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

% Judgment delivered on: 19.11.2015

\+ W.P.(C) 2062/2014 & CM No.4320/2014 (stay)

DISCOVERY ASIA INC. ..... Petitioner

versus

ASSISTANT DIRECTOR OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr M.S. Syali, Sr Advocate with Mr Mayank Nagi and Ms Husnal Syali, Advocates.

For the Respondents : Mr Kamal Sawhney, Mr Raghvendra Singh and Mr Shikhar Garg, Advocates.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the notice dated 28.03.2012 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') pertaining to the Assessment Year 2005-06. It is also directed against the order dated 10.02.2014 whereby the objections preferred by the petitioner were rejected by the Assessing Officer.

2. The assessment under Section 143(3) was originally done on 19.12.2008. The notice under Section 148, which is impugned herein, has been issued beyond the period of four years from the end of the

relevant assessment year. The reasons for initiating the reassessment proceedings which were supplied to the petitioner on 16.01.2014 are as under:-

"INCOME TAX DEPARTMENT

1.	Name & Address of the Assessee	:	Discovery Asia Inc. One Discovery Place Silver Spring, Maryland 20910-3354 USA
2.	Permanent Account No.	:	AABCD4333P
3.	Status	:	Foreign Company
4.	Residential Status	:	Non-resident
5.	Assessment year	:	2005-06
6.	Date of order	:	26.03.2012

Reasons for issue of notice u/s 148 of the Income Tax Act, 1961 :-

Return declaring Nil income for AY 2005-06 was filed by the assessee on 30.10.2005, which was later revised on 30.03.2007 declaring an income of Rs.3,62,68,927/- and the assessment was completed u/s 143(3) on 19.12.2008 at an income of Rs.37,61,13,121/-. The reasons for the variance in the assessed income from the returned income was that Discovery Communications India (DCIN) was held to be the assessee's PE in India and profits were attributable to it. Further, the subscription revenues received by the assessee were taxed as royalty income.

2. Article 12(6) of the DTAA between India and US provides that the provisions of Article 12(1) and 12(2) shall not apply if the royalties or fees for technical services arise through a permanent establishment (PE) and are attributable to such PE and in such a case, the provisions of Article 7 shall apply. Further, as per the provisions of section 115A(b) of the Act, where the total income of a non-resident or a foreign company includes any income by way of royalty/fees for technical services received from government or an Indian concern in pursuance of an agreement after 31st March, 1976, subject to the provisions of sub-section (2), the Income tax payable shall be 20% where such royalty is received

in pursuance of an agreement made after 31.05.1997 but before 01.06.2005. Therefore, in such a case, the provisions of section 44D(3) of the Act would apply, which provides that notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee being a foreign company, no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty received from government or an Indian concern in pursuance of an agreement made by a foreign company after 31.03.1976 but before 01.04.2003.

3. Perusal of the assessment record reveals that in the assessee's case, the royalty income amount to Rs.336,754,388/- was taxed @ 15% under the DTAA. However, as the royalty income had been earned through PE based on agreement dated 18.08.2004 identical and renewal / remaining to the main agreement that was entered into on 02.12.1996, it should have been taxed @ 30% on gross basis. The correct calculation regarding royalty income would be as under:-

Calculation Sheet

Amount of Royalty	336,754,388
Tax @ 30% on above	101,026,316
Add: Surcharge @ 2.5%	2,525,658
Total	103,551,974
Add : Education Cess @ 2%	2,071,039
Total Tax	105,623,013

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3. The petitioner preferred objections on 04.02.2014 which were rejected by the Assessing Officer by virtue of the impugned order dated 10.02.2014. One of the points urged by Mr Syali, appearing on behalf of the petitioner, was that the reasons do not mention anything about failure on the part of the assessee to fully and truly disclose all the material facts necessary for the assessment. He submitted that this is a pre-condition prescribed in the first proviso to Section 147 of the Act before the

reassessment proceedings can be undertaken. It is submitted that there is not even an allegation that there has been any failure on the part of the assessee to fully and truly disclose all the material facts necessary for the assessment. Reliance was placed on ***Haryana Acrylic Manufacturing P. Ltd. v. CIT : (2009) 308 ITR 38 (Del)*** as also on the ***Rural Electrification Corporation Ltd. vs. CIT & Anr.: 355 ITR 356 (Del)***.

4. We have examined the reasons which have been quoted above and it is evident that there is no whisper of the petitioner having failed to disclose fully and truly all the material facts necessary for its assessment. It is therefore clear, based on the said decisions, that the necessary ingredients for invoking the provisions of Section 147 beyond the period of four years are missing. As such, the initiation of the reassessment proceedings pertaining to the assessment year 2005-06 is without the authority of law.

5. We may also point out that the very issue which has been raised in the reasons has been considered in detail in the course of the original assessment proceedings. In fact, the reasons themselves indicate that what is sought to be done through reassessment was already available in the record of the assessment proceedings. The agreements which have been referred to in the reasons were available before the Assessing Officer and had been examined in detail by the Assessing Officer. Therefore, there is also substance in the submissions made by Mr Syali that the reopening of assessment is nothing but a mere change of opinion also. Thus, in either eventuality, the reassessment proceedings cannot be sustained in law.

6. Consequently, the impugned notice dated 28.03.2012 issued under Section 148 of the said Act as also the proceedings pursuant thereto including the order dated 10.02.2014 disposing of the objections are quashed/set aside.

7. The writ petition is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

NOVEMBER 19, 2015 **SANJEEV SACHDEVA, J**
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