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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 31, 2016

Delivered on: April 27, 2016

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W.P.(C) 1938/2013 & CM No. 3684/2013

M/S ALCATEL-LUCENT FRANCE AND ANR Petitioners

Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX Respondent

Through: Mr Zoheb Hossain, Standing Counsel.

WITH

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W.P.(C) 1967/2013 & CM No. 3747/2013

M/S ALCATEL-LUCENT ENTERPRISE AND ANR Petitioners

Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX Respondent

Through: Mr Zoheb Hossain, Standing Counsel.

WITH

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W.P.(C) 2016/2013 & CM No. 3836/2013

M/S ALCATEL-LUCENT BELL NV AND ANR Petitioners

Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1853/2014 & CM No. 3869/2014**

M/S. ALCATEL - LUCENT CANADA INC. Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1862/2014 & CM No. 3880/2014**

M/S. ALCATEL-LUCENT FRANCE (EARLIER
KNOWN AS ALCATEL CIT FRANCE) Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1863/2014 & CM No. 3882/2014**

M/S. ALCATEL - LUCENT BELL NV Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus
DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent

Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1867/2014 & CM No. 3888/2014**

M/S. ALCATEL LUCENT ENTERPRISE Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1868/2014 & CM No. 3890/2014**

M/S. ALCATEL-LUCENT CANADA INC. Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

+ **W.P.(C) 1871/2014 & CM No. 3901/2014**

M/S. ALCATEL LUCENT BELL NV Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate

with Mr Prakash Kumar, Advocate.
versus

DEPUTY DIRECTOR OF INCOME TAX (EARLIER
ASSISTANT DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

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W.P.(C) 1873/2014 & CM No. 3913/2014

M/S. ALCATEL-LUCENT ENTERPRISE Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY DIRECTOR OF INCOME TAX (ASSISTANT
DIRECTOR OF INCOME TAX) Respondent
Through: Mr Zoheb Hossain, Standing Counsel.

WITH

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W.P.(C) 2993/2015 & CM No.5360/2015

M/S ALCATEL-LUCENT FRANCE Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

WITH

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W.P.(C) 2994/2015 & CM No. 5398/2015

M/S ALCATEL-LUCENT ENTERPRISE Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX ,
CIRCLE -1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

WITH

+ **W.P.(C) 2995/2015 & CM No. 5366/2015**

M/S ALCATEL-LUCENT ENTERPRISE, Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX ,
CIRCLE -1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

WITH

+ **W.P.(C) 2997/2015 & CM No. 5369/2015**

M/S ALCATEL-LUCENT BELL NV Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

WITH

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W.P.(C) 2998/2015 & CM No. 5371/2015

M/S ALCATEL -LUCENT BELL NV Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

AND

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W.P.(C) 3000/2015 & CM No. 5375/2015

M/S ALCATEL -LUCENT FRANCE, Petitioner
Through: Mr C.S. Aggarwal, Senior Advocate
with Mr Prakash Kumar, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-1(1)(1), INTERNATIONAL TAXATION, Respondent
Through: Mr Ashok Manchanda, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE R. K. GAUBA

JUDGMENT
27.04.2016

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Dr. S. Muralidhar, J:

1. This judgment is common to sixteen writ petitions filed under Article 226 of the Constitution of India by companies belonging to the Alcatel-Lucent group. Four of the writ petitions are by M/s. Alcatel-Lucent France ('ALF'),

five by M/s. Alcatel-Lucent Bell NV ('ALB'), five by M/s. Alcatel-Lucent Enterprise ('ALE') and the remaining two by M/s. Alcatel-Lucent Canada ('ALC'). The challenge in all these writ petitions is to the notices issued by the Income-tax Department (hereafter 'the Revenue') to each of the Petitioners under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the assessments for various Assessment Years ('AYs'). The orders rejecting the objections of the Petitioners to such reopening are also under challenge. Consequently, the questions that arise for determination are similar.

Facts concerning Alcatel-Lucent France

2. To begin with the Court proposes to discuss in some detail the facts concerning ALF. As already noticed, the facts concerning the other Petitioners are more or less similar, and will be adverted to in brief at the appropriate stage in this judgment.

3. ALF, a company incorporated under the laws of France, through its authorised signatory Mr. Nitin Gupta has filed four of these writ petitions, viz., W.P.(C) Nos. 1938/2013 (concerning AY 2004-05), 1862/2014 (concerning AY 2005-06), 2993/2015 (concerning AY 2006-07) and 3000/2015 (concerning AY 2008-09). The challenge in these writ petitions is to the notices issued to ALF under Section 148 of the Income Tax Act 1961 ('Act') seeking to reopen the assessments for the respective AYs. The orders rejecting the objections of ALF to such reopening are also under challenge.

4. ALF states that it is a tax resident of France in terms of Article 4 of the

Double Taxation Avoidance Agreement ('DTAA'/tax treaty') entered into between India and France. ALF contends that it is entitled to be governed by the DTAA to the extent that the DTAA is more beneficial to it. ALF states that it supplies telecommunication equipment (hardware) along with software from outside India to various telecom companies in India. The case of ALF is that it has no Permanent Establishment ('PE') in India.

5. As far as AY 2004-05 is concerned ALF states that apart from providing services to Alcatel-Lucent India (hereafter 'ALI') on which it has paid tax and for which a return has been filed under the Act, ALF also makes equipment supplies to Indian customers in the telecom sector. It states that these sales were made outside India and payment was received outside India and, therefore, no income accrued or arose that was taxable in India. ALF states that in India, it derives income in the nature of fees for technical services (FTS), royalty and interest, which is offered to tax on gross basis i.e. at the rate of 2.5% in the absence of PE in terms of rates specified under the DTAA.

