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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 557/2015**

COPERION IDEAL PRIVATE LIMITED ..... Appellant
Through: Mr. Salil Kapoor and Mr. Sumit Lalchandani, Advocates.

versus

COMMISSIONER OF INCOME TAX-II ..... Respondent
Through: Mr. N.P. Sahni, Senior Standing counsel With Mr. Nitin Gulati, Advocate.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

O R D E R

% 09.10.2015

1. This appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('Act') is directed against an order dated 26th September 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4375/D/2010 for the Assessment year ('AY') 2002-03.

2. **Admit.**

3. Having heard learned counsel for the parties, the following question of law is framed:

> "Whether the ITAT erred in law in upholding the reopening of the assessment by the Assessing Officer under Section 147 of the Income Tax Act, 1961 in the facts of the case?"

4. The Assessee filed its return of income for the Assessment Year ('AY') 2002-03 on 31st October 2002 declaring income at Rs.67,91,500. The Assessee's case was selected for scrutiny under Section 143(1) of the Act on 24th June 2003. An order was passed on 31st January 2005 under Section 143(3), assessing the income at Rs.71,46,170. One of the items of expenditure was a sum of Rs.20,71,489 under the head "Royalty & Cess".

5. On 5th September 2005, the Assistant Commissioner of Income Tax ('ACIT') issued a notice under Section 154 of the Act to the Assessee seeking explanation on the ground that there was mistake apparent from the record since the aforesaid amount should have been treated as capital expenditure as the benefit was of enduring nature. The Assessee replied to this notice on 21st September 2005 clarifying that (a) it was paying royalty at 5% on its domestic sales to M/s Coperion Waeschle Co. Germany on year to year basis; (b) that the payment did not pertain to acquisition of technical knowhow and therefore was booked as revenue expenditure and debited to the profit and loss (P&L) account. The Assessee also pointed out that it had been paying royalty for the previous 5-6 years based on the turnover and in all those years it has been allowed as a revenue expenditure.

6. It appears that an audit objection was raised, in response to which the ACIT wrote to the Senior Audit Officer on 28th October 2005, clarifying that the expenditure was rightly treated as revenue expenditure.

7. On 24th March 2009, more than four years after the assessment was completed, the ACIT penned the reasons for reopening of assessment as

under:

> "The return of income in this case was filed on 31.10.2002 at an income of Rs. 6791500 and processed u/s 143(1) IT Act, 1961 on 24.06.2003. Subsequently, the case was selected for scrutiny and order u/s 143(3) IT Act, 1961 was passed on 31.01.2005 at assessed income of Rs. 7146170.
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> Section 37 of the IT Act, 1961, provides that any expenditure not being expenditure of capital nature laid out wholly or exclusively for the purpose of business is allowable as deduction in computation of the income chargeable under the head 'profit and gain of business and profession'. The Hon'ble Supreme Court had held (232 ITR 359 - *Southern Switchgears Ltd. vs. CIT* dated 11.12.1997) that grant of technical aid fees for setting up factory and right to sell the products as per collaboration agreement is not allowable as revenue expenditure and was to be treated as capital expenditure.
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> The perusal of asstt. records for the AY 02-03 reveals that the assessee has debited an amount of Rs 2071489/- under the head 'royalty and cess' (Royalty Rs 1973337/-) that was of enduring nature and hence was a capital expenditure and not allowable. As per the decision of the Hon'ble Supreme Court in the aforesaid case, the said expenditure is not allowable.
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> In view of above facts of the case, I have reasons to believe that the income to the tune of Rs 1973337/- has escaped assessment because of failure on part of assessee to disclose fully and truly material facts necessary for asstt. and hence notice u/s 148 is hereby issued for reopening u/s 147 of the IT Act."

8. On that basis, notice was issued to the Assessee on 30th March 2009 under Section 148 of the Act seeking to reopen the assessment for AY 2002-03. The Assessee's objections to the reopening were negatived and a fresh order of assessment was passed on 30th November 2009 by the Assessing Officer

('AO'). The amount of Rs.19,73,337 was added to the income of the Assessee and initiation of penalty proceedings was directed.

9. The Commissioner of Income Tax (Appeals) [CIT (A)] allowed the appeal of the Assessee by order dated 2nd July 2010. The ITAT, by the impugned order dated 26th September 2014, allowed the Revenue's appeal.

10. Reliance has been placed by Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, on the decision of the Supreme Court in ***ALA Firm v. CIT (1991) 189 ITR 285 (SC)*** to urge that in similar circumstances where the AO had overlooked a binding precedent on the issue, it was construed as a sufficient material to justify reopening of the assessment.

