

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.05.2013

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W.P.(C) 550/2007

BHARAT SANCHAR NIGAM LTD.

.. Petitioner

versus

DEPUTY COMMISSIONER OF INCOME

.. Respondent

AND

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W.P.(C) 7707/2007 & CM 14692/2007

BHARAT SANCHAR NIGAM LTD.

.. Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX AND ORS. .. Respondents

Advocates who appeared in these case:

For the Petitioner :Mr M.S. Syali, Sr. Advocate with Mr MayankNagi
and Ms Husnal Syali, Advocate.

For the Respondent :Mr Sanjeev Rajpal, Advocate.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. These two writ petitions are filed by Bharat Sanchar Nigam Limited (BSNL) and seek to challenge the notices under Section 148 of the Income Tax Act (hereinafter also referred to as "the Act") and the proceedings initiated pursuant thereto, for reopening the concluded assessments for the assessment year 2001-02 and 2002-03. The petitioner has, in Writ Petition No. 550/2007

challenged the notice dated 23.11.2005 issued under Section 148 of the Act and the order dated 08.02.2006 passed by the Assessing Officer rejecting the objections raised by the petitioner against the reasons for issuance of the notice dated 23.11.2005. The Assessing officer had, by the notice dated 23.11.2005, initiated proceedings for reassessment of income for the period relevant to the assessment year 2001-02. The challenge in the Writ Petition No. 7707 of 2007 is with respect to the notice dated 12.3.2007 issued under Section 148 of the Act for initiating re-assessment proceedings in relation to the Assessment year 2002-03. As both the writ petitions raised similar issues, the same were taken up for hearing together and are being disposed off by this common order.

2. The petitioner is a Government Company and was incorporated on 15.09.2000 under the Companies Act, 1956. Prior to the incorporation of the petitioner company, the telecommunication services were being provided by Government of India, Ministry of Communication through its two departments, namely Department of Telecommunication Services (in short “DTS”) and Department of Telecommunication Operation (in short “DTO”). The petitioner company was incorporated pursuant to the policy of the Government of India (National Telecom Policy 1999) to hive off its business of providing telecom services and operate the same through a corporate entity. The petitioner was constituted as a wholly owned Government of India enterprise for taking over the business of providing telecommunication services from DTO and DTS. The petitioner started functioning w.e.f. 01.10.2000. The terms of transfer of undertaking of telecom services from DTO and DTS to BSNL was recorded in an Office Memorandum dated 30.9.2000 and the relevant portion of the same is quoted below:

“3. Government of India has decided to transfer all assets and liabilities (except certain assets which will be retained by Department

of Telecommunications required for the units and offices under control of DoT, to be worked out later on), to Bharat Sanchar Nigam Limited w.e.f. 1st October, 2000. The transfer of assets and liabilities to the Company will be subject to the following terms and conditions:-

- (i) The Company will carry out the duties and responsibilities regarding establishing, maintaining and working all types of telecommunication services in the country in accordance with and under the terms and conditions of the licence granted by the Central Government under the Indian Telegraph Act, 1885 and such other directions as may be given by the Central Government from time to time,
- (ii) The assets and liabilities of the Department of Telecommunications, Department of Telecom Services and Department of Telecom operations (the Government) will stand transferred to the Company, with effect from 1st October, 2000. The details of the assets will be worked out as per records available with the various Divisions and other units as on 30th September, 2000 after records and accounts are finalized up to this period.
- (iii) The assets and liabilities in respect of the business currently being carried out on account of the Government shall stand transferred to the Company on the book value thereof, which will be ascertained in the manner aforesaid. The book value of the assets comprising the business being transferred to the Company has been provisionally assessed as Rs 63,000 crores. The said sum of Rs 63,000 crores will be treated as the **provisional value** of the business being transferred to and taken over by the Company subject to finalization of the transfer value by 31.03.2001 in consultation with Ministry of Finance.
- (iv) The Assets are being transferred to the Company in consideration of Rs 5,000 crore equity (for which the Company will issue Five Hundred crores Equity Shares of face value of Rupees Ten each fully paid up having

aggregate value of Rupees Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways, and means advance and the balance as a mix of long term debt, free reserves and preference share capital. The accounting treatment of this mix shall be notified later.