6. For AY 2004-05, ALF filed its return of income on 28th October, 2004 declaring an income of Rs. 1,16,01,630/-. For AY 2005-06, ALF filed its returns on 20th August, 2005 declaring an income of Rs. 2,93,05,860/-. For AY 2006-07, ALF filed its returns of income on 14th October, 2008 declaring a total income of Rs. 8,15,59,098/-. None of these returns was picked up for scrutiny.

7. A survey was conducted in the premises of ALI in New Delhi and Gurgaon on 27th February 2009 under Section 133A of the Act. On the basis

of the facts gathered during said survey, a notice under Section 148 of the Act was issued to ALF on 8th October, 2009 (for AYs 2004-05 and 2005-06) and 3rd November, 2009 (for AY 2006-07). In response to the said notices, ALF filed its returns on 29th October, 2009 reiterating the earlier return already filed by it for the said two AYs. Thereafter, further notices were issued by the Revenue to which replies were filed by ALF.

8. Separate assessment orders were passed by the Assessing Officer ('AO') on 23rd March, 2010 under Section 148 read with Section 143(3) of the act for the four AYs, i.e., 2004-05, 2005-06, 2006-07 and 2008-09. It may be noticed at this stage that for some reason the Revenue did not issue a notice under Section 148 of the Act to ALF as regards AY 2007-08. The order passed by the Assessing Officer ('AO') for AY 2006-07 (forming subject matter of W.P.(C) 2993/2015) formed the basis of the orders for the other three AYs, i.e., 2004-05, 2005-06 and 2008-09.

9. In the assessment order dated 23rd March 2010 for AY 2006-07, specific to the issue of taxability of the software, the AO came to the conclusion that the sale of software was in reality only a licence to use the software for consideration. Consequently, it was held that the consideration for software fell in the category of equipment royalty. It was further held that there was concealment of facts by furnishing inaccurate particulars. On this basis the AO also passed similar but separate assessment orders dated 23rd March 2010 for AYs 2004-05, 2005-06 and 2008-09.

10. The said assessment orders dated 23rd March 2010 were reversed by the Commissioner of Income Tax (Appeals) ['CIT(A)'] by a common order

dated 29th September 2012 for AYs 2004-05 to 2006-07 and 2008-09. The CIT (A) accepted the plea of ALF that the supply of hardware and software was an integrated one and that the software was inseparable as held by this Court in ***DIT v. Ericsson A.B. (2012) 343 ITR 470 (Del)***. However, it was held that “it is undisputed that the appellant has PE in India” and accordingly the AO was “directed to tax the total consideration received by the appellant for integrated supply of hardware and software on the same basis” as was adopted by him for hardware sales, i.e. @2.5% of total sale consideration received by ALF for supply of hardware and software both shall be treated as net profit attributable to India PE. The alternative submission of ALF was that in case the software supply is held to be royalty then such a receipt should be held as “effectively connected” to the PE and should be taxed same way as the hardware i.e., by attributing 2.5 % deemed net profit rate to the PE and thereby taxing the total supplies at the rate of 1%. In para 6.2 of its order dated 29th September 2012, the CIT (A) held that the profit attributable to the PE of ALF in India in respect of sale of hardware and software was to be estimated at 2.5% of the total sale consideration.

11. The appeals filed by the Revenue against the above order dated 29th September 2012 of the CIT(A) were dismissed by the Income Tax Appellate Tribunal (ITAT) by a common order dated 4th April 2014. The ITAT followed the decision of this Court in ***DIT v. Nokia Networks OY (2013) 358 ITR 259 (Del)*** and the decision of the Special Bench of the ITAT in ***Motorola Inc v. DCIT (2005) 96 TTJ 1[ITAT (Del)]*** which was affirmed by this Court in ***DIT v. Ericsson A.B.(supra)***. This decision dated

4th April, 2014 of the ITAT was upheld by this Court by its order dated 27th February, 2015 in ITA No. 119/2015 (*CIT v. Alcatel Lucent Canada*).

12. However, even during the pendency of the above appeals at various stages, notices under Section 148 of the Act came to be issued by the Revenue to ALF seeking to reopen the aforementioned assessments for AYs 2004-05, 2005-06, 2006-07 and 2008-09. The notice for AY 2004-05 was issued on 30th March 2011; for AY 2005-06 on 28th March 2012 and for AY 2006-07 and 2008-09 on 28th March 2013. The reasons recorded under Section 148 for reopening of the above assessments were identical. It is therefore sufficient if the reasons recorded on 29th March 2011 for reopening of the assessment for AY 2004-05 are referred to. It must be noted here that although the caption mentions AY 2003-04, this is obviously a typographical error as is plain from the second and penultimate paragraphs which refer to AY 2004-05. The reasons read as under:

"Reasons recorded for issue of Notice u/s 148 of the Income Tax Act, 1961 in the case of M/s. Alcatel— Ay 2003-04 (*Sic* 2004-05)

29.03.2011

The assessee is a company incorporated under the laws of France and is the supplier of hardware and software products for GSM cellular radio telephone system. During the relevant year it had supplied telecommunication hardware and software to various customers in India. The assessee had filed return of income claiming that the assessee does not have a permanent establishment in India. In the assessment order passed on 23.03.2010 it is held that the assessee had a PE in India and the profits are attributable to the PE in India and the software income earned by the assessee was taxed as royalty income

under the provisions of the Act and the tax treaty.

It is perused from the record of the case that while deciding the tax rate the date of execution of the agreement with Indian customers was not taken into account which resulted into an underassessment of the income of the assessee for the A.Y. 2004-05.

This also satisfies the pre-requisite condition stated under explanation 2 to section 147. Relevant portion of section 147 of the Act reads as below:

.....

