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

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**W.P. (C) 7828/2010**

Reserved on: 6<sup>th</sup> July 2017

Decision on: 26<sup>th</sup> July, 2017

**ORACLE INDIA PRIVATE LIMITED**

..... Petitioner

Through: Mr. M.S. Syali, Senior Advocate  
with Mr. Mayank Nagi, Mr. Tarun Singh,  
Advocates.

Versus

**ASSISTANT COMMISSIONER OF INCOME**

**TAX CIRCLE 13(1), NEW DELHI**

....Respondent

Through: Mrs. Prem Lata Bansal, Senior  
Advocate with Mr. Rahul Chaudhary, Senior  
Standing Counsel with Mr. R.A. Bansal,  
Advocates.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE PRATHIBA M. SINGH**

**J U D G M E N T**

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**26.07.2017**

**Dr. S. Muralidhar, J.:**

1. This writ petition by Oracle India Private Limited ('OIPL') (hereafter 'Assessee') challenges a notice dated 31<sup>st</sup> March, 2010 issued by the Deputy Commissioner of Income Tax, Circle 13(1) [hereafter the 'Assessing Officer ('AO')] under Section 147/148 of the Income Tax Act, 1961 ('Act') seeking to re-open the assessment for Assessment Year ('AY') 2003-2004.

### ***Background facts***

2. The Assessee is a wholly-owned subsidiary of Oracle Systems Corporation, USA ('OSC'), formerly known as Oracle Corporation. The Assessee entered into an Agreement dated 28<sup>th</sup> May, 1993 known as the Software Duplication and Distribution License Agreement ('SDDLA') for duplication and distribution of software. The SDDLA was valid for five years, which was renewable on a year-to-year basis. The last renewal relevant to the AY in question was on 1<sup>st</sup> June, 2002. The Assessee is also stated to be engaged in the activity of software development.

3. On 31<sup>st</sup> January, 2005, the Assessee filed its return declaring an income of Rs. 81,26,08,093. The Assessee *inter alia* claimed deduction under Section 80-IB and Section 10A of the Act.

4. The return was picked up for scrutiny and a notice under Section 143(2) of the Act was served upon the Assessee. Pursuant thereto, the Assessee revised its return on 31<sup>st</sup> March, 2005 declaring an income of Rs. 1,05,02,40,927. The assessment was completed under Section 143(3) of the Act by the AO by an order dated 17<sup>th</sup> February, 2006 making the following disallowances and enhancing the total taxable income to Rs. 1,62,64,66,350:

(i) Disallowance of part of royalty expense claimed of Rs. 18,12,77,408. Reliance was placed on earlier years i.e., AY 2000-01, 2001-02 and 2002-03 wherein the basis of the disallowance was application of Section 92 (old section) to the facts of the case.

(ii) Deduction under section 80-IB of the Act of Rs. 30,88,81,184. The basis of the disallowance was that the Petitioner was not carrying on any manufacturing/production activity and was merely duplicating the products manufactured and procured by OSC, which did not amount to manufacturing/production of articles or things as per provisions of Section 80-IB of the Act.

(iii) Expenditure on import of software master copy (Rs. 9,95,460 net of depreciation @ 75% under Section 32 of the Act) of Rs. 7,46,595. The cost of import of the master copy used for duplication of the software from the master copy being in the nature of capital expenditure and not revenue expenditure.

(iv) Income from the software development centre (deduction under section 10A) of Rs. 8,53,20,234.

5. The Assessee then went in appeal before the Commissioner of Income Tax (Appeals) [‘CIT(A)’]. By an order dated 26<sup>th</sup> October, 2006, the CIT(A) deleted the disallowance on (ii), (iii) and (iv) above. However, the CIT(A) upheld the disallowance on (i) above.

6. Both, the Assessee as well as the Revenue went in appeal before the Income Tax Appellate Tribunal (‘ITAT’). By the orders dated 16<sup>th</sup> December, 2008 and 5<sup>th</sup> August, 2009, the ITAT disposed of the Department’s appeal and the Assessee’s appeal, respectively. Except on the issue of allowability of the cost of the software master copy as revenue expense, all other issues were decided in favour of the

Assessee.

7. The Assessee then preferred an appeal before this Court on the issue of allowability of expenditure on software master copy as revenue expenditure. This Court by the order dated 29<sup>th</sup> May, 2009 passed in ITA No. 684/2009 admitted the appeal and framed the substantial question of law. The said appeal was subsequently allowed on 31<sup>st</sup> August, 2015.

