

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.241 OF 2014

Techpac Holdings Ltd.,
Hamilton HM11, Bermuda

... Petitioner

v/s

The Dy. Commissioner of Income
Tax (OSD-II), Mumbai 400 020
and another

... Respondents

Mr J.D. Mistry, Sr. Counsel with Mr Madhur Agarwal i/b Mr
Atul K. Jasani for Petitioner.
Mr A.R. Malhotra with Mr N.A. Kazi for Respondents.

**CORAM: M.S. SANKLECHA AND
B.P. COLABAWALLA JJ.**

**Reserved On : 3rd March, 2016
Pronounced On: 18th March, 2016**

JUDGMENT [Per B. P. Colabawalla, J]:-

1. This Petition under Article 226 of the Constitution of India challenges the Assessment Order dated 25th March, 2013 passed by Respondent No.1 [Dy. Commissioner of Income Tax

(OSD-II), Mumbai] in relation to A.Y. 2005-06. This Assessment Order was passed under section 144 read with section 147 of the Income Tax Act, 1961 (for short, **“the Act”**). By this Assessment Order, Respondent No.1 has inter alia held that a sum of Rs.575.39 crores is the capital gains in the hands of the Petitioner arising out of a transfer of a capital asset in India. Accordingly, a demand of Rs.697.94 crores has been raised on the Petitioner as and by way of capital gains tax which is inclusive of interest etc under different provisions of the Act.

2. In this Petition, rule was issued on 23rd June, 2014 and interim relief in terms of prayer clause (d) was granted. Thereafter, a request was made on behalf of the Revenue that the Writ Petition be taken up out of turn as the total tax impact in the present proceedings was a very large sum. In this view of the matter, this Writ Petition is taken up for hearing and final disposal.

3. The two principal grounds of challenge to the impugned Assessment Order are that:-

- (i) none of the notices [viz. under sections 148, 142(1) or 143(2) of the Act] were ever served on the Petitioner which is a company incorporated under the laws in Bermuda. Since service of these notices was mandatory before any Assessment Order could be passed under section 144 of the Act, the impugned Assessment Order is wholly without jurisdiction; and
- (ii) that in any event, the notice issued under section 148 of the Act and which finally led to the Assessment Order being passed under section 144 of the Act, was wholly without jurisdiction as Respondent No.1 could not have any reason to believe that income chargeable to tax had escaped assessment. This argument is canvassed on the basis that admittedly the Petitioner is not a transferor of any capital asset in India and hence there was no question of levying any capital gains tax on the Petitioner.

4. It is therefore the case of the Petitioner that the impugned Assessment Order is wholly without jurisdiction and it is in these circumstances that the Petitioner has sought to justify invocation of our writ jurisdiction under Article 226 of

the Constitution of India without first exhausting the statutory remedies available to it under the Act for challenging the impugned Assessment Order.

5. To understand the present controversy, it would be necessary to refer to some relevant facts which are as under:-

(a) The Petitioner is a company incorporated under the laws of Bermuda and is the holding company of the entire Techpac Group. Respondent No.1 is the Deputy Commissioner of Income Tax (OSD-II) who has passed the impugned Assessment Order dated 25th March, 2013 under section 144 of the Act for A.Y. 2005-06 inter alia holding that the Petitioner is liable to pay capital gains tax on a sum of Rs.575.39 crores. Respondent No.2 is the Union of India and is the employer of Respondent No.1.

(b) It is an undisputed position that the shares of the Petitioner company (equity as well as preferential) were held by certain non-resident as well as resident

shareholders. The bulk of the shareholding was held by three private equity funds viz. CVC Capital Partners Asia Pacific LP, Asia Investors LLC, and Hagemeyer Caribbean Holding NV. The Petitioner is a holding company and has under its fold several operating companies in Australia, New Zealand and Thailand including a company called Tech Pacific Asia Ltd., a company registered in the British Virgin Islands. In turn, Tech Pacific Asia Ltd. was the holding company of Techpac Mauritius Ltd. as well as other operating companies in Hong Kong, Malaysia and Singapore. Techpac Mauritius Ltd. was in turn the holding company of an Indian subsidiary by the name of Tech Pacific (India) Ltd. (hereinafter referred to as **“Tech Pacific India”**). This Indian subsidiary in turn was the holding company of Tech Pacific India (Exports) Pte. Ltd., which was a company incorporated in Singapore. All the aforesaid companies (over 20 Companies in 13 different countries) are hereinafter referred to as the **Techpac Group**. Hence the Petitioner was the

ultimate holding company of the Techpac Group.