- (v) The capital structure of Bharat Sanchar Nigam Limited will be finalized by the Ministry of Communications, Department of Telecommunications in consultation with Ministry of Finance and the Comptroller and Auditor General of India, if necessary.
- (vi) The Company, Bharat Sanchar Nigam Limited shall be liable to make repayment of bonds raised by MTNL for DoT/DTS/DTO, which are now being transferred, to the Company.
- (vii) The Company as the successor company shall be responsible for all assets and liabilities and for satisfactory execution of all agreements, contracts and obligations in force, which pertain the business being transferred to it.
- (viii) The Company shall be solely responsible for honouring and performing all contracts/agreements and shall be liable for any defaults, delays or non-performance. The Company shall keep for all times the Government indemnified from all claims.
- (ix) After finalization of assets and liabilities and assets to be retained by Dot regular transfer deed(s) will be executed subsequently in respect of transfer of business to the Company listing out specifically all the assets being transferred.

These orders will come into force from 1st October, 2000.”

3. A Memorandum of Understanding (MOU) was executed between the Government of India, Ministry of Telecommunications and BSNL on 30.09.2000 for the purpose of transferring assets and liabilities from the Ministry of

Communications to the petitioner. In terms of the said MOU, the function of providing telecommunication services was taken over by the petitioner company and an agreement for transfer of business was also entered into between the Government of India, Ministry of Communication and BSNL. The said agreement for transfer of business, inter alia, recorded that “the business of providing telecom services and telecom network, inter-alia, comprising, management, control, operations and maintenance of communications network and services spread all over India, manufacturing, research and development and other facilities, some being also spread all over India, which business (hereinafter also referred to as “the Business”), recently entrusted to, and being currently carried on by DTO and DTS shall stand transferred to and vest in BSNL who has taken over or deemed to have taken over the same, as running concern, subject to the provisions and stipulations of this Agreement.”

4. As per clause 6 of the agreement of transfer, the assets and liabilities in respect of the business currently carried on account of DTS and DTO were transferred to the petitioner at book values, which were at the relevant time being ascertained. The agreement also recorded that the parties had agreed that the total book value of the assets comprising the business of the petitioner would be in excess of Rs 63,000 Crores and therefore the said sum would be taken as the provisional value of the business being transferred. Clause 7 of the agreement recorded the consideration at which the assets were being transferred as under :-

“7. The Assets are being transferred to the Company in consideration of Rs 5,000 crore equity (for which the Company will issue Five hundred crores Equity Shares of face value of Rupees Ten each fully paid up having aggregate value of Rupees Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways and means advance and the balance as a mix

of long term debt free reserves and preference share capital. The accounting treatment of this mix shall be notified later.”

5. The petitioner filed its return of income for the period 15.09.2000 to 31.03.2001, relevant to the assessment year 2001-02 on 26.03.2002 and declared a loss of Rs 58,46,31,20,000/-. The said return was taken up for scrutiny and the Assessing Officer framed an assessment under Section 143(3) of the Income Tax Act vide the assessment order dated 11.02.2004 assessing a net loss of Rs 39,53,78,45,000/-. However, the company was covered under the provisions of section 115JB of the Act and it declared taxable book profit at Rs 1801,28,11,000/- and paid tax on it as per section 115JB of the Act.

6. The Assessing Officer issued a notice dated 23.11.2005 under section 148 of the Act stating that he had reasons to believe that income of the petitioner had escaped assessment within the meaning of section 147 of the Act and called upon the petitioner to file its return of income for the said period. The petitioner requested for the reasons for reopening of the assessment under section 148 of the Act which were furnished by the Assessing Officer under the cover of his letter dated 22.12.2005. The reasons for issuance of notice under section 148 of the Act, as furnished by the Assessing Officer, referred to the capital structure of the petitioner company and the inference drawn by him was that the cost of assets was being met by the general reserve as reflected in the capital structure of the company. As per the Assessing Officer, a sum equal to the general reserve would be required to be reduced from the cost of the assets in terms of Explanation 10 of Section 43(1) of the Act. The Assessing Officer observed that the depreciation had been claimed by the petitioner on the cost of the assets without reducing the proportionate amount of reserves therefrom and on this basis the Assessing Officer had formed a belief that the assessee had claimed excessive depreciation. The Assessing Officer indicated that the proportionate amount of reserves had to

be reduced from the fixed assets to arrive at their actual cost on which depreciation would be allowable.