8. The Revenue's appeal on the issue of eligibility of claim of tax holiday under Section 80-IA of the Act and other issues was dismissed by this Court by the order dated 1<sup>st</sup> September, 2009, which has been affirmed by the Supreme Court by dismissing the Revenue's SLP by the order dated 22<sup>nd</sup> October, 2010 in SLP(C) CC No. 15810/2010. The appeal of the Revenue on the issue of disallowance of part claim of royalty expenditure being ITA No. 987/2010 was dismissed by this Court on 30<sup>th</sup> March, 2011.

***Notice under Section 148***

9. After more than four years from the end of the relevant AY i.e., 2003-04, which period ended on 31<sup>st</sup> March, 2008, the AO issued the impugned notice under Section 148 of the Act to the Assessee on 31<sup>st</sup> March, 2010 stating that he had reasons to believe that income had escaped assessment. A summary of the reasons for re-opening the assessment, as communicated to the Assessee by the AO were as under:

i. Failure of the Assessee to add back cost of acquisition of software by

the development division (as reported in para 17 (1) of the Tax Audit Report for the year ended 31<sup>st</sup> March, 2003) for the computation of total income for the AY in question. The proposed addition on this score was Rs. 55,38,275.

ii. A wrong claim made by the Assessee of the principal amount of Rs. 1,54,19,985 included in finance lease rentals paid during AY 2003-04.

iii. Failure of the Assessee to add back the capital expenditure in the nature of 'Fixed Assets Written Off' debited to the profit and loss account (as mentioned in Note 13 of the Notes to Revised Computation of Taxable Income for the year ended 31<sup>st</sup> March, 2003) in the sum of Rs. 4,85,74,591.

iv. Incorrect and excess claim by Assessee of deduction under Section 80-IB of the Act for the profits of its Delhi Division.

v. Failure to deduct and deposit withholding taxes in the sum of Rs. 2,26,22,320 under Section 40(a)(i) of the Act in the computation of taxable income.

10. By a letter dated 25<sup>th</sup> October, 2010 the Assessee filed its objections to the assumption of jurisdiction under Sections 147/148 of the Act. The Assessee furnished detailed reasons why none of the reasons mentioned were tenable in law and in fact. The objections were disposed of by the AO by an order dated 4<sup>th</sup> November, 2010 relying on the decision of the Supreme Court in **Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191** and of this Court in **Consolidated Photo and W.P.(C) 7828/2010**

***Finvest Ltd. v. ACIT (2006) 151 Taxman 141 (Del).*** It was observed that re-assessment proceedings were valid since the Assessee did not fully and truly disclose all material during the original assessment proceedings. Thereafter, the present petition was filed. By an order dated 23<sup>rd</sup> November, 2010 while directing notice to issue in the petition, this Court directed that the assessment proceedings could go on but no final order would be passed. That interim order has continued since.

***Submissions of Senior counsel for the Assessee***

11. Mr. M.S. Syali, the learned Senior Counsel appearing for the Assessee, submitted as under:

(i) As regards the addition of capital expenditure in the sum of Rs. 55,38,275 on acquisition of software and of Rs. 48,85,74,591 on account of the 'fixed assets written off' on the ground that these amounts had not been added back to the computation of income, the said assumption was factually wrong. Both amounts had in fact been added back to the computation of taxable income under 'capital expenditure debited to Profit and Loss Account' in the revised return.

(ii) In the counter-affidavit filed by the Revenue in the present case, this fact had been admitted and yet the Revenue wanted to 'verify' these facts. There could not be a re-opening of assessment merely because certain facts had to be verified. It was plain that there was no failure by the Assessee to disclose material facts relating to the above items.

(iii) As regards the second reason that a presumption should be drawn that a disallowable item has been claimed as a deduction since the notes to the computation of total income in the audit of accounts stated that the tax and accounting treatment differ, the accounting treatment was in fact explained in detail by the Assessee in the accounts itself.

(iv) The issue concerned financial lease in which the lessee does not become the owner of the equipment. For accounting purposes, economic ownership is accepted. In terms of AS-19, which had to be followed, the payment made pursuant to the financial lease was divided between interest and principal on estimate basis. However, for the purposes of income tax, since the lessee is not the owner, whatever is paid to the owner is lease rent only, which is wholly allowable. The nomenclature for accounting was not determinative for tax purposes. Sufficient disclosure was made even at the time of the original assessment proceedings in the balance sheet produced before the AO.

(v) During the assessment proceedings for AY 2005-06, a questionnaire dated 28<sup>th</sup> November, 2008 was issued to the Assessee by the AO. The queries were answered and the details furnished by the Assessee in reply thereto. The said reply was accepted by the AO in the assessment order dated 29<sup>th</sup> December, 2008 for the said AY 2005-06 without drawing any adverse inference. More than a year thereafter, the re-opening was sought to be done for the AY in question i.e., AY 2003-04 on 31<sup>st</sup> March, 2010. Therefore, there was no failure on the part of the Assessee to disclose the material particulars.