- (c) The Techpac Group was a technology distributor and a leading technology sales, marketing and logistics group in the Asia Pacific region. One Ingram Micro Inc., USA, a company registered in the United States of America is also one such company who has its presence worldwide. The Ingram Micro Group also consists of several companies throughout North America, Europe, Middle East, Africa, Latin America and Asia Pacific regions which support global operations through an extensive sales and distribution network (hereinafter referred to as the **“Ingram Group”**). We must mention here that Ingram Micro Inc., USA was the holding Company of inter alia a company called Ingram Micro Asia Holdings Inc., USA (hereinafter referred to as **“Ingram Micro Asia”**) which was also a company incorporated in USA. Ingram Micro Asia had a fully owned subsidiary in India by the name Ingram Micro India Pvt. Ltd.

- (d) The Ingram Group felt that it required to strengthen its presence in the Asia Pacific region and accordingly offered to take over the Techpac Group. Accordingly, in November 2004, Ingram Micro Asia acquired the shares of the Petitioner company under a share purchase agreement in which Ingram Micro Asia was the purchaser, the shareholders of the Petitioner company (described in Schedule I to the said agreement) were the sellers, and Ingram Micro Inc., USA (the ultimate holding company of the Ingram Group) was the guarantor. The consideration under the said share purchase agreement was set out in clause 2 thereof and inter alia came to a sum of approximately AUD 730 million (Australian dollars). After the aforesaid acquisition, the Indian entity of the Ingram Group [Ingram Micro India Pvt. Ltd.] was merged into the Indian entity of the Techpac Group [Tech Pacific India] and post the merger, the name of Tech Pacific India was changed to Ingram Micro India Ltd

(hereinafter referred to as **“Ingram Micro India”**).

In other words, Tech Pacific India continued to exist post the merger, but under a new name viz. Ingram Micro India. In this fashion, the Ingram Micro Group took over the Techpac Group.

- (e) During the course of search and seizure proceedings carried out at the premises of Ingram Micro India [earlier known as Tech Pacific India] on 17th September 2007, the annual report of Ingram Micro Inc., USA for the year 2005 was inter alia found alongwith the share purchase agreement. Looking at the documents seized during the search, Respondent No.1 was of the opinion that since the shares of the Petitioner company had been transferred to the Ingram Group, captial gains had accrued to the Petitioner. Accordingly, Respondent No.1 served a notice under section 163 of the Act dated 22nd November, 2010 on Ingram Micro India [previously known as Tech Pacific India] seeking to treat them as an agent of the Petitioner in respect of

the alleged capital gains which had arisen in the previous year relevant to A. Y. 2005-06. In addition thereto, Respondent No.1 by its letter dated 24th November, 2010 also called upon Ingram Micro India to furnish details of the sale of shares of the Petitioner company alongwith the details of the amounts received. Thereafter, on 3rd December 2010, Ingram Micro India received another letter from Respondent No.1 calling upon it to furnish the details as required failing which assessment would be completed under section 144 of the Act.

- (f) To challenge this action of Respondent No.1, Ingram Micro India [previously known as Tech Pacific India] filed a Writ Petition being Writ Petition (L) No.2710 of 2010. By an order dated 7th December, 2010, this Court disposed of the said Writ Petition directing Respondent No.1 to give a hearing to Ingram Micro India before passing any order under section 163 of the Act. The said order further recorded that in case the order passed by Respondent No.1 was adverse to

Ingram Micro India, no further action would be taken thereupon for a period of four weeks from the date of communication of the said order.