7. The petitioner filed its objections on 20.01.2006 to the reasons as furnished by the Assessing Officer in terms of the decision of the Supreme Court in the case of **M/s GKN Driveshafts (India) Ltd. v. ITO: (2003) 259 ITR 19 (SC)**. The petitioner contended that all material facts had been placed before the Assessing Officer during the first round of assessment and various queries were raised by the Assessing Officer inter-alia with respect to the valuation of the assets as well as the depreciation claimed by the petitioner and thus there was no new fact which had been discovered subsequent to the assessment order which would warrant reopening of the concluded assessment. The petitioner objected to the proposition that reserves were required to be reduced from the value of the assets for purposes of computing depreciation. It was contended by the petitioner that this was only a change of opinion as to how depreciation was to be computed and thus it was impermissible for the Assessing Officer to initiate reassessment proceedings on this ground. The petitioner also contended that Explanation 10 to Section 43(1) of the Act had no application in the present case as the configuration of the capital structure of the company could not possibly lead to a conclusion that the reserves of the petitioner company represented cost of assets which had been met by the Government of India in the form of a subsidy, a grant or a reimbursement. The reserves were neither a subsidy nor a grant or reimbursement by the Government of India and, therefore, the premise on which the assessment was sought to be reopened was erroneous.

8. The objections raised by the petitioner were rejected by the Assessing Officer by an order dated 08.02.2006. The petitioner thus filed the present writ petition on 02.03.2006. However, the Writ Petition No. 550 of 2007 was not listed as the petitioner had sought approval from COD which had not been

accorded at the material time. The COD granted its approval to proceed with the writ petition at its meeting held on 21.12.2006 which was communicated to the petitioner vide a letter dated 03.01.2007. In the meantime, the Assessing Officer completed the reassessment proceedings for the year 2001-02 by his order dated 22.12.2006. The Assessing Officer recomputed the allowable depreciation at Rs 56,28,89,21,000/- against the amount of Rs 1,26,46,77,42,000/- as computed earlier. The excess depreciation of Rs 70,17,88,21,000/- has been added to the income of the petitioner for the relevant assessment year and the Assessing Officer has raised a demand for a sum of Rs 802,93,34,358/- by the notice of demand dated 22.12.2006. The present petition (i.e. Writ Petition No. 550 of 2007) was thereafter listed for hearing and by the order dated 01.03.2007 this Court directed that the date of filing of the petition be deemed to be 24.01.2007.

9. The issues raised in Writ Petition No.7707/2007 are identical and pertain to the subsequent period i.e., Assessment year 2002-03. The petitioner had filed its return of income for the relevant assessment year 2002-03 on 30.10.2002 declaring a loss of Rs 19,27,43,00,000. However, the audited balance sheet disclosed a profit of Rs 68,57,32,00,000 which was liable to tax under Section 115JB of the Act. The said return was taken up for scrutiny and the Assessing Officer framed the assessment under Section 143(3) of the Act vide the assessment order dated 28.02.2005.

10. The Assessing Officer issued notice dated 12.03.2007 of the Act for reopening the assessment for the period relevant to the Assessment Year 2002-03. At the request of the assessee, the Assessing Officer supplied the reasons for issuance of notice under Section 148 of the Act, under the cover of his letter dated 28.05.2007. The reasons furnished by the Assessing Officer for reopening the assessment are similar to the reasons as furnished by the Assessing Officer

for initiating reassessment proceedings for the assessment year 2001-02 which are the subject matter of challenge in the Writ Petition No. 550/2007.

11. The learned counsel for the petitioner contended that the reassessment proceedings are illegal and without jurisdiction. It is contended that action of the Assessing Officer in seeking reassessment for the reasons as supplied indicate that the assessments were sought to be reopened only on a mere change of opinion as all relevant facts were within the knowledge of the Assessing Officer during the first round of assessment and were subject matter of inquiry in the initial assessment proceedings. The learned counsel for the petitioner has drawn our attention to Para 2 of Schedule T to the notes of accounts to the audited balance sheet which had been submitted to the Assessing Officer. The notes clearly disclose the value of the assets as well as the capital structure of the company. The relevant paragraph of the notes to accounts is quoted below:-

“Assets and Liabilities taken over from DoT

In pursuance of the Memorandum of Understanding dated 30th September 2000 executed between President of India and BSNL all assets and liabilities in respect of business carried out by DTS and DTO were transferred to the Company with effect from 1st October 2000 at a provisional value of Rs 630,000 Million. The value was subject to finalisation with Ministry of Finance by 31st March 2001, which has not yet been done. The assets and liabilities as on 1st October 2000 have been classified broadly under the following heads:

Assets	(₹ In Million)
-- Fixed Assets	501078.6
-- Capital Work-in-progress	47900.9
-- Inventory	18132.2
-- Sundry Debtors	33103.8

	600215.5
Liabilities	

-- Customer Deposits (Excluding interest accrued thereon)	<u>38606.5</u>
-- Net assets taken over by the Company	<u>571609</u>
-- Contingent liabilities taken over by the Company	---

The net assets (including liabilities) transferred to the Company as of 1st October 2000 are subject to confirmation by DoT as regards to ownership and the value.

The Capital structure for BSNL concurred in by Ministry of Finance and conveyed by Department of Telecommunications vide their UN. No. 1-2/2000-B (Pt.) dated 1 December 2001 as consideration for transferring the above stated assets and liabilities is as follows:

-- Equity	50000
-- Non-cumulative preference Shares (9%)	75000
-- 15 Years Government Load (12%)	75000
-- Loan from MTNL (Refer Note 101)	30000
-- Reserves #	331609

	571609
	-----”

12. It has also been brought to our notice that during the assessment proceedings relevant to the assessment year 2001-02, the Assessing Officer issued a questionnaire dated 13.12.2002 seeking various explanations for the purpose of framing the assessment. Question nos. 5 and 6 of the said questionnaire are relevant as the Assessing Officer had raised queries regarding the value of the reserves as well as the taxability of the treatment of the surplus in the hands of the transferors (Department of Telecommunication Services and Department of Telecommunication Operation) the said queries are quoted below:-

“5. Explain as to how the value of reserve, which factually is the balance of surplus amounting to Rs 3,31,609/-, has been worked out. Whether any final decision as to the surplus available on

account of such takeover in the hands of DTS and DTO separately of the above said amount was finalized?"

6. In case no finalization as to the taxability or treatment of such surplus in the hands of DTS and DTO have been finalized, explain as to why such surplus should not be subjected to tax in the hands of the assessee company?"

13. The petitioner replied to the queries and the assessment order was framed after considering the same. The assessment order also noted that the assets had been transferred at book value which would not be less than Rs 63,000 Crores. The components, on the liability side of the balance sheet of the petitioner were examined and the Assessing Officer noted that the fixed components on the liability side consisted of share capital and loans aggregating to Rs20,000 Crores and the balance amount would be reflected as reserves which would increase or decrease corresponding to the change in the book value of the assets as finalized. The relevant portion of the assessment order dated 11.02.2004 for the assessment year 2001-02 is quoted below:-

"10.2 It should be clearly understood that given the huge asset base, it was not possible to arrive at the precise value of the assets handed over by the Government. Therefore, it was decided that the precise value of the total assets would be arrived at in due course and in any case it would not be less than Rs 63,000 Crore. Till the process of precise ascertainment of the value of the assets transferred was completed it was expected that the amount would keep changing. This is true also because in the next year the assessee took over further assets amounting to Rs 3578 Crore and these were adjusted with the assets taken over as on 1.10.2000. Therefore, on the liability side the fixed components, consisting of capital and loan were only adding up to Rs 20,000 Crore as detailed above. The balancing figure was to represent the 'reserves' on the liability side and with the change in the value of the assets taken over the 'reserve' was to be increased or decreased correspondingly. This formed the balance sheet of the company at the time of transfer of business from Government of India to BSNL."

14. It is thus contended on behalf of the petitioner, that the Assessing Officer was fully conscious of all relevant facts which had been duly disclosed before him. The provisions of Explanation 10 of Section 43(1) were not applicable and consequently the cost of assets had been taken at the book value and depreciation was computed accordingly. The subsequent action of the Assessing Officer in seeking to apply the provisions of Explanation 10 to Section 43(1) of the Act would only tantamount to a change of opinion as no new material was discovered which would warrant re-computation of depreciation, on the contrary, the issues relating to depreciation and value of assets had been discussed in the first round of assessment itself.