(vi) The fourth reason concerned the deduction claimed on account of manufacture of software under Section 80-IB at Rs. 30,88,81,184 which constituted 30% of the profit i.e., Rs. 102.96 crores. This issue was discussed at length in the original assessment order. A specific query was raised in the course of the original assessment proceedings.

(vii) The presumption that production started in January, 1993 was incorrect. This was evident from the assessment record of the first year of claim as well as what was mentioned in Form-10CCB. Commercial operations commenced only after the Agreement dated 28<sup>th</sup> May, 1993 was entered into. The year of commencement was, therefore, AY 1994-95 and not AY 1993-94. From the initial year i.e., AY 1994-95, the AY in question i.e., AY 2003-04 was the 10<sup>th</sup> year. There was no claim made thereafter under Section 80-IB. The re-opening was made on the erroneous presumption that the year of commencement was AY 1993-94. Reference was also drawn to the assessment order dated 12<sup>th</sup> March, 1998 for AY 1995-96 which noted the eligibility under Section 80-IA.

(viii) As regards the reasons contained in paras 4.2 and 4.3 of the reasons furnished by the AO for re-opening of the assessment, viz., that the turnover of the undertaking was more than the amount on which royalty was paid and, therefore, the claim under Section 80-IB was inflated, it was explained that there was a segmental breakup in the record of the AO. The issue as regards the basis on which the royalty was payable was examined extensively in the assessment proceedings. The basis of the royalty was 30% of the Indian published price, even though the sale might have been at a different price.

(ix) This was a clear case of change of opinion by the AO. Even in the remand report dated 1<sup>st</sup> May, 2002, no adverse comments were made by the AO for the CIT(A) who by an order dated 18<sup>th</sup> November, 2002 accepted the Assessee's submission and restricted the observations on the ground that the activity of duplication did not amount to manufacture. The order of the CIT(A) was affirmed by the ITAT and by this Court in ***Oracle India (P.) Ltd. v. Commissioner of Income Tax (2014) 264 CTR 144 (Del)***. The SLP against the said order was dismissed by the Supreme Court in ***CIT s. Oracle Software India Ltd. (2010) 320 ITR 546 (SC)***.

(x) Reason No. 5 (i) given by the AO was that there was no evidence of Delhi Division of OIPL being registered as an 'industrial undertaking', it was pointed out that there was no such requirement in law. This Court has in ***Praveen Soni v. CIT (2011) 333 ITR 324 (Del)*** held that the said registration was not essential. In any event, there was no failure by the Assessee to furnish all the material facts.

(xi) Reason No. 5 (ii) was that the Assessee had failed to disclose a material fact concerning change of its location from Delhi to Gurgaon. It is pointed out that this change was a presumption drawn by the Revenue and was not a fact. Reference is made to the report in Form 10-CCB.

(xii) Reason No. 5 (iii) was that the highly paid executives could not possibly be construed as workers. It was pointed out that there are no

particulars for arriving at the above conclusion which was based entirely on surmises and conjectures.

(xiii) Reason No. 6 was that the Auditors had stated that the deduction under Section 80-IB was only an estimate. It was pointed out that Form 10-CCB was signed by another Auditor separately whereas the Audit Report itself was signed on 30<sup>th</sup> March, 2005. In any event, this was hardly a justification for re-opening of the assessment.

(xiv) The 7<sup>th</sup> reason was that the cost of the master copy being Rs.2,26,22,320 could not be disallowed as deduction since it was not envisaged in the royalty agreement. In any event, if it had to be allowed, it had to be treated as royalty. In this regard, it was pointed out that the stand taken by the Revenue was contradictory. In the original assessment order, the expenditure of master copy was disallowed as capital expenditure to the extent of Rs.9,95,460. This was obviously, therefore, examined in detail during the course of the assessment proceedings.

(xv) The 8<sup>th</sup> reason was that there were comments made by the Auditors about proper records not being maintained and non-compliance with the provisions of the Companies Act. The Assessee drew the Court's attention to the Audit's Report where in para 2 the Auditor pointed out its inability to verify items (a) - (h) noting that they "were unable to perform alternate audit procedures to satisfy ourselves as to the appropriate balances in the books of accounts owing to the nature of the company's records". Consequently, this also was not a valid reason for

disallowing the continuance.