- (g) Be that as it may, Respondent No.1, after hearing Ingram Micro India passed an order dated 14th January, 2011 under section 163 of the Act inter alia holding it to be an agent of the Petitioner company and also computing capital gains in the hands of the Petitioner at Rs.575.39 crores.
- (h) Being aggrieved by the aforesaid order, Ingram Micro India approached this Court in its writ jurisdiction by filing Writ Petition No.285 of 2011. This Court by its order dated 30th November, 2011 quashed the order passed by Respondent No.1 under section 163 of the Act on the ground that the same was beyond the period of limitation prescribed under the Act. In other words, this Court quashed the order of Respondent No.1 treating Ingram Micro India as an agent of the Petitioner company. This

order has not been challenged by the Revenue and has attained finality.

(i) In this Writ Petition, it is the specific stand of the Petitioner that after passing of the aforesaid order dated 30th November, 2011 (in Writ Petition No.285 of 2011), it was not aware of any proceedings being taken by the Revenue authorities to make any assessment in the hands of the Petitioner company of the alleged capital gains arising from the transfer of its shares. It is the specific case of the Petitioner that no notice of whatsoever nature either inter alia under section 148 or under section 142(1) or under section 143(2) of the Act has been served on the Petitioner and the Petitioner was not aware of any other procedure / proceedings sought to be adopted by the Revenue authorities in this regard.

(j) Be that as it may, on 29th October 2013, Ingram Micro Inc., USA (having its address at 1600 E. St. Andrew Place, Santa Ana, CA 92705, USA) received

the impugned Assessment Order dated 25th March, 2013 passed under section 144 of the Act holding that the total taxable income computed in relation to the Petitioner company was Rs.575.39 crores. It is the case of the Petitioner that this Assessment Order was forwarded by Ingram Micro Inc., USA to the Petitioner on 30th October, 2013. It is only at this time that the Petitioner first came to know of the impugned Assessment Order and has therefore approached this Court in its writ jurisdiction seeking to quash the same.

6. In this factual background, Mr Mistry, learned Sr. Counsel appearing on behalf of the Petitioner, principally urged two contentions before us. They are :

(A) despite the fact that the impugned Assessment Order records that notices under sections 148, 143(2) as well as 142(1) of the Act were issued and served on the Petitioner, no such notices were ever received by the Petitioner. Mr Mistry contends that this has now become expressly clear from the affidavit in reply filed in this Writ

Petition wherein it has now been admitted that the notices under sections 148, 142(1) and 143(2) were sought to be served not on the Petitioner but on Ingram Micro India [previously known as Tech Pacific India]. This is despite the fact that the Revenue authorities were in possession of the address of the Petitioner in Bermuda and yet chose not to serve any notice on the Petitioner on the said address. He submitted that in the facts of the present case before any Assessment Order could be passed under section 144 of the Act, it was a sine-qua-non that a notice under section 148 of the Act ought to have been served on the Assessee. If this was not done, the Assessment Order passed under section 144 was wholly without jurisdiction requiring our interference under Article 226 of the Constitution of India. In support of the aforesaid proposition, Mr Mistry relied upon a decision of the Supreme Court in the case of ***Y. Narayana Chetty and another v/s Income Tax Officer, Nellore and others***,¹

(B) that in any event of the matter, in law, no capital gains had accrued in the hands of the Petitioner as the shares of the Petitioner company were transferred by its shareholders to Ingram Micro Asia and therefore Respondent No.1 could

