IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 19.05.2015

\+ **W.P.(C) 7417/2012 & CM No.18979/2012**

M/s LAHMEYER HOLDING GMBH … Petitioner

versus

DEPUTY DIRECTOR OF INCOME TAX, CIRCLE 3(2)… Respondent

Advocates who appeared in this case:-

For the Petitioner : Mr M.S. Syali, Sr Advocate with Ms Husnal Syali, Mr Mayank Nagi and Mr Tarun Singh

For the Respondent : Mr Balbir Singh with Mr Abhishek Singh Baghel and Mr Arjun Harkauli

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

J U D G M E N T

BADAR DURREZ AHMED, J

Relief Sought:-

1. This writ petition is directed against the notice dated 13.10.2011 under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') in respect of assessment year 2008-09. It is also directed against the proceedings pursuant to the said notice culminating in the order dated 19.07.2012 passed by the assessing officer rejecting the objections raised by the petitioner to the initiation of re-assessment proceedings.

Rival Contentions in brief:

2. The re-assessment proceedings have been objected to by the petitioner on two counts—(1) change of opinion and (2) no new material or additional facts had come to the knowledge of the assessing officer. The alleged escapement of income from tax is founded on the premise that the transfer of the unexpired value of contracts by the petitioner to its 100% subsidiary (Lahmeyer International Consulting Engineers Gmbh) ('LICEG') in lieu of shares of LICEG in August 2007 would be exigible to capital gains tax at the hands of the petitioner. According to the petitioner, the said transfer of business was a part of a restructuring exercise and was well within the the knowledge of the assessing officer and the Dispute Resolution Panel ('DRP') in the course of the original assessment proceedings. Therefore, the fact that no such addition was made was, in itself, an indication that the assessing officer and the DRP had formed an opinion that the transaction was not taxable. Consequently, it was submitted on behalf of the petitioner, the attempt to re-open the assessment was clearly based upon a change of opinion, which was not permissible in law. It was also urged that no new material had surfaced after the assessment order and, therefore, the assessing officer could not invoke section 147 of the said Act.

3. The revenue, on the other hand, took the stand that there was no change of opinion because, according to them, no opinion as such had been formed during the original assessment proceeding with regard to the taxability of the said transaction. It was also submitted that the assessing officer had not considered the said transaction in his draft order and the DRP had also no occasion to consider it as no variation on this aspect had been proposed by the assessing officer. It was further contended that the transaction came to light as a result of the queries raised by the DRP with regard to the business restructuring arrangement of the petitioner. Since the DRP had not given any directions with regard to the taxability of the transaction, the assessing officer could not include it, on his own, in the assessment order. It was submitted that, therefore, the assessing officer was well within his rights to construe the material placed before the DRP as "new" material so as to invoke jurisdiction under section 147 of the said Act.

Facts:

4. The petitioner (Lahmeyer Holding Gmbh) ('LHG'), which is a foreign company, was formerly Lahmeyer International Gmbh. On 16.08.2007, the petitioner (while it was known as Lahmeyer International Gmbh), transferred

the unexpired value of its contracts in India to its 100% subsidiary – Lahmeyer International Consulting Engineers Gmbh ['LICEG'] – in exchange for the additional shares of LICEG. In other words, the petitioner continued to hold 100% of the shares of LICEG though the number of shares held increased because of additional share capital. Furthermore, the unexpired value of its (petitioner's) contracts in India stood transferred to LICEG. Subsequently, the petitioner gave up its earlier name – Lahmeyer International Gmbh – and adopted its current name – LHG. And, LICEG then changed its name to Lahmeyer International Gmbh ('LIG').