***Submissions of Senior counsel for the Revenue***

12. Mrs. Prem Lata Bansal, the learned Senior Counsel appearing for the Revenue, stated that it was apparent from the accounts that the additions as stated in reasons 1 and 3 had in fact been made. According to her, this required verification and, therefore, the AO should be permitted to proceed with the assessment proceedings for this purpose. She placed reliance on the decisions in ***CIT v. Usha International Limited (2012) 348 ITR 485 (Del)***, ***OPG Metals & Finsec Ltd. v. CIT (2013) 358 ITR 144 (Del)*** and ***Indian Hume Pipe Co. Ltd. v. ACIT (2012) 348 ITR 439 (Bom)*** to urge that the mere production of the accounts would not relieve the Assessee of the responsibility of showing that the Assessee had made a full and true disclosure of all material facts necessary for the assessment in the first round of the assessment proceedings. Ms. Bansal maintained that under Explanation 1 to Section 147, the mere production of accounts would not necessarily be deemed to be a disclosure.

13. As far as reason No. 2 regarding finance lease and the difference in the treatment for accounting purposes is concerned, she submitted that there was no occasion for the AO in the first round to appreciate this distinction. The mere filing of the revised return would not amount to a full and true disclosure. As regards the claim for deduction under Section 80-IB of the Act was concerned, she pointed out that in the original assessment order while disallowing the said claim, the limited issue considered by the AO was that the duplication and distribution of

products was not tantamount to manufacturing of any product. It was during the course of assessment proceedings for the other AYs that the AO referred to the assessment record of the present AY i.e., AY 2003-04 and found that the Assessee had failed to prepare its accounts properly and to disclose all relevant facts. It was on that basis that he formed a reason to believe that income had escaped assessment.

14. Mrs. Bansal submitted that the assessment order dated 17<sup>th</sup> February, 2006 for AY 2003-04 gives the working of the calculation of royalty and that it had been computed on the total turnover of Rs. 124.81 crores. Royalty was to be computed on the sub-license, duplication and distribution income which was claimed to be eligible for deduction under Section 80-IB. A profit on the remaining turnover of Rs. 102.56 crores (Rs. 227.37 crores – Rs. 124.81 crores) was not eligible for deduction under Section 80-IB. She maintained that the assessment regarding the claim of deduction under Section 80-IB in respect of profit earned on the turnover of Rs. 102.56 crores was not examined by the AO in the original assessment order.

15. As regards the debiting of an expenditure of payment of Rs. 2.26 crores as cost of master copy paid by the Assessee to its parent company, Ms. Bansal submitted that this was in the nature of royalty as defined under Section 9(1)(vi) of the Act and the relevant provisions of the Double Taxation Avoidance Agreement ('DTAA') between India and USA. The Assessee was, therefore, liable to deduct TDS on the said royalty payment. In the event of non-deduction of TDS, the Assessee was obligated to add back the said sum under Section 40(a)(i).

This was not disclosed by the Assessee or considered by the AO during the original assessment proceedings under Section 143(3) of the Act.

16. Ms. Bansal also submitted that even otherwise the Assessee failed to fulfil certain statutory conditions for claiming deduction under Section 80-IB of the Act. In the first place, the establishment in Delhi was not an industrial undertaking. It was merely an office where the work of duplication and distribution of software developed by the parent company was undertaken. The requirement of a minimum number of employees was also not fulfilled. It was also not registered as an industrial undertaking. These issues were neither raised nor discussed in the original assessment proceedings.

17. Further, as per para 10 of the 10-CCB Report, the address was shown as Gurgaon. This implied that the Delhi Division had closed and shifted to Gurgaon, which fact was never disclosed. Ms. Bansal pointed out that the statutory Auditor engaged by the Assessee had issued qualifying remarks as claim under Section 80-IB of the Act as regards the maintenance of accounts. The Chartered Accountant i.e., S.R. Batliboi & Associates who completed the tax audit on 30<sup>th</sup> March, 2005 declined to certify the genuineness and appropriateness of the claim under Section 80-IB of the Act. Form 10-CCB was certified by another Chartered Accountant firm i.e., Gaurav Gupta & Associates on 31<sup>st</sup> March, 2005. This required verification and, therefore, the re-opening of the assessment was justified.

18. Relying on the decision in ***Raymonds Woollen Mills v. ITO (1999)***

**236 ITR 34 (SC)**, Ms. Bansal submitted that at the time of initiation of the proceedings under Section 147 of the Act, the AO had to only examine whether there was *prima facie* some material on the basis of which the assessment should have been re-opened. It is not open to the Court in exercise of its writ jurisdiction to go into the sufficiency and/or correctness of the material which forms the basis of the re-opening of the assessment. The Court was not expected to act as an appellate authority. Reliance was placed on the decision in **Bawa Abhai Singh v. DCIT (2002) 253 (ITR) 83 (Del.)**.