¹ [1959] 35 ITR 388

never have any reason to believe that income chargeable to tax had escaped assessment as contemplated under section 147 of the Act. To elaborate this point further, Mr Mistry contended that in the facts of the present case, it was the shares of the Petitioner company that were transferred by its shareholders to Ingram Micro Asia. If there was any capital gains that accrued to any person in this transaction, if at all, the same would be in the hands of the shareholders of the Petitioner and not in the hands of the Petitioner company viz. Techpac Holdings Ltd. To put it simply, he gave an illustration that if “A” transferred his shares in “Larsen & Toubro Ltd” to “B”, the capital gains if at all could be taxed in the hands of “A” but certainly not in the hands of “Larsen & Toubro Ltd”. To attract capital gains, Mr Mistry submitted that (i) the person who is sought to be taxed has to have transferred a capital asset; and (ii) some gain ought to have arisen by virtue of such transfer in the hands of the transferor. In the facts of the present case, Techpac Holdings Ltd. (the Petitioner) has neither transferred any capital asset and neither has it received any gain by virtue of any such transfer. In this view of the matter, he submitted that the Revenue Authorities have proceeded on a total misconception in seeking to tax capital gains, if any, in the hands of the Petitioner

company.

7. For all the aforesaid reasons, Mr Mistry submitted that the impugned Assessment Order is wholly without jurisdiction and ought to be set aside by us in our writ jurisdiction under Article 226 of the Constitution of India.

8. On the other hand, Mr Malhotra, learned counsel appearing for the Revenue authorities, submitted as under :

(A) it is an admitted fact that Ingram Micro India [earlier known as Tech Pacific India] is a down-stream company of the Petitioner. The Revenue was having the last known address of the Petitioner as that of Ingram Micro India [earlier known as Tech Pacific India] being Gate No.1A, Godrej Industrial Estate, Phirozsha Nagar, Eastern Express Highway, Vikhroli (East), Mumbai 400 079. Since this was the last known address of the Petitioner, the notice dated 29th March, 2012 under section 148 of the Act was sent to this address on 30th March, 2012. This notice was duly received by Ingram Micro India [earlier known as Tech Pacific India] and was thereafter returned to the Revenue Authorities. Mr Malhotra submitted that Ingram

Micro India opened the postal envelope and after seeing the contents thereof, closed it and sent it back to the Revenue Authorities. He submitted that therefore a request was made to the authorized representative of Ingram Micro India [earlier known as Tech Pacific India] for submitting the correspondence address of the Petitioner, which was not supplied to them. Since Ingram Micro India [earlier known as Tech Pacific India] was having a business understanding with the Petitioner, the service of the notice issued under section 148 of the Act on Ingram Micro India [earlier known as Tech Pacific India] was good service on the Petitioner;

(B) With reference to the service of notices dated 16th January, 2013 issued under sections 142(1) and 143(2) of the Act, Mr Malhotra gave an identical explanation. Mr Malhotra submitted that these notices were also served on the last known address being that of Ingram Micro India [earlier known as Tech Pacific India] and the same were returned back to the Revenue authorities with the remarks "Refused". He submitted that since these notices were duly served and not responded to by the Petitioner, and time to carry out the assessment proceedings was getting over, the Revenue had no option but to pass an ex-parte Assessment Order under section 144 of the Act on 25th March, 2013.

In these circumstances, Mr Malhotra submitted that there was no merit in the contention of the Petitioner that they were not served with the notices under sections 148, 142(1) or 143(2) of the Act;

(C) The Assessing Officer clearly had reason to believe that income chargeable to tax had escaped assessment because by virtue of the aforesaid share purchase agreement entered into in November, 2004 there was clearly a transfer of a capital asset in India as contemplated under section 9(1)(i) of the Act. Mr Malhotra submitted that as a consequence of the said agreement, Ingram Micro India [earlier known as Tech Pacific India] alongwith all its assets and liabilities was transferred to Ingram Micro Asia. Since Ingram Micro India [earlier known as Tech Pacific India] was a company situated in India, there was clearly a transfer of a capital asset in India and therefore by virtue of the provisions of section 9(1)(i) of the Act, the income from such transfer was deemed to accrue in India. Mr Malhotra submitted that as the income was earned towards consideration of transfer of its business / economic interest i.e. Ingram Micro India [earlier known as Tech Pacific India] by reason of the above transaction, the Petitioner had earned income liable for capital gains tax in India. Mr Malhotra submitted that the share purchase

agreement entered into in November, 2004 would clearly establish that the same was not really between the shareholders of the Petitioner and Ingram Micro Asia but was one between the Petitioner and Ingram Micro Asia. He therefore submitted that even on this count, the submissions made on behalf of the Petitioner were of no substance and ought to be rejected by us.