5. The assessing officer passed a draft assessment order dated 08.012.2010 under section 144C of the said Act proposing to make variations in the income returned by the petitioner in respect of the assessment year 2008-09. In the draft assessment order it is specifically recorded that:-

> "… During the subject year, Lahmeyer has earned revenue from execution of contracts with Jammu & Kashmir State Power Development Corporation – Baglihar Construction services ('JKSPDC') Jaypee Karcham Hydro Corporation Limited ('JKHCL') AND Jaypee Venture Private Ltd. ('JVPL'). The receipts earned from 1st April 2007 to 31st July has been offered to taxation in the hands of the assessee. Receipts earned from 1st August 2007 till 31st March 2007 in India has been offered to tax

in the hands of M/s. Lahmeyer International GmbH ('LIG') which is a Company incorporated in Germany on July 20th 2007."

6. The petitioner filed objections to the draft order on 07.01.2011. The variations proposed by the Assessing Officer and the objections filed by the petitioner did not relate to the question of the transfer of the unexpired value of the contracts by the petitioner to LICEG (Now 'LIG') in exchange of shares of the latter. However, from the directions under Section 144C (5) of the said Act given by the DRP on 28.09.2011, it is evident that during the DRP proceedings, a clarification had been sought from the petitioner with regard to the restricting undertaken by the applicant during the relevant assessment year. The same had been replied to by the petitioner through its letter of 23.09.2011. The observations of the DRP with regard to the business transfer from the petitioner to LICEG (Now 'LIG') are extracted hereinbelow:-

> **"5. Observations of the DRP**
> **Regarding business transfer from Lahmeyer Holding GmbH to Lahmeyer International GmbH**
>
> The DRP during proceedings before it had sought clarification regarding the business restructuring undertaken by the applicant during the relevant assessment year. The applicant vide its letter dated 23rd September, 2011 has furnished the following reply:

As submitted earlier, Lahmeyer International GmbH (now known as LHG) transferred its entire business (on a going concern basis) to LICG (now known as LIG) with a view to increase its capital contribution in LICG. English translation of the audited financial statement of LIG (now known as LHG), alongwith a certificate from notary public, duly evidencing the said fact, have been enclosed as **Annexure 1.** Also English translation of the audited financial statements of LICG (now known as LIG) is enclosed as **Annexure 2**.

It is submitted that prior to the business transfer on August 16, 2007, all Indian contracts were executed by LIG (now known as LHG). Accordingly, consideration receivable in respect of following Indian contracts, as relevant for the subject AY, upto July 2007 was accrued and duly offered tax in the hands of LIG (now known as LGH):

- Jammu and Kashmir State Power Development Corporation– Balihar Construction Services
- Jaypee Karcham Hydro Corporation Limited
- Jaypee Ventures Limited

Thereafter, with effect from August 2007, LICG (now known as LIG) executed the above contracts and therefore, all revenues accrued under such contracts (being contracts relevant for subject AY) have been accrued by LICG and offered to taxation in the hands of LICG (now known as LIG).

- Further, it is clarified that while Indian customers were updated on the global restructuring, given that the name of the legal entity executing the Indian contracts remained the same, no addendum was executed with the Indian customers.

We request you to take the above on record. In case your Honors required any further information / clarification in this regard, an opportunity to represent / furnish may be granted to the assessee for the same."

Certified Translation German – English
Financial Figures 2007 – Explanatory Note

To Whom It May Concern

For the purpose of presentation to authorities and institutions, I, the undersigned notary public, herewith certify that on August 16, 2007 an agreement relating to contribution of capital, my legal document role of deeds No. M 319/2007, was concluded between Lahmeyer International GmbH, registered with the Commercial Register of the Municipal Court Frankfurt / Main HRB 72343 and Lahmeyer International Consulting Engineers GmbH, registered with the Commercial Register of the Municipal Court Frankfurt / Main HRB 80852, about the transfer of the sum total of business activities of Lahmeyer International GmbH to Lahmeyer International consulting Engineers GmbH.

The above mentioned transfer of the sum total of business activities of Lahmeyer International GmbH to Lahmeyer International Consulting Engineers GmbH was effected to satisfy Lahmeyer International GmbH's obligation to contribute to the capital increase as agreed upon by the extraordinary shareholders' meeting of Lahmeyer International Consulting Engineers GmbH on August 16, 2007, by legal document role of deeds No. M 318/2007. The capital increase was registered in the Commercial Register of the Municipal Court Frankfurt / Main on October 31, 2007 under the above mentioned HRB No. 80852.