In view of the above, I have reason to believe that the income of the assessee for A.Y. 2004-05 chargeable to tax has escaped assessment. In this case, not more than six years have elapsed from the end of the relevant Asstt. Year (i.e. A.Y. 2004-05) and income of more than 1 lakh has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, therefore, the notice u/s 148 r.w.s. 147 of the I.T. Act, 1961 satisfies the time limit for issue of notice as provided in Section 149 of the Act.

As required by section 151 of the Income-Tax Act 1961, the reasons are hereby put up for the kind perusal & recording of satisfaction."

Reopening of the Assessment for AY 2003-04

13. At this stage it is necessary to digress to a discussion of the facts for AY 2003-04. By an order dated 30th March 2006 for the said AY, the AO disagreed with the contention of ALF that it had no PE in India. The AO accordingly held that the software income earned by ALF had to be treated as royalty income under the Act as well as the DTAA. A specific reference was made to Clause (c) (ii) under Explanation 2 of Section 147 (ii) (c) of the

Act, while stating that in deciding the tax rate, the date of the execution of the agreement by ALF with its Indian customers was not taken into account and this resulted in escapement of the income of ALF for AY 2003-04.

14. The appeal by ALF against the above order dated 30th March, 2006 of the AO was allowed by the CIT (A) by an order dated 13th August 2010. The CIT (A) accepted the plea of ALF that no part of the consideration for supply of software which was an integral part of the equipment could be taxable as royalty either under Section 9(1)(vii) of the Act or the relevant provisions of the DTAA. The further appeal by the Revenue against the said order dated 13rd August, 2010 of the CIT(A) for AY 2003-04 was dismissed by the ITAT by the same common judgment dated 4th April 2014 by which it dismissed the Revenue's appeals for the AYs 2004-05, 2005-06, 2006-07 and 2008-09. This decision dated 4th April, 2014 of the ITAT was upheld by this Court by its order dated 27th February, 2015 in ITA No. 119/2015 (*CIT v. Alcatel Lucent Canada*).

15. Therefore, as far as AY 2003-04 was concerned, the Revenue should be taken to have accepted the case of ALF that the income received from the sale of software which was embedded in the hardware supplied by it to the telecom companies in India should be treated as business income and not as royalty.

16. However, during the pendency of the above appeals, for AY 2003-04, a notice under Section 148 of the Act was issued to ALF on 31st March 2010 seeking to reopen the assessment. The 'reasons to believe' recorded by the AO preceding the issuance of the said notice reads as under:

"The assessee is a company incorporated under the laws of France and is the supplier of hardware and software products for GSM cellular radio telephone system. During the relevant year it had supplied telecommunication hardware and software to various customers in India. The assessee had filed return of income claiming that the assessee does not have a permanent establishment in India. In the assessment order passed on 30.03.2006 it is held that the assessee had a PE in India and the profits are attributable to the PE in India and the software income earned by the assessee was taxed as royalty income under the provisions of the Act and the tax treaty.

It is perused from the record of the case that while deciding the tax rate the date of execution of the agreement with Indian customers was not taken into account which resulted into an underassessment of the income of the assessee for the A.Y. 2003.04.

This also satisfies the pre-requisite condition stated under explanation 2 to section 147. Relevant portion of section 147 of the Act reads as below:

.....

In view of the above, I have reason to believe that the income of the assessee for A.Y. 2003-04 chargeable to tax has escaped assessment. In this case, not more than six years have elapsed from the end of the relevant Asstt. Year (i.e. A.Y. 2003-04) and income of more than 1 lakh has escaped assessment, therefore, the notice u/s 148 r.w.s. 147 of the I.T. Act, 1961 satisfies the time limit for issue of notice as provided in Section 149 of the Act.

As required by section 151 of the income-Tax Act 1961, the reasons are hereby put up for the kind perusal and recording of satisfaction."

17. The objections of ALF to the above notice dated 31st March 2010 were rejected by an order dated 5th December 2011. Both the above notice and the

order were challenged by ALF in W.P.(C) No. 8739 of 2011 in this Court. In a judgment dated 15th May, 2012 in the said writ petition (*Alcatel-Lucent France v. ADIT*), this Court concluded that in the original assessment proceedings under Section 143(3) of the Act (i.e. for AY 2003-04) the question of taxability of income as well as the rate of tax had been specifically examined. The Court held that ALF disclosed the said income in its revised return. In the assessment order dated 30th March 2006, it had been held that the fee for licensing of the software to the Indian customers was taxable as royalty/FTS under Article 13 of the DTAA and Section 9(1)(vi) and (vii) of the Act, and that income was subjected to tax @ 10%. As already noticed, the said order of the AO was reversed in appeal before the CIT(A) whose order has been affirmed both by the ITAT as well as by this Court. The Court further held that "no new fact had come to the knowledge of the Assessing Officer after completion of the original reassessment proceedings" and the mere reconsideration of the some facts would not justify initiating the reassessment proceedings. Accordingly, the notice dated 31st March 2010 under Section 148 of the Act for AY 2003-04 as well as the order dated 5th December 2011 rejecting ALF's objections thereto were quashed by the Court. The aforementioned judgment dated 15th May 2012 in W.P.(C) No. 8739 of 2011 does not appear to have been challenged by the Revenue.

Re-opening of the assessment for AYs in question

18. Now reverting to the AYs in question i.e., 2004-05, 2005-06, 2006-007 and 2008-09. ALF states that it did not receive the notice dated 30th March 2011 issued to it under Section 148 of the Act for AY 2004-05. However, it

acknowledged receiving a subsequent notice dated 26th September 2011 issued under Section 143(2). In its reply dated 16th November 2011, ALF denied receiving the notice dated 30th March 2011 issued under Section 148 of the Act and contended that on that ground the proceedings initiated thereunder were void *ab initio*. Thereafter, a further notice dated 22nd November 2011 was issued to ALF under Section 142(1) wherein ALF was called upon to file its return of income to which it replied on 14th December 2011 stating that its original return may be treated as compliance with the notices under Section 142(1)/148. ALF also requested for the reasons for initiation or reassessment proceedings under Section 147 of the Act. ALF was thereafter provided with a copy of the reasons.