19. As regards the finance lease rentals, Ms. Bansal pointed out that the Assessee had actually deducted a sum of Rs. 1,54,19,985 from the taxable income. In the case of a financial lease, payment on account of principal was in the nature of capital expenditure. Therefore, it could not be deducted from the profits. The statement of the Assessee that it added back the depreciation on the assets acquired on finance lease was not verifiable from the records. The AO was, therefore, justified in concluding that Rs. 1,54,19,985 had escaped assessment and constituted a wrong claim on the part of the Assessee. Even the deduction under Section 80-IB during the AY in question was erroneous. The last eligible year for deduction was AY 2002-03 and the Auditor had qualified the audit report regarding the commencement of operation; later claiming it to be a typing error was simply an afterthought. The financial results with the return of AY 1994-95 showed that the period of operation of the financial year was shown as 18<sup>th</sup> January, 1993 to 31<sup>st</sup> March 1994. Thus, it is apparent that the Assessee had commenced

its operation in the financial year 1993 itself. Even on this ground, the re-opening of the assessment was fully justified.

### ***Analysis and Reasons***

20. The above submissions have been considered. It requires to be noticed that this is a case where the original assessment for AY 2003-04 took place under Section 143(3) of the Act. A very detailed assessment order has been passed in the first instance by the AO to which a reference will be made thereafter. The re-opening has been made by the notice dated 31<sup>st</sup> March, 2010 which is after the expiry of 4 years from the end of the relevant assessment order. Therefore, the first proviso to Section 147 is attracted.

21. The jurisdictional requirement that has to be fulfilled for justifying such re-opening of assessment where an assessment originally has been made under Section 143(3) of the Act and where the re-opening is after the expiry of 4 years from the end of the relevant AY is that the Revenue has to show that some income chargeable to tax escaped assessment by reason of the failure on the part of the Assessee “to disclose fully and truly all material facts necessary for his assessment, for that assessment year”.

22. Importantly, Section 147 underwent a significant change by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1<sup>st</sup> April, 1989. The Supreme Court in ***CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)*** has held that after 1<sup>st</sup> April, 1989, the AO has the power to re-open the assessment in terms of first proviso to Section 147

of the Act “provided there is ‘tangible material’ to come to the conclusion that there is escapement of income from assessment.” Placing reliance on the decision of *CIT v. Kelvinator of India Ltd.* (*supra*), this Court in *Coperion Ideal Private Limited v. Commissioner of Income Tax-II (2015) 378 ITR 525 (Del.)* held as under:

“14. .... The Supreme Court emphasised that although the power to reopen is much wider after the amendment, the words “reason to believe” needed a schematic interpretation and that the Assessing Officer ought not to be given power to reopen the “reassessment has to be based on fulfilment of certain pre-condition and if the concept of ‘change of opinion’ is removed, as contended on behalf of the Department, then, in the garb of 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”

23. It has been repeatedly emphasized in several decisions including the aforementioned decision in *CIT v. Kelvinator of India Ltd.* (*supra*) that the re-opening of an assessment on the same material that was available with an AO during the original assessment proceedings would be a case of mere change of opinion.

24. What Explanation (1) does is to clarify that the mere production of the account books or other evidence by the Assessee before an AO from which the AO, with due diligence, could have discovered ‘material evidence’ would not necessarily amount to disclosure. In other words, the fact of production of the account books and other evidence should not be presumed to be the making of a disclosure of ‘all material facts’ by the Assessee. Nevertheless, the burden is on the AO to show that

there has been a failure by the Assessee to disclose fully and truly all material facts necessary for the assessment.

25. In a situation where the Assessee has already produced all the account books and other evidence, while Explanation (1) may not lead to an automatic presumption of disclosure, unless there is some fresh tangible material available with the AO, he will not be able to show that there was a failure on the part of Assessee to disclose fully and truly all material facts. If the material is that which was already available during the original assessment proceedings, the AO will be unable to show that there has been a failure by the Assessee to disclose fully and truly all material facts.

26. The expression “will not necessarily amount to disclosure” as used in Explanation 1 to Section 147 of the Act brings in an element of subjectivity and also the requirement of assessing on a case-to-case basis where in fact there has been a full disclosure by virtue of the Assessee producing the account books and other evidence in the first instance. This explanation, therefore, would not relieve the AO of the burden of demonstrating the Assessee’s failure to make a full and true disclosure of all material facts necessary for the assessment for the AY in question.

27. A second aspect of the matter is that the above jurisdictional requirement should be shown to have been fulfilled from the reasons for re-opening of the assessment. In other words, the reasons must speak for themselves. The mandatory jurisdictional requirement in

terms of the first proviso to Section 147 of the Act will not be fulfilled if the reasons do not themselves clearly indicate that there was in fact a failure by the Assessee to make a full and true disclosure of all material facts. The reasons have to explain what the material was that was not disclosed by the Assessee which the Assessee ought to have disclosed in the first instance. This should be apparent from a reading of the reasons themselves. The reasons have to go beyond merely repeating the language of the provision regarding the failure of the Assessee to make a full and true disclosure of material facts. They should indicate in what manner was there such a failure.