Berlin, November 7, 2007

Seal:

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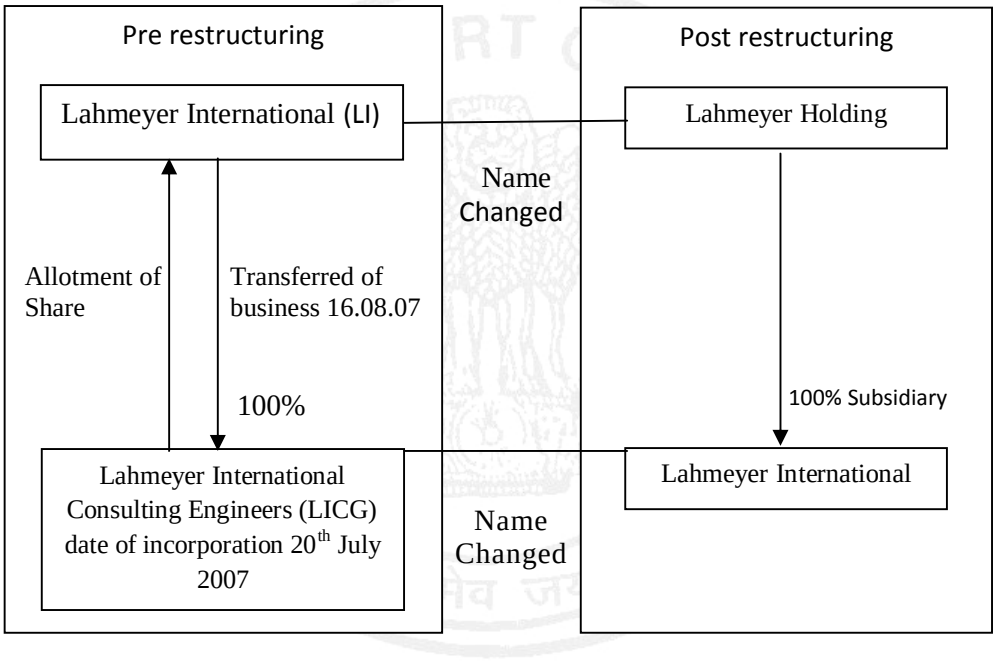
Dr. Johannes Meinel
Coat of arms of Berlin
Notary public in Berlin

What emerges from an examination of the aforesaid reply is that as part of its business restructuring

- The applicant has transferred all pending contracts to its 100% subsidiary Lahmeyer International Consulting Engineers (LICE) whose name was subsequently changed to Lahmeyer International which has in lieu thereof allotted applicant shares.

- Although, the contracts were all allotted to applicant but no addendum was executed with the Indian customers pursuant to business restructuring since the name changed ensures that continuity of name even though the entity executing the contracts has changed from applicant to its 100% subsidiary.

- The structure post the restructuring exercise and allotment of shares remains that of holding company and 100% subsidiary as the diagram below will show.



(underlining added)

7. By virtue of the said directions under Section 144C (5) of the said Act, the DRP required the Assessing Officer to complete the assessment as directed by it.

8. Thereafter, the Assessing Officer passed the assessment order under Section 143(3) read with Section 144C of the said Act on 04.10.2011. In the said assessment order, it has once again been recorded that the receipts earned by the petitioner from 01.04.2007 to 31.07.2007 had been offered to taxation in the hands of the petitioner and that the receipts earned from 01.08.2007 to 31.03.2008 in India had been offered to tax in the hands of 'LIG'. No addition was made in respect of the transaction in question, namely, the transfer of the unexpired value of the contracts in exchange of shares.