19. The objections by ALF to the reopening of the assessment for the aforementioned four AYs were rejected by separate orders. For AY 2004-05 on 28th February 2013, for AY 2005-06 on 11th March 2014, for AYs 2006-07 and 2008-09 on 4th March 2015. Although, the four orders rejecting the objections are identical, illustratively reference is made to the order dated 28th February 2013 passed by the AO rejecting ALF's objection for reopening of the assessment for the AY 2004-05.

20. ALF had raised three principal objections. The first concerned ALF not having received the notice dated 30th March 2011 under Section 148 of the Act. Since this plea was negatived and not further urged, it need not be discussed at this stage. The second was that by the order dated 15th May 2012, the High Court already quashed similar notice for AYs 2003-04. According to the AO, there was no similarity of the facts in W.P.(C) No.

8739 of 2011 since the assessment order dated 30th March 2006 for that AY i.e., 2003-04 had reproduced and thoroughly discussed the various provisions of the India-France DTAA thereby forming a considered opinion on the issue whereas the assessment order dated 23rd March 2010 for AY i.e., 2004-05 made only a 'cursory mention' of the earlier assessment orders by reproducing the 'notes to return of income' filed by the Assessee. There was no mention of the DTAA or any article thereof, therefore, it "could not be believed by any stretch of imagination" that the AO had formed any opinion on the issue of taxation of royalty income under Article 13 or any particular paragraph of the said Article of India-France DTAA or that the issue was examined or even considered by the AO. Further, according to the AO, the issue as to the effective connection of the royalty to the PE was not examined. One more objection of ALF which was considered by the AO was the third proviso to Section 147. Here again, the AO simply discussed the order of the CIT(A) without taking into account all the facts, viz., that on the date the reopening was sought to be initiated, appeals were pending either before the CIT(A) or the ITAT.

The present writ petitions

21. The present writ petitions have been filed by ALF questioning the above notices under Section 148 of the Act and the consequent orders of the AO rejecting its objections to the reopening of the assessments for the aforementioned AYs.

22. While notice was issued in W.P.(C) No. 1938 of 2013 on 22nd March 2013, stay was granted of the assessment proceedings. Similar interim

orders were passed in the other writ petitions. Replies have been filed by the Revenue and rejoinders thereto have been filed by ALF.

Submissions of counsel

23. Broadly the submissions of Mr. C.S. Aggarwal, learned Senior counsel for ALF is that reopening of the assessment was sought to be done merely on a change of opinion since the assessment orders earlier passed under Section 148/143 (3) were after a detailed examination by the AO of whether there was any concealment of income from the sale of software as royalty income with effective linkage to the PE in India. Secondly, it was submitted that in terms of the third proviso to Section 147, since the correctness of the assessment order of the AO was subject matter of appeal either before the CIT(A) or the ITAT, reassessment proceedings could not be undertaken. Thirdly, it was contended that the decision dated 15th May 2015 of this Court in W.P.(C) No. 8739 of 2011 was on identical facts and the issue stood decided in favour of the ALF. Fourthly, it was submitted that there was no fresh tangible material for the formation of the reasons to believe.

24. Reliance was placed on the decisions in ***Ritu Investments (P) Ltd. v. DCIT (2012) 345 ITR 214 (Del)***, ***Atma Ram Properties (P) Ltd. v. DCIT (2012) 343 ITR 141 (Del)*** and ***CIT v. Kelvinator of India Ltd.(2010) 320 ITR 561 (SC)***.

25. Replying to the above submissions, Mr. Ashok Manchanda, learned Senior Standing counsel and Mr. Zoheb Hossain learned Junior Standing counsel for the Revenue sought to place reliance on the decision of the Supreme Court in ***Income Tax Officer, Cuttack & Ors. v. Biju Patnaik***,

1990 SCR Supl. (3) 488. Reliance was also placed on the decision in **CIT v. Usha International Ltd. (2012) 348 ITR 485 (Del.)**. According to Mr. Manchanda, when the return was originally filed, the stand of ALF was that it had no PE in India. The AO negated this plea and held to the contrary. When the matter travelled to the CIT(A), the ALF succeeded as far as the question concerning the treatment of the income for the sale of software as income for royalty. However, the CIT (A) concurred with the AO that ALF did have a PE in India and it was on that basis that there was attribution of profits to the PE with the direction to the AO to tax the gross receipts at 2.5%. Yet, while filing the return in response to the notices under Section 148 in the second round, the ALF continued to maintain that it had no PE in India. This in itself would constitute a failure of the Assessee to disclose fully and truly all material facts.

26. Mr. Manchanda also referred to the fact that in the assessment order, the AO had made a reference to certain agreements produced by ALF which had no bearing at all to the issue in the assessment proceedings. These included even agreements to which ALF was not a party. Although, this was a fact not specifically adverted to in the 'reasons to believe' recorded for reopening of the assessments for the above AYs, Mr Manchanda submitted on the strength of the decision in **Biju Patnaik (supra)** that as long as the material on the basis of which the reasons to believe had been formed was available in the record and that record was before the Court, it could not be said that the reopening of the assessment on that score was not legally permissible.

Analysis and reasons

27. The above submissions have been considered. The Court finds that there is no answer given by the Revenue to one of the main grounds of challenge stemming from the third proviso to Section 147, which 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:

...