11. It requires to be noticed that in ***ALA Firm*** (*supra*) the relevant AY was 1961-62. An item of expenditure in respect of 'house property' was allowed as deduction on the ground that it was not assessable either as revenue or capital expenditure. When for the subsequent AY 1962-63 the Assessee filed its return showing nil income, the Income Tax Officer issued notice on 3rd September 1963 stating that the amount ought to have been brought to tax in AY 1961-62 in view of the decision of the Madras High Court in ***Ramachari & Co. v. CIT (1961) 41 ITR 142***. Following the reply given by the Assessee, the ITO issued a notice under Section 148 read with Section 147(b). The Assessee objected to reopening of the assessment. It was in the above facts and circumstances, that the Supreme Court held that the material which constituted information and the basis of which the assessment was reopened was the decision of the Madras High Court which had not been

considered at the time of the original assessment. Accordingly, the reopening of the assessment was upheld.

12. There are at least two reasons why the decision in ***ALA Firm*** (*supra*) would not be applicable in the facts of the present case. In the first place, it is apparent that the said decision was not in the context of reopening of assessment sought to be made four years after the expiry of the relevant assessment year of the original assessment. The reopening was done not very long after the initial assessment. Secondly, the decision was rendered in respect of Section 147 of the Act as it stood prior to its amendment with effect from 1st April 1989.

13. The effect of the change brought about to Section 147 by way of amendment with effect from 1st April 1989 requires to be examined. Prior to 1st April 1989, in order to reopen an assessment the AO ought to have had reason to believe that the income of the Assessee has escaped assessment on account of the omission or failure by the Assessee to file a return or to disclose fully and truly all material facts necessary for assessment for that year. After the amendment the only requirement as far as Section 147 (1) is concerned is that the AO should have reason to believe that the income of the Assessee has escaped assessment. However the *proviso* to Section 147 (1) as amended kicks in where the reopening is sought to be done after four years after the end of the relevant assessment year for which the original assessment was made. This brings in the requirement of the AO satisfying himself of the existence of either jurisdictional fact. The escapement of income should be occasioned "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."

14. The Supreme Court in ***CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)*** has held that, even in terms of the amended Section 147 there has to be some tangible material for an AO to have reason to believe that income has escaped assessment. The Supreme Court emphasised that although the power to reopen is much wider after the amendment, the words "reason to believe" needed a schematic interpretation and that the AO ought not be given power to reopen the assessment on the basis of a mere change of opinion. It was emphasised that "re-assessment has to be based on fulfillment of certain pre-condition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of re-opening 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". The Supreme Court held as under:

> "Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment."

15. In ***Haryana Acrylic Manufacturing Co. Ltd. v. CIT, 308 ITR 38 (Del.)***, this Court reiterated the law in relation to reopening of an assessment under Section 147/148 of the Act after the expiry of four years after the assessment year for which the original assessment was made. Recently, in its decision

dated 22nd September 2015 in ITA No. 356 of 2013 (***Commissioner of Income Tax II v. Multiplex Trading & Industrial Co. Ltd.)*** this Court, in a case where reopening of assessment was sought to be made four years after the expiry of the original assessment, held that "in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty."

16. In the present case, there was no failure on the part of the Assessee to disclose the material particulars with the return originally filed. On the contrary, the AO himself replied to the audit objection pointing out that royalty was allowed to be claimed as revenue expenditure by the Assessee for the years earlier to AY 2002-03. A copy of the agreement under which royalty was being paid was provided to the Revenue. The only reason for reopening the assessment was that the decision in ***Southern Switchgears Ltd. v. CIT 232 ITR 359,*** which was rendered by the Supreme Court several years earlier on 11th December 1997 was not noticed by the AO at the time of finalization of assessment at the first instance on 31st January 2005 under Section 143(3) of the Act.

17. In light of the legal position after the amendment to Section 147 of the Act, as explained in ***CIT v. Kelvinator of India Ltd.*** (*supra*), the Court is of the view that, in a case where the assessment is sought to be reopened in 2009, four years after it was originally made, i.e. 2005, the mere fact that there was a judgment of the Supreme Court of 1997 which was not noticed

by the AO when he framed the original assessment cannot *per se* constitute the only material on the basis of which the assessment could have been reopened. When on the same material, four years after the assessment year for which the original assessment is finalised, the AO seeks to reopen the assessment on the basis of a judicial precedent delivered more than eight years earlier, it would be a case of mere 'change of opinion', something clearly held impermissible by ***CIT v. Kelvinator of India Ltd.*** (*supra*), The threshold requirement of that the AO should, on the basis of some tangible material, conclude that there was escapement of income on account of the Assessee failing to disclose material particulars, is not fulfilled in the present case. Consequently, the reopening of the assessment was, in the facts of the present case, not justified.

18. The question is accordingly answered in the affirmative, i.e. in favour of the Assessee and against the Revenue. The impugned order of the ITAT is set aside.

19. The appeal is allowed, but in the circumstances, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 09, 2015/mg