9. Shortly thereafter, on 13.10.2011, the Assessing Officer issued the impugned notice under Section 148 of the Act indicating that he had reason to believe that income of the petitioner chargeable to tax for the assessment year 2008-09 had escaped assessment and that he proposed to re-assess the income. By a letter dated 03.11.2011, the petitioner requested the Assessing Officer to provide the copy of the reasons, if any, recorded for initiating the present proceedings under Section 147 of the said Act. The purported reasons were supplied thereafter and the same read as under:-

> "1. The Draft order u/s 144C was passed on 08th December, 2011. The assessee went to DRP and direction of the DRP u/s 144C (5) was received on 28th September, 2011.

2. Regarding the business transfer from Lahmeyer Holding GmbH to Lahmeyer International GmbH the DRP has given the following observation.

> "The DRP during proceeding before it had sought clarification regarding the business restructuring undertaken by the applicant during the relevant assessment year. The applicant vide its letter dated 23rd September, 2011 has furnished the following reply:
>
> > "As submitted earlier, Lahmeyer International GmbH (now known as LHG) transferred its entire business (on a going concern basis) to LICG (now known as LIG) with a view to increase its capital contribution in LICG, English translation of the audited financial statement of LIG (now known as LHG), alongwith a certificate form notary public, duly evidencing the said fact, have been enclosed as **Annexure 1**. Also English translation of the audited financial statements of LICG (now known as LIG) is enclosed as **Annexure 2**.

It is submitted that prior to the business transfer on August 16, 2007, all Indian contracts were executed by LIG (now known as LHG). Accordingly, consideration receivable in respect of following Indian contracts, as relevant for the subject AY, upto July, 2007 was accrued and duly offered tax in the hands of LIG (now known as LGH):

- Jammu and Kashmir State Power Development Corporation
- Balihar Construction Services
- Jaypee Karcham Hydro Corporation Limited
- Japyee Ventures Limited

Thereafter, with effect from August 2007, LICG (now kwon as LIG) executed the above contracts and, therefore, all revenues

accrued under such contracts (being contracts relevant for subject AY) have been accrued by LICG and offered to taxation in the hands of LICG (now known as LIG).

- Further, it is clarified that while Indian customers were updated of the global restructuring, given that the name of the legal entity executing the Indian contracts remained the same, no addendum was executed with the Indian customers.

We request you to take the above on record. In case your Honour required any further information / clarification in this regard, an opportunity to represent / furnish may be granted to the assessee for the same.

Certified Translation German – English Financial Figures 2007 – explanatory Note
To Whom it May Concern For the purpose of presentation to authorities and institutions, I, the undersigned notary public, herewith certify that on August 16, 2007 an agreement relating to contribution of capital, my legal document role of deeds No. M 319/2007, was concluded between Lahmeyer International GmbH, registered with the commercial Register of the Municipal Court Frankfurt / Main HRB 72343 and Lahmeyer International Consulting Engineers GmbH, registered with the Commercial Register of the Municipal Court Frankfurt / Main HRB 80852, about the transfer of the sum total of business activities of Lahmeyer International GmbH to Lahmeyer International Consulting Engineers GmbH. The above mentioned transfer of the sum total of business activities of Lahmeyer International GmbH to Lahmeyer International Consulting Engineers GmbH was effected to satisfy Lahmeyer GmbH's obligations to contribute to the capital increase as agreed upon by the extraordinary shareholders' meeting of Lahmeyer International Consulting Engineers GmbH on August 16, 2007 my legal document role of deed No. 318/2007. The capital increase was registered in the Commercial Register of the Municipal Court

Frankfurt / Main on October 31, 2007 under the above mentioned HRB No 80852. Berlin, November 7, 2007.

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Dr. Johannes Meinel
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Norary Public In Berlin

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3. The following points emerge from an examination of the reply read with the certificate from the notary public during DRP Proceedings is that, as part of its business restructuring.

   - The applicant has transferred all pending contracts to its 100% subsidiary Lahmeyer International Consulting Engineers (LICE) whose name was subsequently changed to Lahmeyer International which has in lieu thereof allotted applicant shares.