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing

Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148." (emphasis supplied)

28. The third proviso acts as a restraint on the AO from seeking to reopen an assessment which is itself the subject matter of further scrutiny in an appeal

that is pending. In the present case, the orders initiating the reopening of the assessments were passed even when the appeals against the assessment orders were pending either before the CIT(A) or ITAT. The said determination by the AO in the earlier assessment proceedings was, at the time of issuance of the second round of notice under Section 148 of the Act, still the subject matter of the appeal before the CIT(A). In other words, these notices were issued for AYs 2004-05 and 2005-06 on 30th March 2011 and 20th March 2012, whereas, an appeal was pending in respect of the said two years before the CIT(A) as of those dates. The order of the CIT(A) came only on 29th September 2012. As regards AY 2006-07 and 2008-09, the notices under Section 148 of the Act were issued on 28th March 2013 at a stage when the Revenue's appeal against the order of the CIT(A) for the said two AYs was still pending before the ITAT. As already noticed, the decision of the ITAT in those pending appeals was rendered on 4th April 2014. The third proviso to Section 147 of the Act mandates that the AO would not assess or re-assess income "involving matters which are the subject matter of any appeal, reference or revision". This mandate of the third proviso to Section 147, which was inserted with effect from 1st April 2008, appears to have been completely overlooked by the AO when he proceeded to issue the notices under Section 148 of the Act for the above AYs.

29. Turning to the 'reasons to believe', even a cursory look reveals that they are no different from the reasons that preceded the notice dated 31st March 2010 for AY 2003-04 which was quashed by this Court by order dated 15th May 2012 in W.P.(C) No. 8739 of 2011. The reasons for reopening of the assessment, as stated in what was recorded on 29th March 2011, for AY

2004-05 is that (i) ALF had filed a return of income claiming that it does not have a PE in India (ii) in the assessment order dated 23rd March 2010 it was held that the assessee had a PE in India to which its profits are attributable (iii) the software income earned by ALF was taxed as royalty income under the provisions of the Act and the tax treaty (iv) while deciding the tax rate, the date of execution of the agreement with Indian customers was not taken into account (v) this resulted in an underassessment of the income of ALF for AY 2004-05. Therefore, again a reference is made to Clause (c) (ii) under Explanation 2 to Section 147 of the Act. Although, the reopening is beyond the period of four years after the end of AY 2004-05 and within a period of six years, no reference has been made to any particular material that was not disclosed by ALF. The language of the statute is simply repeated - that the AO had reason to believe that the income of more than one lakh had escaped assessment “due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment”. As was noticed by this Court in its order dated 15th May 2012 while quashing an identical notice for AY 2003-04, the reasons do not refer to any new fact coming to the knowledge of the AO after the completion of original assessment proceedings.

30. It also requires to be noticed that the original assessment proceedings for AYs 2004-05, 2005-06, 2006-07 and 2008-09 were under Sections 148/143(3) of the Act. The AO, should therefore, be presumed to have examined in some detail whether there had been any escapement of income for assessment. In the circumstances, the inescapable conclusion is that the attempt for the second time to reopen the assessments for the AYs in

question is based only on a change of opinion and nothing else.

31. As far as the reliance of the decision in *Biju Patnaik (supra)* is concerned, as rightly pointed out by Mr. Aggarwal, that dealt with Section 147(a) as it then stood. Section 147 (a) has undergone a change that has been explained in some detail by the Supreme Court in *Kelvinator India (supra)* and in particular the following extract:

"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 fulfilment 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 preconditions 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. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.- A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

32. In view of the above authoritative enunciation of the legal position in light of the amended Section 147, the reliance by the Revenue on the decision of **Biju Patnaik** (*supra*) is to no avail.

33. Where reopening of the assessment is sought to be done more than four years after the end of the relevant assessment year, then the requirement of the Revenue having to say that there was a failure to disclose fully and truly

all material facts by the Assessee leading to escapement of income is a *sine qua non*. In ***Ritu Investments v. DCIT*** (*supra*), the Court took note of the fact that the AO would not get jurisdiction to reopen the assessment only on the basis of mere “error of judgment”. The Court referred to the decision in ***Gemini Leather Stores v. Income Tax Officer, B-Ward, Agra*** (1975) 100 ITR 1 (SC), and held that when the AO had all the material facts before him he could not take recourse to Section 147(a) “to remedy the error resulting from his own oversight”. Reference was also made to the decision in of the Supreme Court in ***Indian & Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi*** (1979) 119 ITR 996 (SC), and it was noted that the contrary view in ***Kalyanji Mavji & Co. v. CIT*** (1976) 102 ITR 287 (SC) was no longer good law. In this context reference was also made to the decision of ***Atma Ram*** (*supra*). The Court clarified that Explanation (1) to Section 147 applies only where the AO on the basis of account books or other evidence fails to discover the material facts and not where the AO fails to apply the relevant law. There can be no doubt that as far as the present case is concerned, the reasons do not refer to any failure on the part of ALF to disclose any material when it filed its original return or even the return pursuant to the earlier notices issued under Section 148 of the Act.

34. Mr Manchanda for the Revenue placed considerable on the following passage in the decision of this Court in ***Usha International*** (*supra*):

"25. Thus if a subject matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, principle of "change of opinion" cannot and

does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion."

35. As far as the present case is concerned, a perusal of para 8.2 of the order dated 23rd March 2010 for AY 2006-07 reveals that the issue concerning the treatment of the income from the sale of the embedded software as royalty has been dealt with in detail. It cannot, therefore, be said that no opinion was formed by the AO on this aspect. The reasons for reopening only refer to escapement of income and nothing else. This hinged upon whether, in fact, the income from the sale of software at all could be said to be 'royalty'. Where the CIT(A) has agreed with ALF that this did not amount to royalty, the question of applicable rate of tax on such royalty would not arise. It is therefore, not possible to agree with the contention of the Revenue on the strength of the decision of the *Usha International* (*supra*) that in the first instance there was no opinion formed by the AO.