28. In many of the cases, where the re-opening of an assessment is challenged, the Revenue tries to make up for the obvious defect in the reasons themselves which do not spell out the reasons by providing a justification at the stage of disposal of the objections or later in the counter-affidavit when the re-opening is challenged by a writ petition. This, again, is impermissible in law. Since the reasons must speak for themselves, a subsequent attempt to supply the omission at the stage of an order disposing of the objections raised by the Assessee or providing them in the counter-affidavit in reply to the writ petition or even worse, making good that defect in the course of arguments before the Court, will simply not suffice.

29. In the present case, what Ms. Bansal attempted to do as regards reasons (1) and (3) falls under the last category. Her submission that a perusal of the accounts did not reveal that the Assessee added back the capital expenditure on acquisition of software and the value of the fixed

assets (Reason Nos. 1 and 3) is not apparent either from the reasons themselves. The reasons for re-opening of the assessment in the present case *qua* reasons (1) and (3) read as under:-

“1. From the perusal of the assessment record of M/s Oracle India Private Limited for AY 2003-04, it has been observed that in para 17(1) of Tax Audit Report in Form No. 3 CD, it has been specifically mentioned that an amount of Rs. 55,38,275 representing the cost of acquisition by the software division was of capital nature and thus was liable to be added back to the computation of total income. No such amount has been added back which has resulted in understatement of taxable income by Rs. 55,38,275 because of failure on the part of the assessee to compute and declare true taxable income.

....  
3. In the 'Notes to Computation of Total Income', it has been mentioned in para 13 that the amount of Rs. 48,85,74,591/- debited to the P&L A/c under schedule 17 as 'Fixed Assets Written off' has been added back while computing the taxable income for want of verification and supporting documents. From a perusal of the 'Computation sheet of Total Income' it becomes clear that this amount has not been added to the taxable income. Thus income to the extent of Rs. 4,85,74,591/- has escaped assessment for failure on the part of the assessee.”

30. Therefore, all that reason (1) suggests is that there was failure on the part of the Assessee to compute and declare true taxable income; in reason (3) it is stated that income had escaped assessment “for failure on the part of the Assessee”. This does not satisfy the requirement of the Act.

31. What Ms. Bansal has sought to urge during the course of the

submissions before this Court is not even urged in the counter-affidavit. All that is stated is that despite what the Assessee has averred being '*prima facie*' in the order, the Revenue still needs to verify that fact. The audited accounts were already available with the AO and formed part of the assessment record. They did not require re-assessment proceedings for the purpose of such verification. In any event, the Court declines to accept reasons (1) and (3) as being valid reasons for re-opening of the assessment.

32. This was not a case where the AO could not have, from the assessment record itself, gleaned the information. Even at the stage of hearing the objections of the Assessee to the re-opening, the AO could have realized the mistake in re-opening the assessment for these two reasons.

33. Turning now to Reason No. 2 which pertains to finance lease, the actual reason for re-opening reads thus:

“2. In para 4 to the 'Notes to Computation of Total Income', the following noting have been given:

"Under the Accounting Standard AS-19, issued by the Institute of Chartered Accountants of India, assets acquired under financial lease are required to be capitalized in the books of accounts. The interest charges pertaining to the finance lease payments are also debited to the Profit and Loss Account. The income tax provisions, however, allow the lessee only to claim deduction for lease rentals and not to claim depreciation. Accordingly, in the tax computation, the company has claimed deduction of the principal amount of Rs.

15,419,985/- paid towards lease rental during the year and offered to tax the depreciation debited to the Profit and Loss Account."

The claim made in the underlined portion is totally incorrect and against the law. The assessee has actually deducted the amount of Rs.1,54,19,985/- from the taxable income which is totally wrong as in the case of financial lease any payment on account of principal is of the nature of capital expenditure and is not deductible from the profits. Thus the income of Rs.1,54,19,985/- has escaped assessment for wrong claim on the part of the assessee."

34. Here again, apart from saying that the Assessee made a wrong claim, there is not even a statement that there was any failure on the part of the Assessee to make a full and true disclosure of all material facts necessary for the assessment. What the fresh tangible material is on the basis of which the AO has come to the conclusion that income has escaped assessment is not even mentioned here.