   - Although, the contracts were all allotted to applicant, no addendum was executed with the Indian customers pursuant to business restructuring.

   - The structures post the restructuring exercise and allotment of shares remains that of holding company (Lahmeyer Holding) and 100% subsidiary (Lahmeyer International).

4. That above information regarding business restructuring and transfer of business in lieu shares was not placed before the Assessing Officer during the time of assessment proceedings.

5. Further, based on the facts and discussion made in the aforesaid paragraphs, it is concluded that transfer of unexpired value of contracts in lieu of shares is chargeable to capital gain tax as per Article 13 of DTAA as well as provisions of the Income tax act.

> 6. As the assessee has not offered any income on this account, I have reason to believe that the capital gain chargeable to tax has escaped assessment in AY 2008-09. This is a fit case for initiating proceedings is u/s 148."
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> (underlining added)

10. Thereafter, by a letter dated 27.04.2012, the petitioner submitted its objections to the initiation of the re-assessment proceedings. Those objections were rejected by the Assessing Officer by virtue of the impugned order dated 19.07.2012. And, it was held that the notice issued under Section 148 of the said Act was not without jurisdiction and was valid as per the provisions of the said Act.

11. Being aggrieved by the issuance of the notice under Section 148 of the said Act and the rejection of the objections by virtue of the order dated 19.07.2012, the present writ petition has been filed.

Analysis and Discussion:

12. As pointed out above, the petitioner has raised two specific issues with regard to the challenge to the initiation of the re-assessment proceedings. The first one pertains to the question of 'change of opinion' and the second that there was 'no new material' or additional fact which had come to the

knowledge of the Assessing Officer after the passing of the original assessment order under Section 143(3) of the said Act.

Change of opinion:

13. On the aspect of 'change of opinion', it had been contended that the issue of restructuring of the petitioner company and the transaction of transfer of unexpired value of the contracts by the petitioner to its 100% subsidiary in exchange of the shares of the 100% subsidiary was examined both by the Assessing Officer in his draft assessment order as well as by the DRP in the course of the DRP proceedings. Despite the Assessing Officer and the DRP having examined the transaction, they did not make any addition in this regard. It was, therefore, the case of the petitioner that the Assessing Officer and the DRP had formed an opinion that the transaction was not exigible to Capital Gains Tax and the proposal in the re-assessment proceedings that it was taxable amounted to a change of opinion.

14. On the other hand, the learned counsel for the revenue had contended that there was no question of any change of opinion as, according to him, no opinion as such had been formed during the original assessment proceedings. It was submitted that the Assessing Officer had not considered the said

transaction in his draft assessment order and the DRP also had no occasion to consider it as no variation on this aspect had been proposed by the Assessing Officer. It was further the case of the revenue that the transaction came to light only as a result of the queries raised by the DRP with regard to the business restructuring arrangement of the petitioner. But, as the DRP had not given any directions with regard to the taxability of the transaction, the Assessing Officer could not include it on his own in the assessment order. Consequently, it was submitted that when this "new" material was available with the Assessing Officer, he was well within his rights to initiate re-assessment proceedings.

15. The counsel for the parties referred to a Full Bench decision of this court in ***CIT V. Usha International Limited*****: 2012 (348) ITR 485**. In the said decision, it was, *inter alia*, observed as under:-

> "It is, therefore, clear from the aforesaid position that:-
> (1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.
>
> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and, is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and 'prejudicial to the interest of the Revenue, they are entitled to and can invoke power under section 263 of the Act. This aspect and position has been highlighted in CIT v. DLF Power Ltd. I. T. A. No. 973 of 2011 decided on November 29, 2011-since reported in [2012] 345 ITR 446 (Delhi) and BLB Ltd. v. Asst. CIT Writ Peti-tion (Civil) No. 6884 of 2010 decided on December 1, 20 11-since reported in [2012] 343 ITR 129 (Delhi). In the last decision it has been observed (page 135):

> "The Revenue had the option, but did not take recourse to section 263 of the Act, in spite of audit objection. Supervisory and revisionary power under section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudice can be corrected, when jurisdiction under section 263 is invoked."