15. The learned counsel for the petitioner also relied on a full bench decision of this court in the case of **CIT v. Kelvinator of India Ltd.: 99 (2002) DLT 221**, wherein it has been held that if the Assessing Officer has examined the facts and not made an addition, it cannot be presumed that he had not applied his mind to the assessment. The learned counsel also cited the decision of this court of in the case of **CIT v. Usha International Ltd.: (2012) 348 ITR 485 (Del.)** as also the decision of the Supreme Court in the case of **CIT Vs. Kelvinator of India Ltd.: (2010) 320 ITR 561 (SC)**, in support of his contention that reassessment proceedings cannot be initiated on a mere change of opinion.

16. The learned counsel for the petitioner also urged that, even on merits, no reasonable person could come to the conclusion that the reserves of the company represented cost of the assets of the company being met by the government in the form of a subsidy, grant or reimbursement so as to attract the provisions of Explanation 10 to Section 43(1) of the Act. It is contended that treating the reserves separately from the capital was fallacious as the reserves represented

shareholder's fund and the value of the shares would include not only the face value of shares but also reserves and surpluses.

17. We have heard the learned counsel for both the parties and the principal question that needs to be addressed is whether the action of the Assessing Officer in reopening the assessment is based on any tangible material or represents only a mere change of opinion? The second issue that can be considered is whether, on the basis of the capital structure of the petitioner, an inference could be drawn that reserves represented cost of assets met by the government so as to fall within the ambit of Explanation 10 to Section 43(1) of the Act?

18. The petitioner company has been incorporated to provide the telecom services which were being carried out earlier by Department of Telecommunication Services (DTS) and Department of Telecommunication Operations (DTO). As per the decision of the Government of India, the business being conducted by DTO and DTS were vested with the petitioner company. This was pursuant to NTP 1999, whereunder the Government had decided to corporatise certain services and operations being carried on by the Department of Telecommunications under the Ministry of Communications. Thus, in a sense the Government decided to incorporate a new company as a Government of India enterprise to carry on the business of telecom services instead of conducting the same directly. The assets were to be transferred at book values. The value of net assets was agreed to be in excess of Rs 63,000 Crores and, therefore, the same was provisionally taken as a book value of the business being transferred. The consideration for the same was agreed to be met by issue of equity capital of Rs 5000 Crores (500 Crore shares of the face value of Rs 10/- each), preference share capital of Rs 7500 Crores and debt of Rs 7500 Crores. The balance consideration was reflected as reserves. This capital structure was also duly

disclosed by the petitioner company in its Directors Report forming a part of the first annual report as under:-

“CAPITAL STRUCTURE & FINANCING

The Authorised Share Capital of your Company is Rs 10000 crores, and the present paid up capital is Rs 5000 crores. Pursuant to the MoU dated 30th September, 2000, signed with the Government of India, Ministry of Communications, your Company took over the business of erstwhile Deptt. of Telecom Services and Deptt. of Telecom Operations with effect from 1st October, 2000 on a going concern basis alongwith all the assets, liabilities and all the contractual obligations. The business was transferred to the Company at an estimated value of Rs 63,000 crores. The Capital Structure of the Company as indicated by DoT is as under :

Rs 5000 crores	Fully paid up Equity Capital.
Rs 7500 crores	Preference Share Capital.
Rs 7500 crores	Loans.

The Balancing figure will be represented by the Reserves.”

19. Paragraph 2 of schedule T to the Final accounts for the period 15.9.2000 to 31.3.2001 containing the notes to the accounts as reproduced hereinbefore also disclosed the value at which the assets were transferred to the petitioner and also the capital structure as was decided at the material time. Indisputably, the Assessing Officer had occasion to examine the aspect of valuation of assets and the same is also clearly evident from the questionnaire framed by the Assessing officer for the purposes of scrutiny of the return filed by the petitioner. Merely because there is no discussion regarding applicability of Explanation 10 to Section 43(1) of the Act cannot lead to the conclusion that the Assessing Officer was ignorant of the said provisions. There is no occasion for us to presume that the assessment order framed by the Assessing Officer was without application of

mind as to the relevant facts and the applicable laws. A full bench of this court has held in the case of **CIT v. Kelvinator of India Ltd. (DHC)** (*supra*) as under:

“43. We also cannot accept submission of Mr Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed....”

