecting the objections filed by the assessee are the subject matter of challenge in this writ petition which pertains to the assessment year 2002-03.

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2. The assessment under Section 143(3) was completed and the assessment order was passed on 04.03.2005. The notice under Section 148 of the said Act which, as mentioned above, was issued on 30.03.2009 has been issued after four years from the end of the relevant assessment year (assessment year 2002-03). That being the position, the first proviso to Section 147 of the said Act would be applicable. Section 147 and the first proviso thereto as well as Explanation 1 after the provisos read as under:-

> "**147**. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> 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

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and truly all material facts necessary for his assessment for that assessment year.

xxxx xxxx xxxx xxxx

Explanation 1. – Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

xxxx xxxx xxxx xxxx"

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3. It is a settled position in law that for reassessment proceedings beyond the period of four years from the end of the relevant assessment year, it is an essential condition that the income chargeable to tax which has allegedly escaped assessment must be occasioned, *inter alia*, by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, for that assessment year. Mr Syali, the learned senior counsel, appearing on behalf of the petitioner / assessee submits that in the present case, this pre-condition has not been met, inasmuch as, there has been no failure on the part of the petitioner / assessee to make a full and true disclosure of the material facts necessary for the assessment. He further points out that even in the reasons which have been supplied, it has not been indicated as to which material fact was not fully and truly disclosed by the assessee. He placed reliance on

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the decision in ***Haryana Acrylic Manufacturing Company v. Commissioner of Income Tax & Anr*** : **308 ITR 38(Del)** as well as on ***Microsoft Corporation (I) Pvt. Ltd v. Deputy Commissioner of Income Tax & Anr***: **357 ITR 50 (Del)** and ***Bombay Stock Exchange v. Deputy Director of Income Tax***: **2014 TIOL 961** - High Court Bombay, W.P.(C) No. 2468/2011. Mr Syali also place reliance on a recent decision of this court in the case of ***M/s Swarovski India Pvt. Ltd v. Deputy Commissioner of Income Tax***, **W.P.(C) 1909/2013** decided on 08.08.2014.

4. Mrs Prem Lata Bansal, Senior Advocate, who appears on behalf of the Revenue, contended that the reasons to believe clearly indicate that there was failure on the part of the assessee to fully and truly disclose the material facts necessary for assessment. She, therefore, submitted that this case was distinguishable from the cases of ***Haryana Acrylic*** (supra) and other judgments cited by the learned counsel for the petitioner. She also contended that all the ingredients necessary for invoking the provisions of Section 147 and, particularly, the proviso thereto have been satisfied and the re-opening of assessment is valid in law. She placed reliance on three decisions of this court in the case of ***CIT v. Usha International Ltd.***: **348**

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ITR 485 (del), ***M/s OPG Metals & Finsec Ltd. V. CIT***, **W.P.(C) No. 8283/2010** decided on 30.08.2013 and ***Meinhardt Singapore Pte Ltd. V. ADIT***: **(2013) 212 Taxman 637**.

5. Before we examine the rival submissions made by the learned counsel for the parties, it would be appropriate if we set out the relevant facts. As pointed out above, the assessment was completed by virtue of the assessment order under Section 143(3) on 04.03.2005. The notice under Section 148 was issued on 30.03.2009. By a letter dated 16.04.2009, the petitioner / assessee requested for the reasons for believing that income had escaped assessment. The reasons were subsequently supplied on 28.05.2009. The reasons read as under:-

> "**Reasons for reopening the case u/s 147 of I.Tax Act in the case of M/s Oracle India Pvt. Ltd. in A.Y. 2002-03.**
>
> In this case, return declaring income of Rs. 61,96,43,330/-was filed on 31.10.2002 and assessment order u/s 143(3) of (I. Tax Act was passed on 04.03.2005 assessing the total income at Rs. 138,74,45, 540/-.
>
> Further, on verification of the assessment record for the A.Y. 2002-03, following mistake was pointed out:-
>
> > "As per the Form No. 3CEB (Attachment II) - The assessee has acquired intangible asset / property such as know-how, patent, copyright, etc. by paying royalty of Rs. 70,60,25,973/- for duplication/ distribution of licensed software and

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the same was charged to the profit and loss account as Revenue expenditure. Whereas as per the amendment made by the Finance Act, 1998, depreciation will be allowed u/s 32 in respect of intangible asset. Thus, the assessee was entitled only to claim depreciation of Rs. 17,65,06,493/- @ 25% on these intangible assets. Thus, depreciation was excess allowed by Rs. 52,95,19,480/- approx.