36. In fact, in the order rejecting the objections preferred by the ALF, the AO rejects this plea only on the ground that the earlier orders only made a cursory reference to the issue. This understanding by the AO of what constitutes reasons for reopening an earlier assessment order is both factually and legally erroneous. As long as the earlier assessment order made a reference to an issue, it did not matter, as far as the AO is concerned, whether the reference to it was 'cursory' or otherwise. In fact, as already noticed, it was not cursory. There was a detailed discussion on this aspect.

Secondly, the AO failed to appreciate that he could not assume jurisdiction to reopen the assessment when the earlier assessment orders were the subject matter of the appeal. He chose to ignore the third proviso to Section 147, even though it was pointed out by ALF.

37. The desperate attempt by the Revenue at trying to infer the failure to disclose material particulars because of the inconsistent stand of ALF on whether it has a PE in India deserves to be rejected. Reasons for the second time were recorded by the AO on 14th March 2013 for reopening the assessment for AY 2006-07 and 13th March 2013 for AY 2008-09. This was after the order dated 29th September 2012 of the CIT(A) which negated the plea of ALF that it had no PE in India. The AO was aware that ALF was nevertheless maintaining its stand that it did not have a PE although it did not appeal against the order of the CIT(A). It cannot be said that there was any failure to disclose any material particulars only because ALF continued with its stand of not having a PE in India. In any event this was known to the AO and yet in the reasons recorded for reopening the assessment this is not referred to as a failure on the part of ALF to disclose true and material particulars.

38. The reasons for reopening merely repeat the words of the statute that there has been a failure by ALF to disclose material particulars. This is certainly not sufficient as far as the legal requirement is concerned. It has been repeatedly held by the Court that the mere repeating of the words in the statute is hardly sufficient compliance. Reference in this regard may illustratively be made to the decision dated 8th October 2015 of this Court in

W.P.(C) 1873 of 2013 (*Oracle System Corporation v. Dy. Director of Income Tax*) and the decision dated 18th December 2008 in W.P.(C) NO. 17719-20 of 2006 (*Silver Oak Laboratories Pvt. Ltd v. DCIT*).

39. It is also trite law that at the stage of the rejection of the objections for reopening of the assessment or in the counter affidavit in the writ petition challenging reopening of the assessment, the Revenue cannot be permitted to supply fresh reasons or fresh material that do not themselves find mention in the reasons for reopening of the assessment. This legal position is again well settled in *Indian Oil Corporation v. ITO [1986] 159 ITR 956(SC)*.

40. Mr. Manchanda, learned counsel for the Revenue, sought to develop another line of argument referring to the second proviso to Section 147 which states that the first proviso would not apply where “any income in relation to any asset (including financial interest of any entity located outside India) chargeable to tax has escaped assessment for any assessment year.” This according to him has to be read along with Clause (d) of Explanation 2 which states that for the purposes of Section 147 where a person is found to have any asset (including financial interest of any entity located outside India) then it would be deemed to be a case of income having escaped assessment. He also referred to Explanation 4 of Section 147 to urge that the above provisions were introduced by way of the Finance Act, 2012 would be applicable to any assessment year prior to 1st April 2012.

41. Mr. Manchanda was, however, unable to point out how any of the above provisions are applicable to the case in hand. Mr. Manchanda tried to urge

that the income by way of royalty as a result of the sale of embedded software should be held to arise from the intellectual property held by ALF outside India. As already pointed out, this does not constitute the reasons for reopening the assessment. This has been suggested only at the stage of arguments before this Court. The Court will only have to go by what there is on record as regards the 'reasons to believe' for the purposes of Sections 147 and 148 of the Act and not the reasons which Revenue now suggests during arguments in the Court.

42. A desperate attempt has been made by the Revenue, as is reflected in the order of the AO rejecting the objections of ALF to the reopening of the assessments, to draw a distinction between the facts concerning AY 2003-04 and those concerning the subsequent AYs which form subject matter of the present writ petitions. Mr. Manchanda suggested that no reference was made by the AO in the original assessment order to the applicability of Section 44DA(1) of the Act which was specifically referred to by the AO when he formed the reasons for reopening the assessment.

43. The reasons for reopening the assessment for AY 2004-05 do not made any reference to Section 44DA(1). Although it has been mentioned in the reasons for the other three AYs in question, this was not an issue that arose for the first time based on any tangible material that came to the notice of the AO subsequent to the original assessment orders which were themselves under Section 147 read with Section 143 (3) of the Act. As far as the issue regarding the agreements, this appears to be brought up for the first time at the stage of rejection of the objections. It did not form part of the original

reasons for reopening the assessments. Section 147 is not to be casually invoked to suit the convenience of the Revenue and at every stage to correct the errors of AOs which could have easily been avoided had there been a proper discharge of the statutory duty. Once that legal perspective is kept in view, repeatedly invoking Section 147 of the Act on the same materials, only because there is no statutory bar against it, would constitute an abuse of the process of law.

44. The Court would also like to observe that it is extraordinary that Sections 147 and 148 of the Act have been invoked by the Revenue not once but twice in respect of the same Assessee and on the same set of facts and same reasons. The Court had in its order dated 15th May 2012 for AY 2003-04 already held that the reopening of the assessment for these very reasons was bad in law.