20. Admittedly, no new tangible material has been discovered subsequent to the framing of the first assessment relating to the assessment year 2001-02. The reasons as furnished by the Assessing Officer, *ex-facie*, indicates that he has sought to make certain inferences based on disclosures which were already on record and had been considered while framing the first assessment. The relevant portion of the reasons for issue of notice under Section 148 are quoted below:

“The assessee company came into existence on 1st October 2000 and the year under consideration is the first year of the assessee. The history of the assessee company is that in pursuance to the New Telecom Policy, 1999 the Government decided to corporatise the service provision functions of the Department of Telecommunication (DoT) were carved out for providing telecom services in the country and maintaining the telecom network factories. The business of providing telecom services and running the telecom Factories was transferred to the new company i.e. BSNL w.e.f. 1.10.2000 AND THE Government retained functions of policy formulation, licencing, R&D etc.

The takeover of the assets and liabilities by the Company was in terms and conditions with the Office Memorandum No.-2-30/2000 dated 30.09.2000 issued by the Ministry of Communications, Govt. of India. In terms of this OM dated 30.09.2000, the total book value of the assets transferred to BSNL was provisionally assessed as ₹63,000 crores subject to finalization of the transfer value by 31.03.2001. In the consultation with the Ministry of Finance. The assets transferred included fixed assets (like land, building etc.) and trading assets (like debtors raised by DOT and not realized till the time of transfer of business).

Para 3 (iv) of the OM further mentioned that the assets were transferred to the Company in consideration of Rs 5000 crores equity (for which the Company will issue Five Hundred crores Equity Shares of face value of Rs 10/- each fully paid up having aggregate value of Rs Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways and means advance and the balance as a mix of long term debt, free reserves and preference share capital. It was also mentioned that the accounting treatment of this mix would be notified later.

Para 3 (v) of the OM mentioned that the capital structure of BSNL would be finalized by the Ministry of Communications, Department of Telecommunications in consultation with Ministry of Finance and the Comptroller and Auditor General of India, if necessary. Accordingly, another Office Memorandum No. 67-2/2002-OC dated 19.06.2002 was issued by the Department of Telecommunications, Govt. Of India regarding the terms of capital structure and package of measures in the form of financial reliefs. As per this OM the capital structure of BSNL was as follows:

Paid up Equity Share Capital	Rs 5000 crores
9% (Non-Cumulative) Preference	Rs 7500 crores
Government Loan	Rs 7500 crores
MTNL Loan	Rs 3000 crores
Reserves	Balance of asset Value transferred.

During the course of assessment for the A.Y. 2003-04, the assessee was required to explain the nature of reserves as mentioned in the capital structure of BSNL. In response the assessee stated that it is in the nature of a 'capital reserve' and is the 'balance of asset value

transferred'. The assessee further gave a mathematical equation for reserves as:

$$\text{RESERVES} = \text{Asset} - \text{Liabilities} - \text{Paid-up Equity Capital} - 9\% \text{ (NC) Preference Share Capital} - \text{Government Loan} - \text{MTNL Loan}.$$

Thus, from the assessee's definition of reserves, the following can be derived:

$$\text{ASSET} = \text{Reserves} + \text{Liabilities} + \text{Paid-up Equity Capital} + 9\% \text{ (NC) Preference Share Capital} + \text{Government Loan} + \text{MTNL Loan}.$$

The assets transferred to BSNL include fixed assets as well as trading assets. Therefore from the above equation it is clear that part of the cost of fixed assets of the assessee company are met by the reserves, which as per the assessee are in the nature of capital reserves. This means that to the extent of reserves, the cost, of fixed assets of the assessee company is met by the Government.

Now, sub-section (1) of section 43 of the Income-tax Act, 1961 defines actual cost for the purpose of depreciation as the actual cost of assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. Explanation 10 to this sub-section further states that where a portion of the cost of an asset is met directly or indirectly by the Central Government in the form of a subsidy or grant or reimbursement (by whatever name called), then so much of the cost as is relatable such subsidy or grant or proviso to this explanation further states that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets such asset in respect of the or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee.

In the instant case part of fixed assets and part of other assets in met by the Government in form of reserves created at the time of corporatisation. Thus, the actual cost of fixed assets to the assessee must be reduced by that proportion of the reserves as the fixed assets bears to all the assets taken over at the time of corporatization.”

21. It is apparent from the above that the conclusion drawn by the Assessing Officer that the cost of fixed assets of the petitioner company has been met by the Government is based on the capital structure as was recorded in various documents including the Office Memorandum dated 30.09.2000 issued by the Ministry of Telecommunication, Government of India. Whereas the earlier Assessing Officer had not thought it fit to conclude that the cost of the fixed assets were required to be reduced to the extent of the reserves during the first round of assessment, the reasons as recorded disclose that this was sought to be done by reopening the assessment. This in our view represents a clear change in the opinion without there being any further “tangible material” to warrant the same. It is trite law that a mere change of opinion cannot be a reason for reassessing income under Section 147 of the Act. The Supreme Court in the case of **CIT vs. Kelvinator of India Ltd. (SC)** (*Supra*) has held as under:-

“On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. 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.”