Thus, where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion. Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where

fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression "material facts" means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers juris-diction to reopen the assessment."

(underlining added)

Specifically, the learned counsel for the revenue placed reliance on the following observations in ***Usha Internaional*** *(supra)*:-

"Thus, if a subject-matter, entry or claim / deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim / deduction or the entry, and, therefore, it is the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, the principle of "change of opinion" cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject-matter, entry, claim, deduction. When the Assessing

> Officer fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion."
>
> (underlining added)

16. The above extracts from ***Usha International*** *(supra)*, make it clear that if a particular aspect is not examined by an Assessing Officer, it cannot be presumed that he must have examined the same. It is also clear that if, in the first instance, in the original assessment proceedings, no opinion is formed, the principle of 'change of opinion' would not apply. However, it is also evident from the decision in ***Usha International*** *(supra)* that re-assessment proceedings would be invalid in case an issue or query is raised and answered by the assessee in the original assessment proceedings. But, thereafter the Assessing Officer does not make any addition in the assessment order. In such situations, it would have to be accepted that the issue had been examined, but the Assessing Officer did not find any ground or reason to make any addition or to reject the stand of the assessee. Therefore, this can be regarded as a case where the Assessing Officer forms an opinion. And, re-assessment would be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons for the same.

17. Another decision which was referred to and, more particularly by the learned counsel for the petitioner, was the Supreme Court decision in ***CIT v. Kelvinator India Limited*: 2010 (320) ITR 561 (SC)**. In the said decision, the Supreme Court, *inter alia*, observed as under:-

> "Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."
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> (underlining added)

18. From the above decision, it is evident that a distinction has to be made between the power to review and the power to re-assess. The Supreme Court clearly observed that the Assessing Officer has no power to review, although he has been given the power to re-assess subject to fulfillment of certain pre-conditions. It is also made clear that the concept of 'change of opinion' is an

in-built test to check the abuse of power by the Assessing Officer. The Assessing Officer, in the garb of re-opening of an assessment under Section 147 of the said Act cannot be permitted to review the assessment.

19. Applying the principles of ***Kelvinator India Limited*** *(supra)* and ***Usha International*** *(supra)*, we are of the view that in the present case, the Assessing Officer and the DRP had examined the issue of business restructuring. Even the fact that receipts upto and including July 2007 were offered for taxation in the hands of the petitioner and thereafter, that is, from August, 2007 to 31.03.2008, the revenues were to be raised in the hands of the petitioner's 100% subsidiary, namely, LIG, were clearly, noticed and recorded not only in the final assessment order, but also in the draft assessment order and the proceedings before the DRP. Therefore, we cannot agree with the learned counsel for the revenue that the transaction in question had not been examined by the Assessing Officer or the DRP in the course of the original assessment proceedings. The fact that despite such examination, no addition was made in respect of the said transaction, would lead us to the conclusion that in the original assessment proceedings, an opinion had been formed that the said transaction was not exigible to tax, though no reasons for the same were explicitly given in the assessment order.

Having formed such an opinion, the subsequent initiation of the re-assessment proceedings, taking a contrary view that the transaction was exigible to capital gains tax in India, would be nothing but a case of "change of opinion". In other words, the Assessing Officer is attempting to review the earlier assessment order which is not permissible in law.

20. It was contended, as noted above, that the Assessing Officer himself had no occasion to examine the said transaction and that the queries with regard to restructuring of the petitioner company had been raised by the DRP and not by the Assessing Officer. Furthermore, it was submitted that because the directions of the DRP are to be followed, the Assessing Officer had no discretion left in the matter and, therefore, the Assessing Officer had not formed any opinion with regard to the said transaction. This argument cannot be accepted for two reasons. First of all, the Assessing Officer himself in the draft assessment order had noticed the restructuring and had specifically recorded that receipts upto and including July 2007 were being taxed in the hands of the petitioner and for the balance period from August 2007 to March 2008 were to be taxed in the hands of the petitioner's 100% subsidiary 'LIG'. The Assessing Officer was, therefore, aware of the entire transaction. Secondly, and, in any event, the DRP in the course of the