45. For the above reasons the Court holds that there was no justification for the Revenue to have invoked the power under Sections 147 and 148 of the Act for the second time in respect of ALF for AYs 2004-05, 2005-06, 2006-07 and 2008-09. The impugned notices issued and the corresponding orders of the AO rejecting ALF's objections to the said notices are hereby quashed. The writ petitions of ALF are allowed but in the circumstances with no orders as to costs.

Facts concerning ALC

46. The facts, concerning the other petitions are mentioned at this stage only to highlight that the issues involved in them are identical to those in the petitions by ALF. Consequently, the decision in their petitions cannot be any

different.

47. As far as ALC is concerned, notices under Section 148 were first issued on 8th January 2010 in relation to AY 2005-06 and AY 2007-08. ALC filed its return of income for the AYs 2005-06 and 2007-08 declaring 'nil' income on 8th March 2010. The AO thereafter issued letters dated 16th March 2010 during the course of the assessment proceedings in relation to each of the AYs seeking an explanation as to why the assessment order passed in the case of ALF for AY 2006-07 should not be relied upon and a similar order passed. ALC replied to the AO by a letter dated 18th March 2010 relying on ALF's submissions in regard to AY 2006-07.

48. The AO proceeded to pass separate assessment orders under Section 148 read with 143(3) dated 23rd March 2010 for AYs 2005-06 and 2007-08 computing the total income of ALC at Rs 17,43,129 for AY 2007-08, at Rs. 3,20,41,442 for AY 2005-06. The AO held that ALC had a PE in India and that software supplies will be taxed as royalty. ALC filed an appeal before the CIT(A) against the order of the AO on 21st April, 2010 for both the aforementioned AYs.

49. Even while the appeal was pending, the impugned notices under Section 148 dated 28th March, 2012 for AYs 2005-06 and 2007-08 were again issued to ALC. ALC filed a letter dated 2nd May, 2012 seeking extension of time for filing of a return in compliance with the said notice and another letter dated 22nd May, 2012 stating that the return of income filed originally in response to the earlier notice under Section 148 may be considered as its return in compliance with the impugned notice dated 28th March, 2012.

Further, by letters dated 22nd May, 2012 and 2nd December 2013, ALC sought the reasons recorded prior to initiation of the reassessment proceedings under Section 147/148.

50. Meanwhile the CIT(A) passed a common order dated 29th October 2012 in the appeals against the assessment orders dated 23rd March, 2010 pertaining to AYs 2003-04 to 2008-09. The CIT(A) further held that software receipts were not taxable as being in the nature of 'royalty' and attributed 2.5 % net profit on the entire receipts (hardware and software) as profits attributable to the PE.

51. Subsequent to this, ALC filed a letter dated 5th June 2013 requesting the AO to keep the reassessment proceedings in abeyance in light of the order dated 15th May, 2012 passed by this Court in WP(C) 8739/2011 staying the proceedings till disposal of the writ petitions in the case of ALF for 2003-04. The Deputy Director of Income Tax, Circle 1(1) then issued notices dated 20th November 2013 to ALC under Section 142(1) in each of the aforementioned AYs requiring ALC to furnish certain information and present itself at the office of the AO. The AO provided ALC with a copy of the reasons recorded for reopening of assessment by letter dated 16th January, 2014 to which ALC filed detailed objections by a letter dated 18th February 2014 to the validity of the initiation of reassessment proceedings under Section 147 and requested the AO to dispose of the said objections by passing a speaking order. Thereafter, the AO passed the impugned order dated 11th March 2014 rejecting ALC 's objections.

52. ALC filed WP(C) No. 1853 of 2014 for AY 2007-08 and WP(C) No.

1868 of 2014 for AY 2005-06 challenging the notices under Section 148 and the orders rejecting the objections of the Assessee to the initiation of the reassessment proceedings.

Facts concerning ALB

53. In the case of ALB, notices were issued under Section 148 for the AYs 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 pursuant to which it filed its return of income for the said AYs. The AO then passed separate assessment orders dated 23rd March 2010 computing the income of ALB at Rs. 45,60,020 for AY 2004-05; Rs. 48,80,614 for AY 2005-06; Rs 45,02,671 for AY 2006-07; Rs. 88,437 for AY 2007-08 and Rs 9,03,620 for AY 2008-09. ALB also filed appeals before the CIT(A) on 21st April, 2010 against the orders of the AO for each of the aforementioned AYs.

54. Even while the appeals were pending, the impugned notices under Section 148 dated 30th March, 2011 for AY 2004-05; dated 28th March 2012 for AYs 2005-06 and 2007-08; and dated 28th March 2013 for AYs 2006-07 and 2008-09 were issued to ALB. Subsequently, notices under Section 143(2) were also issued on 26th September 2011 for AY 2004-05. By a letter dated 16th November 2011, ALB submitted that it had never received notices under Section 148 of the Act for the said AYs. Thereafter, notices under Section 142(1) of the Act were issued on 22nd November 2011 to the Assessee requiring it to furnish a return of income.

55. ALB then wrote a letter dated 14th December 2011 stating that the return of income filed originally in response to the earlier notice under Section 148 may be considered as its return in compliance with the impugned notice

dated 30th March 2011 in AY 2004-05. By the same letter, ALB also requested for intimation of the reasons recorded by the AO for initiation of the proceedings under Section 147 of the Act which were accordingly furnished to the Assessee. Thereafter, the Asst. Director of Income Tax (Int'l Tax), Circle 1(1) sent a letter dated 14th June 2012 to ALB enclosing proof of service of the notice under Section 148 and further stating that no return had been filed pursuant to the notice under Section 142(1) dated 22nd November 2011 and calling upon ALB to present at a hearing and submit an explanation for the same.