22. Following the aforesaid view we are of the opinion that the notices dated 23.11.2005 and 12.03.2007 under Section 148 of the Act and all proceedings initiated pursuant thereto are illegal and are liable to be quashed.

23. In view of our decision above, it is not necessary to examine the question whether the configuration of the capital structure of the petitioner could by itself provide a reason for the Assessing Officer to believe that provisions of Explanation 10 to Section 43(1) of the Act were applicable and the book value at which the assets were vested with the petitioner were required to be reduced to the extent of the reserves of the company. However, having heard the counsel for the parties on this issue, it is apposite that we consider the same.

24. Explanation 10 to Section 43(1) of the Act is as under:

“Explanation 10. - Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

Provided that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee.”

25. The Assessing Officer seems to have proceeded on an assumption that whereas the value of share capital, issued to the Government as part consideration for the transfer of business to the petitioner company, is limited only to the face value of the shares, the reserves represent a subsidy, grant or reimbursement for meeting the cost of assets transferred. We find no basis for such an assumption. We are hard pressed to imagine as to how free reserves and surpluses of a company can be considered anything but as part of shareholders funds.

The Assessing Officer erred in completely ignoring that reserves and surpluses of a company are a part of shareholders funds and the book value of equity share consists of not only the paid up capital but also the reserves and surpluses of the company. The format of the balance sheet as prescribed under Schedule VI of the Companies Act, 1956 also clearly indicates that reserves and surpluses are a part of shareholders fund. The balance sheet of the petitioners company also reflects the reserves and surpluses as a part of shareholders' funds. The relevant portion of the balance sheet of the petitioner company as on 31.03.2001 is quoted below:-

"Shareholders' Funds		
Capital	A	50,000,000
Preference Capital pending allotment (Refer Note 2.3 on T)		75,000,000
Reserves & Surplus	B	339,079,523
Loan Funds		
Secured Loan	C	5,100,000
Unsecured Loans	D	107,983,258
Total		<u>577,162,781"</u>

26. The scheme of hiving off the business of telecom services by Government of India to a corporate entity entailed incorporation of a wholly owned

government company (i.e, the petitioner company) and the transfer of the business as a going concern along with all its assets and liabilities to the company. The net assets were transferred at book value, which was agreed to be at least Rs 63,000/- Crores and in consideration of this the petitioner company accepted a liability of Rs 7500 Crores and issued both equity and preference share capital of the face value of Rs 5000 Crores and Rs 7,500 Crores, respectively. The balancing figure was reflected as reserves which is an integral part of the shareholders funds. The Government of India has transferred the assets to the petitioner company at their book value i.e., the value at which the said assets are reflected in the books of DTS and DTO and the book value of the Government of India's holding in the petitioner company as shareholder and a creditor aggregates the book value of the assets transferred. The configuration of the capital structure of the petitioner has no impact on the value of the Government's holding in the petitioner company as reserves of a company are subsumed in the book value of its capital. We find no basis, at all, for the Assessing Officer to surmise that reserves represent a subsidy, grant or reimbursement from which the cost of assets of the petitioner company are met and the whole consideration received by the Government of India for transfer of business is limited to the value of loans and the face value of the shares issued to the Government of India. A reserve represents the shareholders' fund and may be utilized in various ways including to declare dividends or for issuing bonus shares. There is no plausible reason to assume that the value of shareholders' holding in a company is limited to the face value of the issued and paid up share-capital and the reserves represent a subsidy or a grant or a reimbursement by the shareholders from which directly or indirectly the cost of the assets in the hands of a company are met. We are thus of the view that the reasons as furnished by the Assessing Officer for reopening the assessments could not possibly give rise

to any belief that income of the petitioner had escaped assessment and proceedings initiated on the basis of such reasons are liable to be quashed.

27. We accordingly set aside the notices dated 23.11.2005 and 12.03.2007 issued under Section 148 of the Act and quash all proceedings initiated pursuant thereto. The parties are left to bear their own cost.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, J

MAY 09, 2013'
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