In view of the facts narrated above, there is failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment and I have reason to believe that the income of the assessee to the extent of Rs. 52,95,19,480/- approx. has escaped assessment for which action u/s 147 of the I. Tax Act is to be initiated in the year under consideration i.e. A.Y. 2002-03.

Since the assessment in this case was completed u/s 143(3) of I. Tax Act, and four years have also been elapsed from the end of the relevant assessment year, therefore, kind approval of the Commissioner, Delhi-V, New Delhi is solicited as per the provisions of Section 151(2) of I. Tax Act. to issue notice u/s 148 read with section 147 of the I. Tax Act.

Submitted please.

(R.K. Sharma)
DCIT, Circle -13(1), New Delhi

Add. CIT, Range-13,New Delhi.

In view of the mistakes as indicated above, there is reason to believe that income has escaped assessment to the extent of Rs. 52.95 crores. As such kind approval for issue of notice u/s 148 of the Act may kindly be accorded."

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6. In respect of the above reasons, Mr Syali submitted that first of all, it was only an alleged mistake on the part of the Assessing Officer and it cannot be construed as a failure on the part of the assessee to fully and truly disclose all material facts. Furthermore, Mr Syali submitted that as per Form No. 3CEB, paragraph 9 was an omnibus paragraph requiring information in the following manner:-

> "9. Particulars in respect of transactions in intangible property.
>
> Has the assessee entered into any international Transaction(s) in respect of purchase/sale/use of Intangible property such as know-how, patents, copyrights, licenses, etc ?
>
> If 'yes' provide the following details in respect of each associated enterprise and each category of intangible property:
>
> (a) Name and address of the associated enterprise with whom the international transaction has been entered into.
>
> (b) Description of intangible property and nature of transaction.
>
> (c) Amount paid/received or payable/receivable for purchase/sale/use of each category of intangible property.
>
> (i) As per books of account.
>
> (ii) As computed by the assessee having regard to the arm's length price.
>
> (d) Method used for determining the arm's Length price [See Section 92C (1)]"

The aforesaid Form No. 3CEB particulars that were filled in by the petitioner / assessee were as under:-

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"9.	Particulars in respect of transactions in intangible property.	
	Has the assessee entered into any international Transaction(s) in respect of purchase/sale/use of Intangible property such as know-how, patents, copyrights, licenses, etc ?	Yes
	If 'yes' provide the following details in respect of each associated enterprise and each category of intangible property:	Refer Attachment II and notes 3, 4 and 5 in Attachment IV."

He submitted that the question was whether the assessee had entered into any international transactions in respect of "purchase / sale / use" of intangible property such as knowhow, patents, copyright licenses, etc. The true and correct answer given by the petitioner was 'yes' inasmuch as the petitioner had entered into an international transaction with its parent company in USA with regard to the use of the knowhow for duplication of software. The attachments referred to above also indicated that royalty was paid for duplication and distribution of licensed software and the extent of the royalty paid was ₹ 70,60,25,973/-. This is the exact amount which is reflected in the reasons referred to above.

7. According to Mr Syali, there is no non-disclosure of the fact that royalty to the extent of ₹ 70,60,25,973/- had been paid by the petitioner /

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assessee to its parent company in USA. The petitioner had claimed the entire amount as a revenue expenditure in the original assessment proceedings. He further submitted that this fact was very much under consideration of the Assessing Officer himself who had issued a questionnaire dated 31.08.2004. Point No. 8 of the questionnaire specifically dealt with royalty in the following manner:-

> "8. Furnish the details of royalty paid during the year and justify the same."