9. With the help of learned counsel, we have gone through the papers and proceedings in the above Writ Petition as well as the annexures thereto. As far as the issue of service of notices under sections 148, 142(1) and 143(2) of the Act are concerned, it is an admitted position that the said notices were never served on the Petitioner. The Revenue seeks to justify service of these notices on the Petitioner by contending that they have served the said notices on the last known address of the Petitioner which was the address of Ingram Micro India [earlier known as Tech Pacific India], the downstream company of the Petitioner. We fail to see how the notices being served on Ingram Micro India [earlier known as Tech Pacific India] would amount to service on the Petitioner. This is more so in the facts of the present case considering that admittedly on the date

when these notices were sought to be served on Ingram Micro India [earlier known as Tech Pacific India], the Revenue was aware of the address of the Petitioner. This is clearly borne out by (i) the share purchase agreement that was in the possession of the revenue authorities on the said dates in which (at Recital “A” pg 34 of the paper-book) the registered office of the Petitioner company is clearly mentioned; and (ii) the letter dated 30th March, 2012 (Exh.R-2, page 203 of the paper-book) addressed by Respondent No.1 to the Joint Secretary, (FT & TR)-II, Central Board of Direct Taxes, North Block, New Delhi 110 001 in which Respondent No.1 clearly mentions that the registered office of the Petitioner is Charladon House, 2-Churchstreet, Hamilton, HM-11, Bermuda. Despite having this address prior to issuance of the notices under section 148, 142(1) and 143(2) of the Act, we fail to understand why these notices were not served on the Petitioner at this address. In these circumstances, we cannot accede to the contention of Mr Malhotra that service of the aforesaid notices on Ingram Micro India [earlier known as Tech Pacific India] (which is a subsidiary of the Petitioner) would be good service on the Petitioner.

10. We must also not lose sight of the fact that in the present case Ingram Micro India [earlier known as Tech Pacific India] was not the assessee or even a representative - assessee of the Petitioner. In fact, the Revenue in the earlier round of litigation, sought to treat Ingram Micro India [earlier known as Tech Pacific India] as an agent of the Petitioner under the provisions of section 163 of the Act. Being aggrieved by this action of the Revenue, Ingram Micro India [earlier known as Tech Pacific India] approached this Court in its writ jurisdiction by filing Writ Petition No.285 of 2011. This Court by its order dated 30th November, 2011 quashed the order of the Revenue Authorities passed under section 163 of the Act treating Ingram Micro India [earlier known as Tech Pacific India] as the agent of the Petitioner. Once this Court struck down the action of the Revenue treating Ingram Micro India [earlier known as Tech Pacific India] as an agent of the Petitioner, all the more, service of the notices under sections 148, 142(1) and/or 143(2) of the Act on Ingram Micro India [earlier known as Tech Pacific India] could never be considered as good service on the Petitioner.

11. Section 148 of the Act clearly stipulates that before making any assessment, re-assessment or re-computation under section 147 of the Act, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period as may be specified in the notice a return of income or the income of any other person in respect of which he is assessable in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. The section further stipulates that once this is done, the provisions of the Income Tax Act shall, so far as may be, apply as if such return were a return required to be furnished under section 139 of the Act. Therefore, clearly as stipulated in the said section, the notice issued under section 148 of the Act has to be served on the assessee. This is a sine-qua-non before any further action can be taken. If this notice itself is not served, all other proceedings that flow therefrom would have no legs to stand on and would fall to the ground. This is no longer res-integra as it stands concluded by the decision of the Supreme Court in the case of **Y. Narayana Chetty and another**.¹ The Supreme Court, whilst considering similar provisions under the Income Tax Act, 1922 held that service of