56. ALB responded by a letter dated 25th June 2012 repeating that it had not received any notice under Section 148 and without prejudice to the above, enclosing a copy of its letter dated 14th December 2011. ALB then filed detailed objections on 4th July 2012 to the initiation of the reassessment proceedings under Section 147 of the Act for AY 2004-05. In relation to the other AYs as well, ALB filed detailed objections to the initiation of proceedings under Section 147.

57. Meanwhile, the CIT(A) passed an order dated 21st November 2012 pertaining to AY 2004-05; an order dated 5th December 2012 pertaining to AYs 2005-06, 2006-07, 2007-08 and 2008-09 (which was appealed before the ITAT on 22nd February 2013) whereby it was held that software receipts are not taxable in the nature of 'royalty' and attributed 2.5% net profits on the entire receipts (hardware and software) as profits attributable to the PE. The ITAT passed an order dated 4th April 2014 for the AYs 2002-03 to 2008-09 holding that revenues earned out of software equipment did not fall

within the ambit of ‘royalties.’

58. ALB's objections were disposed of by an order dated 28th February 2013 for AY 2004-05, dated 11th March 2014 for AYs 2005-06 and 2007-08; and dated 4th March 2015 for AYs 2006-07 and 2008-09, rejecting the same. Hence, ALB filed WP (C) No. 2016 of 2013 pertaining to AY 2004-05, WP(C) No. 1863 of 2014 for AY 2005-06, WP(C) No. 2998 of 2015 for AY 2006-07, WP (C) No. 1871 of 2014 for AY 2007-08 and WP (C) No. 2997 of 2015 pertaining to AY 2008-09 challenging the impugned notices under Section 148 and the orders disposing of the objections to the initiation of proceedings under Section 147.

Facts concerning ALE

59. As far as ALE is concerned, notices under Section 148 were issued to it on 20th October 2009 pursuant to the survey took place at the premises of ALI. This prompted ALE to file returns of income for the AYs 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 declaring ‘nil’ income. During the course of the assessment proceedings, the AO issued letters dated 16th March 2010 seeking an explanation as to why the reasoning in the case of ALF for the AY 2006-07, being on similar facts, should not be relied upon and an order passed in the case of ALE for the aforementioned AYs.

60. ALE sought to rely on the submissions made by ALF in the case pertaining to AY 2006-07. On 23rd March, 2010 the AO passed separate assessment orders under Section 148 computing the total income of the Assessee at Rs. 7,53,22,740 for AY 2004-05, Rs 4,48,20,790 for AY 2005-06, Rs. 6,52,19,674 for AY 2006-07, Rs. 11,19,02,284 for AY 2007-08 and

Rs. 16,41,68,300 for AY 2008-09. In doing so, the AO also held that ALE has a business connection and PE in India and that software supplies were to be taxed as royalty. ALE then filed appeals against these orders on 21st April 2010 before the CIT(A).

61. Even while the appeal was pending, the impugned notices under Section 148 were again issued to the Assessee Company on 28th March 2012 for AYs 2004-05 to 2008-09. ALE initially sought time for filing of its return by letter dated 2nd May 2012 and then filed a letter dated 22nd May 2012 where it requested the AO to consider the earlier returns filed by it as compliance with the new notice dated 23rd March 2012.

62. The CIT(A) passed an order dated 21st November 2012 in the appeals for AYs 2002-2003 to 2008-09 whereby it was held that software receipts are not taxable in the nature of 'royalty' and attributed 2.5% net profits on the entire receipts (hardware and software) as profits attributable to the PE. By letter dated 5th June 2013 ALE requested the AO to keep the reassessment proceedings in abeyance in light of the order dated 15th May, 2012 passed by this Court in WP(C) 8739/2011 staying the proceedings till disposal of the writ petitions in the case of ALF for 2003-04. However, the Deputy Director of Income Tax, Circle 1(1) issued notices under Section 142(1) requiring ALE to furnish certain information and present itself for explanation on these points before the AO on 2nd December 2013.

63. On that date, ALE wrote to the AO requesting that reassessment proceedings be dropped in light of the aforementioned order dated 15th May, 2012 in WP(C) 8739/2011. ALE also requested a copy of the reasons

recorded for initiation of proceedings under Section 147. On 16th January, 2014, ALE was provided a copy of the said reason for reopening of assessment. Based on this, ALE filed detailed objections to the validity of the initiation of reassessment proceedings under Section 147 for the AYs 2004-05 to 2008-09 on 18th February 2014 which primarily were threefold: that the proceedings were barred in terms of the third proviso to Section 147 of the Act; that no new material had come to light, and, that a mere change in opinion cannot be the basis for reopening of an assessment under Section 147.

64. By orders dated 11th March 2014, the AO disposed of the objections and rejected the contentions of the Assessee Company. Thereafter, ALE filed WP(C) No. 1967/2013 challenging the initiation of proceedings u/s 147/148 of the Act for the AY 2004-05. This Court by an order dated 22nd March 2013 issued notice in the matter and stayed the assessment proceedings initiated by issuance of notice u/s 148 of the Act. ALE also filed WP(C) No. 1873 of 2014 challenging the reopening of the assessment for the AY 2005-06, WP(C) No. 2994 of 2015 for AY 2006-07, WP(C) No. 1867 of 2014 for AY 2007-08 and WP (C) No. 2995 of 2015 for AY 2008-09.

65. The issues on the above three batches of writ petitions by ALC, ALB and ALE are identical to the issues that arose in the writ petitions filed by ALF which have been allowed by this Court by the present judgment. For the same reasons, the Court allows the writ petitions in this batch which have been filed by ALC, ALB and ALE and hereby quashes the impugned notices issued and the corresponding orders of the AO rejecting their

objections to the said notices are hereby quashed. All pending applications are disposed of. There shall be no orders as to costs.

S. MURALIDHAR, J

R. K. GAUBA, J

APRIL 27, 2016
RK/mg