In response to this question, details were submitted by the petitioner / assessee and the entire aspect of royalty has been discussed in the original assessment order dated 04.03.2005 in the following manner:-

> "**Royalty Payment**:
>
> During the year assessee has claimed to have paid a sum of Rs. 70,60,25,973/- on account of royalty to M/s Oracle Corporation USA for duplicating & sub-licensing of software to its customers.
>
> The assessee vide questionnaire dated 31.08.2004 was asked to justify the royalty payment. In response the assessee vide reply dated 21.09.2004 submitted that the company imports master copy of software from Oracle Corp, USA and in pursuance of software duplication and distribution license agreement executed with "Oracle Corp, USA on 28th May, 1993. Based on terms and conditions of the agreement, the assessee is required to remit royalty on the basis of Indian Published Price of software replicated and distributed in India. The assessee further stated that the India Exchange Control laws prevailing at the time of the agreement entered into and those applicable in the subject assessment year provide that Indian Software reproducers

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such as assessee company are permitted to remit upto 30% of the Indian published price to overseas copy right holders i.e. Oracle Corp, USA in this case. The assessee also produced copy of approval issued the Reserve Bank of India for payment of royalty read in conjunction with ADMA Circular No.6 dated March 10, 1993 permitting remittance of royalty. The assessee has treated the royalty expenditure as revenue in nature which has been incurred wholly and exclusively for the purpose of company's business, the same is allowable ü/s 37 of the I.T.Act. The reply filed by the assessee was examined and it has been found that this issue is squarely covered and discussed elaborately in assesses own case for the Asstt. Year 1999-2000. The addition on the similar issue also made in Asstt. Year 2000-01& 2001-2002. It may also be mentioned that the CIT(A) in appeal has upheld the addition on this account.

In view of these facts, a disallowance u/s 37(1) on account of payment of royalty beyond maximum limit of 30% of the sublicence fees earned by the assessee is computed @ 30% of Rs. 11,99,06,200/- i.e. (-35,97,18,600) + 70,60,25,973 = Rs. 34,63,07,373/-. Penalty proceedings u/s 271(1)(c) are being initiated separately for concealment of income and furnishing inaccurate particulars as discussed above.

(ADDITION: Rs. 34,63,07,373/-)"

8. These facts were pointed out by the assessee in the objections submitted on 28.08.2009, however, the Assessing Officer rejected those objections by virtue of the impugned order dated 23.11.2009. The Assessing Officer, *inter alia*, held as under:-

"I have considered the submission of the assessee on the facts and merits of the case. I have also considered the judicial decisions relied up on by the assessee. The objections raised by the assessee are discussed as under-

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(a) The objection raised that the reopening of the assessment proceedings is merely on the basis of change of opinion and the AO had enquired into the matter and was conscious about the fact that the royalty payment were revenue in nature, is not correct. The issue addressed by the AO was that whether the quantum of expenditure of royalty claimed by the assessee was fully allowable under Section 37 of IT Act, the same was claimed in excess. The AO had not addressed the issue of royalty being a capital expenditure as per provisions of section 32 of the IT Act and only depreciation is allowable to the assessee.

(b) The submission of the assessee is not tenable. In form 3CEB, the column 9 reads as "particulars in respect of transactions in intangible property" which does not mean that the transaction required in this column are, not regarding to acquisition of intangible assets.

(c) The submission of the assessee that the assessee had disclosed all the material facts and at the time of the recording reason for reopening the assessment there was no fresh material with the assessing officer which was not made available by the assessee during the course of original assessment proceedings is not correct. Since the royalty payment, as per provisions of section 32 of the IT Act is an intangible asset and the same of capital in nature. The assessee has not disclosed this fact neither in the return of income nor at the time of assessment proceedings. Hence, the contention that all the material facts were fully and truly disclosed is not correct.

xxxx xxxx xxxx xxxx"

Finally the Assessing Officer rejected the objections and directed the assessee to comply with the notice under Section 143(2) and 141(1) of the

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said Act issued for reassessment. It is at this stage that the present writ petition was filed and this court at the interim stage stayed further proceedings.

9. The position in law has been clearly spelt out in ***Haryana Acrylic Manufacturing Company*** (*supra*) as under:-

> "29. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in *Wel Intertrade Private Ltd.* [2009] 308 ITR 22 (Delhi) we had agreed with the view taken by the Punjab and Haryana High Court in the case of *Duli Chand Singhania* [2004] 269 ITR 192 that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our

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view-point, we hold that the notice dated March 29, 2004, under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated March 2, 2005, are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above."