35. The AO has plainly overlooked the jurisdictional requirement in terms of the proviso to Section 147 even as regards Reason No. 2. Turning to the counter-affidavit on this aspect, what is stated *qua* this reason too is, again, a reproduction of the same reason. Thereafter, it is stated as under:

"As per the Accounting Standards AS-19, "finance lease rentals would be segregated into principal and interest, and the charge to the revenue statement would comprise of depreciation and interest". In the notes to account para - 5, it has been declared that lease payment of Rs. 2,41,52,274/- has been made during the year. The assessee has debited interest charges of Rs. 87,32,289/- under the head interest on finance leases in the P& L A/c

and Rs. 1,54,19,985/- under the head payment of lease (principal) for motor vehicles in the computation of the income. The claim made in the underlined portion is totally incorrect and against the law. The assessee has actually deducted the amount of Rs. 1,54,19,985/- from the taxable income which is totally wrong as in the case of financial lease any payment on account of principal is of the nature of capital expenditure and is not deductible from the profits. Thus the income of Rs. 1,54,19,985/- has escaped assessment for wrong claim on the part of the assessee. The issue regarding reduction of payment of lease rental (principal) in the computation of income, by the assessee was not considered by the AO during the assessment proceedings u/s 143(3).”

36. The Court finds that there has been a full disclosure of all material facts of the Assessee. In the original assessment proceedings itself, the Assessee clearly sets out the basis for the difference in the accounting treatment of a finance lease and the tax treatment. It was explained by the Assessee in the accounts itself that under the mandatory accounting standard (AS-19) issued by the Institute of Chartered Accountants, the assets acquired under the finance lease were required to be capitalized in the books of accounts of the lessee. In the AY in question, the Assessee had incurred financial lease rent expenditure on the motor vehicles taken on finance lease. The difference was, as far as the Act is concerned, for the purposes of tax treatment. The lessee was allowed only to claim the deduction for lease rent in respect of leased assets and not claim depreciation. Consequently, for the purposes of accounting treatment as mandated by AS-19, the Assessee capitalized the value of the motor vehicles taken on lease and showed the finance lease account payable as secured loan in its books of accounts. While the interest on

the said amount was directly debited to the Profit and Loss Account and claimed as deduction in the computation of taxable income, the principal portion of the finance lease rent paid by the Assessee reduced the finance lease liability that was not debited to the Profit and Loss Account. As part of the accounting treatment, the depreciation was debited to the Profit and Loss account. For the purposes of tax treatment, however, the depreciation was in fact added back. The Assessee separately claimed the principal portion of the leased rent.

37. The Assessee was guided by Circular No. 2 of 2001 issued by the Central Board of Direct Taxes ('CBDT') which provided that AS-19 would have no implication on the allowance of depreciation on the assets under the provisions of the Act. All of this was already explained in the original assessment proceedings and examined by the AO. A complete disclosure is made in the balance sheet. Note 5 to the accounts also explained this. In the later AY i.e., AY 2005-06, the AO again examined this issue and accepted the explanation offered by the Assessee.

38. The Court is of the view that Reason No. 2 is also, therefore, not a valid reason for re-opening of the accounts.

39.1 At this stage, it requires to be noted that in ***CIT v. Usha International Limited*** (*supra*), a Full Bench of this Court by a majority of 2:1 held that the fresh tangible material need not be something external to the assessment record. If there was material which formed part of the assessment record which the AO did not consider in the first

instance, then such material, according to the majority, would fall within the scope of Section 147(b) of the Act.

39.2 What is significant as far as the said decision is concerned, is that the original assessment was processed under Section 143. The question was of re-opening the assessment within 4 years of the end of the assessment order for the AY in question. In fact the questions formulated by the Full Bench read as under:

- (i) What is meant by the term "change of opinion?"
- (ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?
- (iii) Whether the bar or prohibition under the principle 'change of opinion' will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?
- (iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?

39.3 It becomes clear from para 9 of the said judgment that the Court was discussing the decision in ***CIT v. H.P. Sharma (1980) 122 ITR 675 (Del)*** which dealt with Section 147 as it stood prior to 1<sup>st</sup> April, 1989. This then led the majority in para 10 of the opinion to note that the said decision was not dealing with Section 147 of the Act as amended with effect from 1<sup>st</sup> April, 1989 but was with reference to *W.P.(C) 7828/2010*

Section 147(b) of the Act under which the AO could re-open assessment on the basis of ‘information’.

39.4 In para 11, the Court noted that the observations in ***Consolidated Photo and Finvest Ltd. v. ACIT (2006) 281 ITR 394 (Del) (FB)***. The Court then summarized in para 13 (3) the legal position as under:

Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

39.5 The reference in the later part of the said decision to ***Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC)*** appears to overlook the fact that the said decision was in the context of Section 147(b) of the Act as it stood prior to the amendment with effect from 1<sup>st</sup> April, 1989.