proceedings before it, made specific queries with regard to the business restructuring of the petitioner and the transaction in question. The petitioner gave a detailed reply and the same has been noted in the observations of the DRP which we have extracted in the earlier part of the judgment. The DRP, after examining the entire business restructuring arrangement and the transaction in question, did not make any addition. The Assessing Officer in his final assessment order also did not make any addition on account of the subject transaction. It must be noted that the DRP procedure is part of the assessment proceedings. Queries raised and answered during the DRP proceedings would stand on the same footing as queries raised and answered in the course of an assessment proceedings before an Assessing Officer where the DRP procedure is not applicable. Therefore, on both counts, it cannot be said that an opinion had not been formed in respect of the transaction in question during the assessment proceedings. The fact that no addition was made in respect of the said transaction, would clearly raise the presumption that after having examined the said transaction, it was opined that it was not exigible to tax. The subsequent view being taken, as indicated in the purported reasons for initiating the proceedings under Section 147 of

the said Act, would be nothing but a 'change of opinion' which is not permissible in law.

No new Material:

21. We are also in agreement with the learned counsel for the petitioner that no new facts or material had come to the knowledge of the Assessing Officer to enable him to initiate re-assessment proceedings. All the material facts on which the Assessing Officer had based his purported reasons were available on record at the time when the original assessment order was passed.

22. In ***Usha International*** *(supra)*, it has been observed that if new facts, material or information comes to the knowledge of the Assessing Officer which was not on record and available at the time of the assessment order, the principle of 'change of opinion' would not apply. In the present case, we have already observed that all the relevant material was on record and available at the time of original assessment proceedings. Therefore, the re-assessment proceedings on the basis of the same material would be contrary to law.

Section 144C(8)

23. One more aspect which needs some discussion is with regard to the submission that the DRP had no occasion to consider the issue of taxability of the transaction involving the transfer of the expired value of the contract in exchange of shares as no variation had been suggested by the Assessing Officer on this aspect of the matter in his draft assessment order. It was submitted by the learned counsel for the revenue that the jurisdiction of the DRP in terms of Section 144C(8) was that it could confirm, reduce or enhance the variations proposed in the draft order, but it could not introduce a new element of tax or variation. In response to this, the learned counsel for the petitioner drew our attention to the Explanation added after Section 144 C(8). It was submitted by the learned counsel for the petitioner that by virtue of the said Explanation, the DRP always had the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee. Section 144 C(8) and the Explanation appended thereto reads as under:-

> "144C (8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

> *Explanation.* – For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee."

24. The said explanation was introduced through the Finance Act of 2012. But, it was to take effect retrospectively from 01.04.2009. The Dispute Resolution Panel's directions were issued after the Explanation had come into operation. In any event, the Explanation is clarificatiory. Reading the Explanation with sub-section 144C(8), it is evident that the Dispute Resolution Panel could examine the issues arising out of the assessment proceedings even though such issues were not part of the subject matter of the variations suggested by the Assessing Officer. In this light, it is significant that though the draft order had not proposed any addition with regard to the restructuring and the said transaction, yet, the DRP had asked for details of the restructuring and had examined the matter. After such examination, the DRP did not direct any addition to be made in this regard. It is evident that the DRP formed an opinion that the transaction was not exigible to capital gains tax and, to contend otherwise, in the purported

reasons for re-opening of the assessment, would be nothing but a 'change of opinion' which is not permissible in law.

Conclusion:

25. For the reasons set out above, the writ petition is allowed. The notice dated 13.10.2011 issued by the Assessing Officer under Section 148 of the said Act in respect of the assessment year 2008-09 is quashed. All proceedings pursuant thereto, including the order dated 19.07.2012, rejecting the objections, also stand quashed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

MAY 19, 2015
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