(underlining added)

In ***Microsoft Corporation (I) Pvt. Ltd*** (*supra*) also this court observed as under:-

> "From the above, it is evident that merely having a reason to believe that income had escaped assessment is not sufficient for reopening the assessment beyond the four year period referred to above. It is essential that the escapement of income from assessment must be occasioned by the failure on the part of the assessee to, *inter alia*, disclose material facts, fully and truly. If this condition is not satisfied, there would be a bar to taking any action under Section 147 of the said Act."
>
> (underlining added)

Both these decisions were taken note of in ***M/s Swarovski India Pvt. Ltd*** (*supra*) wherein it was observed as under:-

> "12. It is clear that the escapement of income by itself is not sufficient for reopening the assessment in a case covered by the first proviso to Section 147 of the said Act unless and until there is failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment. In the present case, it has not been specifically indicated as to which material fact or facts was/were not disclosed by the petitioner in the course of its original assessment under Section 143(3) of the said Act."
>
> (underlining added)

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Similarly, in the Bombay High Court decision it has been held that merely making a bald assertion that the assessee had not made a full and true disclosure of material facts was not sufficient. It must be specifically indicated as to what material fact or facts was/were not disclosed by the petitioner in the course of its original assessment under Section 143(3) of the said Act.

10. The decisions referred to by Mrs Bansal do not in any way detract from this legal position. In ***Usha International Ltd.*** (supra) itself, a Full Bench of this court (per majority) clearly noted that there was a distinction between disclosure / declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion. This is stated so in paragraph 24 of the said decision which also indicate that failure to make full and true disclosure of material facts is a pre-condition which should be satisfied if the re-opening is after four years of the end of the relevant assessment year. The court also took note of Explanation 1 to Section 147 which stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts did not amount to full and true disclosure. But, here, we find that it has not been pointed by the

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revenue as to what fact was not disclosed by the assessee. The assessee had clearly stated during its original assessment proceedings that it had paid an amount of ₹ 70,60,25,973/- to its parent company in USA by way of royalty for use of the knowhow for duplication of software and also for distribution of the software for which it had a license. The petitioner had also clearly disclosed that it had a license from its parent company and that the parent company continued to own all the rights in respect thereof and there was no acquisition of those rights other than the right to use the intangible assets in the knowhow. It was also the case of the petitioner / assessee that the entire payment by way of royalty was in the nature of revenue expenditure and this aspect had been examined and accepted by the Assessing Officer in the original assessment. Therefore, we find it difficult to agree with Mrs Bansal that the issue as to whether this payment was or was not in the nature of revenue expenditure had not been considered by the Assessing Officer during the course of the original assessment. In any case, we are not examining this case from the stand point of change of opinion but from the stand point of whether the assessee had made a full and true disclosure of material facts. There is no material which has been pointed out on behalf of the revenue which

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subsequently came to the knowledge of the revenue which was not already there in the original assessment proceedings. No new fact has emerged as a result of further or deeper examination of the existing documents or any other fresh material. Insofar as the assessee is concerned, it had disclosed all the material facts and, therefore, there is no question of the move to re-open assessment being valid. The other decisions relied upon by Mrs Bansal turn on their own facts and do not alter the settled position in law which has been indicated above.

11. The fact of the matter is that the petitioner, during the original assessment proceedings, had clearly indicated the nature of the royalty payments. The Assessing Officer had specifically asked in his questionnaire as to the nature of the royalty payments and the assessee was asked to justify the same. Upon further information provided by the assessee, the Assessing Officer considered the aspect of royalty payment and also noted the fact that the petitioner had claimed the same as revenue expenditure. In fact, the Assessing Officer disallowed ₹ 34,63,07,373/- out of the entire claim of ₹ 70,60,25,973/- and made an addition on account thereof.

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12. Consequent upon the above discussion, we are of the view that the very condition that the assessee must not have made full and true disclosure of the material facts is not satisfied and therefore, the re-opening cannot be permitted. The impugned notice dated 30.03.2009 and all proceedings pursuant thereto including the impugned order dated 23.11.2009 are set aside. We are making it clear that we have arrived at the above conclusion upon examining the case from the stand point of validity of assumption of jurisdiction under Section 147/148 and have not examined the merits of the matter as to whether the royalty payments were of a revenue or capital nature.

13. The writ petition is allowed as above. The pending application also stands disposed of.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

SEPTEMBER 25, 2014
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