¹ [1959] 35 ITR 388

the requisite notice on the assessee is a condition precedent to the validity of any re-assessment. If a valid notice is not issued as required, proceedings taken by the Income Tax Officer in pursuance of the invalid notice and the consequent orders on assessment passed by him, would be void and inoperative. The Supreme Court opined that the notice under section 34 of the 1922 Act (similar to section 148 of the 1961 Act) cannot be regarded as a mere procedural requirement. It is only if the said notice is served on the assessee as required, that the Income Tax Officer would have jurisdiction to proceed further against him. If no notice is issued or if the notice issued is invalid, then the proceedings taken by the Income Tax Officer without a notice, or in pursuance of the invalid notice, would be illegal and void. The relevant portion of the Supreme Court decision [at pg 392 of the ITR report] reads thus:-

“The first point raised by Mr Sastri is that the proceedings taken by Respondent No.1 under Section 34 of the Act are invalid because the notice required to be issued under the said section has not been issued against the assessee contemplated therein. In the present case the Income Tax Officer has purported to act under Section 34(1)(a) against the three firms. The said sub-section provides inter alia that “if the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income tax has been underassessed”, he may, within the time prescribed,

“serve on the assessee a notice containing all or any of the requirements which may be included in the notice under sub-section (2) of Section 22 and may proceed to reassess such income, profits or gains”. The argument is that the service of the requisite notice on the assessee is a condition precedent to the validity of any reassessment made under Section 34; and if a valid notice is not issued as required, proceedings taken by the Income Tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. In our opinion, this contention is well-founded. The notice prescribed by Section 34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in the CIT v. Ramsukh Motilal [(1955) 27 ITR 54] and R.K. Das & Co. v. CIT [(1956) 30 ITR 439] and we think that that view is right.”

(emphasis supplied)

12. Looking to the facts of the present case and since the notice issued under section 148 of the Act was admittedly not served upon the Petitioner (who is the assessee in the present case), the consequent Assessment Order passed under section 144 of the Act is clearly without jurisdiction and ought to be set aside on this ground alone.

13. In view of our above finding that in the absence of

service of notice issued under section 148 of the Act, the Assessing Officer does not acquire jurisdiction to proceed further, the notices issued under section 142(1) and 143(2) both dated 16th January, 2013 (and which, in the facts of this case, can only be issued post the service of notice issued under section 148), also fall to the ground. Nevertheless, in the present facts we find that both these notices under section 142(1) and 143(2) were not served on the Petitioner. More importantly, we fail to understand how a notice under section 142(1) and under section 143(2) can be issued on the same date. Section 142(1) of the Act stipulates that for the purpose of making an assessment under the Act, the Assessing Officer may serve on any person who has made a return under section 115WD or section 139 or in whose case, the time allowed under sub-section (1) of section 139 for furnishing the return has expired, a notice requiring him on a date therein specified (a) where such person has not filed a return within the time allowed under sub-section (1) of section 139 of the Act or before the end of the relevant assessment year, inter alia to furnish a return of income. Section 143(2) in turn applies where a return has been furnished either under section 139 or in

response to a notice under sub-section (1) of section 142 of the Act. Therefore, clearly, sub-section (2) of section 143 would come into play only when a return is furnished under section 139 or a return is furnished in response to a notice under sub-section (1) of section 142. This would clearly establish that a notice under section 142(1) and under section 143(2) can never be issued on the same date. Furthermore in the facts of the present case, section 143(2) could never apply because admittedly no return had ever been filed by the Petitioner. We find that the Assessment Order merely records that notices under sections 148, 142(1) and 143(2) have been served on the Petitioner. Apart from the fact that this is factually incorrect, we find that there is a total non-application of mind on the part of the Assessing Officer in issuing a notice under section 143(2) of the Act. We therefore have no hesitation in holding that the Assessment Order passed under section 144 of the Act is wholly without jurisdiction as the notices under section 148 as well as under section 142(1) were never served on the Petitioner.

14. Having held so, we must state that in the facts of the present case, we find that even otherwise the Assessing Officer

could never have reason to believe that income chargeable to tax had escaped assessment warranting the issuance of a notice under section 148 of the Act. Section 147 of the Act (to the extent it is relevant for our purpose) reads as under :-

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

Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

15. Section 147 of the Act stipulates that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or re-assess such income and also any other income

chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. Therefore, before any notice under section 148 of the Act can be issued for initiating assessment / re-assessment proceedings, the Assessing Officer ought to have reason to believe that any income chargeable to tax has escaped assessment for that particular assessment year. This “reason to believe” is a sine-qua-non for issuance of the notice under section 148.

16. The facts of the present case and as more elaborately set out earlier in the judgment, clearly show that the shares of the Petitioner company were transferred by its shareholders to Ingram Micro Asia. The Petitioner itself has not transferred anything. In order to attract capital gains tax there are two requirements that need to be fulfilled – (1) that there is a transfer of a capital asset; and (2) there is a gain by virtue of such transfer. If these conditions are satisfied, then capital gains tax is to be computed as set out in section 48 of the Act.

The facts of the present case would clearly show that the Petitioner has not transferred any capital asset in India that would give rise to any capital gains tax in their hands. This is borne out from the share purchase agreement which itself stipulates that the 100% shareholding of the Petitioner company was transferred by its shareholders (described in schedule I thereof) to Ingram Micro Asia for a total consideration of AUD 730 million (Australian dollars) equivalent to Rs.2,501.72 crores (conversion rate being 1 Australian dollar = Rs.34.127). Even if we were to assume that by virtue of Ingram Micro Asia purchasing the 100% shareholding of the Petitioner, there was a transfer of a capital asset in India, the same could never be taxed as capital gains in the hands of the Petitioner company. This is for the simple reason that the shares of the Petitioner company have been transferred to Ingram Micro Asia by the Petitioner's shareholders and therefore the transferor in the aforesaid transaction is the shareholders of the Petitioner and not the Petitioner company. In these circumstances, if there was any liability towards capital gains tax, if at all (we are not called upon to consider this aspect), it was that of the shareholders of

the Petitioner and not the Petitioner itself. This being the position in law, the Assessing Officer could never have reason to believe that income of the Petitioner chargeable to tax in India had escaped assessment. If the Assessing Officer could not have had any reason to form the aforesaid belief, then naturally what follows is that no notice under section 148 of the Act could be issued in the facts of the present case. Consequently, the Assessment Order passed under section 144 of the Act was therefore wholly without jurisdiction. On this count also, we find that the Assessment Order passed under section 144 of the Act is unsustainable and has to be set aside.

17. Faced with this situation, Mr Malhotra very feebly tried to contend that the share purchase agreement entered into in November, 2004 was one which was actually between the Petitioner company and Ingram Micro Asia and not between the shareholders of the Petitioner and Ingram Micro Asia. We are afraid we are unable to accept this argument for more than one reason. Firstly, the impugned Assessment Order does not proceed to compute the capital gains on the basis that the aforesaid share purchase agreement was ostensibly entered into

between the Petitioner company and Ingram Micro Asia. This argument is being canvassed for the first time by the Revenue in this Writ Petition. Secondly, we find this argument without any substance as we fail to see how the Petitioner company can enter into any agreement for sale of its own shares. The shares of the Petitioner company are held by its shareholders who are the owners of the shares and who alone can transfer the same to a third party. Therefore, we are unable to understand the basis of the argument of Mr Malhotra that the share purchase agreement was ostensibly between the Petitioner company and Ingram Micro Asia.

18. In view of our earlier findings the Petitioner must succeed. However, it is clarified that we have not examined whether any capital gains have accrued to the shareholders of the Petitioner. If the Revenue Authorities are of the opinion that in fact capital gains have accrued to the shareholders of the Petitioner, they are free to take such action against the shareholders of the Petitioner as are permitted in law. Equally, if such proceedings are adopted by the Revenue against the shareholders of the Petitioner, all contentions to contest the

same are left open. Thus all contentions of all the parties concerned are kept open in that regard. For all the aforesaid reasons, rule is made absolute and the Petition is granted in terms of prayer clause (a). No order as to costs.

(B.P.COLABAWALLA, J.)

(M.S. SANKLECHA, J.)