39.6 Consequently, the Court is of the view that as pointed out by the opinion of the other member of the Bench, R.V. Easwar, J. in ***Usha International Ltd. v. CIT***, the law declared by the Full Bench of this Court in ***CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del) (FB)*** which was upheld by the Supreme Court is still good law and no watering down of the said judgment would be permissible. As rightly pointed out by him, the decisions in ***A.L.A. Firm v. CIT [1991] 189 ITR 285 (SC)*** was in the context of Section 147(b) of the Act as it stood

prior to 1<sup>st</sup> April, 1989 and the case was predominantly concerned with the question as to what would constitute information within the meaning of Section 147(b) of the Act.

40. In any event, as already pointed out, Reasons Nos. 1, 2 and 3 in the present case do not offer a sufficient justification for re-opening of the assessment.

41. Even reason No. 4 is essentially about the claim of deduction under Section 80-IB of the Act. A perusal of the assessment order dated 17<sup>th</sup> February, 2006 reveals that there is a separate discussion in the said order under the caption 'deduction under Section 80-IB.' There is a discussion of the case law and the facts of the case. The assessment order discussed the basis for the computation of royalty and notice that it is @ 30% of the Indian published price. The segmental breakup in fact was before the AO.

42. When that matter travelled to the CIT (A), a remand report was called from the AO. In his report dated 1<sup>st</sup> May, 2002 no adverse comments were made by the AO in relation to the written submissions of the Assessee. The CIT (A) in his order dated 18<sup>th</sup> November, 2002 accepted the registered disallowance on the premise that the activity of duplication did not amount to manufacture. As regards the unit not being registered as an industrial undertaking, this was not based on any fresh tangible material. Also, the change of the undertaking from Delhi to Gurgaon was already disclosed in the report Form 10-CCB. The objections as regards the highly paid executives not being construed as

workers, again, appears to proceed on surmises and conjectures.

43. As pointed out by the Assessee for the subsequent AY 1995-96, the Revenue has accepted that the Assessee fulfils the eligibility conditions under Section 80-IA and 80-IB of the Act. The fact that there was a separate auditor in respect of the Form 10-CCB for the purposes of claiming deduction under Sections 80-IA and 80-IB has been acknowledged by the Revenue itself. How all of this can go to deprive the Assessee of the deduction is not clear. In any event, the jurisdictional requirement that there must be some tangible material warranting *prima facie* to the belief that income has escaped assessment does not stand satisfied. The reasons have no communication as to what was the material fact which was not disclosed by the Assessee during the original assessment proceedings. The audited accounts give an explanation for the cost of the master copy. Again, the order of the AO reveals that the issue was discussed at length. This cost was disallowed as capital expenditure to the extent of Rs. 9,95,460. As regards the comments of the Auditor, the entire relevant passage reveals that the comments are in the context of paras 2 (a) - (h) which cannot be acted upon by the Assessee. In fact, in view of each of the items of classification in the Auditor's report, there is addition to the Assessee's income in the revised return.

44. The Court is, therefore, satisfied that none of the reasons for re-opening the assessment satisfy the legal requirement as stipulated in the proviso to Section 147 of the Act.

45. In this context, it must also be noted that the issue concerning duplication of blank CD with the master media amounting to manufacture was considered in the Assessee's own case by the Supreme Court in ***CIT v. Oracle Software India Ltd. (2010) 320 ITR 546 (SC)***. It was categorically held that "processing of blank CDs, dedicating them to a specific use, constitutes manufacture in terms of Section 80-IA(12)(b) read with Section 33B of the Income Tax Act". It was further concluded by the Supreme Court that "marketed copies are goods and if they are goods then the process by which they become goods would certainly fall within the ambit of Section 80-IA(12)(b) read with Section 33B because an industrial undertaking has been defined in Section 33B to cover 'manufacture or processing of goods'." This was for AYs 1995-96 & 1996-97. The judgment of this Court for AYs 1994-95 & 1995-96, is reported in ***CIT v. Oracle Software India Ltd. (2007) 293 ITR 353 (Del)***.

46. As far as the AY in question i.e., AY 2003-04 is concerned, the order dated 1<sup>st</sup> September, 2009 of this Court in ITA No. 827/2009 was confirmed by the Supreme Court by its order dated 22<sup>nd</sup> October, 2010 in SLP (CC) No. 15810/2010 (SC). So there have been consistent orders in the case of Assessee itself for AYs 1994-95 and 2004-05. The Court is, therefore, satisfied that even on the rule of consistency, there was no justification in the re-opening of the assessment for the AY 2003-04 on the said ground as set out at (4) to (8) in the reasons recorded by the AO.

### ***Conclusion***

47. For the above reasons, the writ petition is allowed and the notice dated 31<sup>st</sup> March, 2010 issued by the AO under Section 147 and 148 of the Act for re-opening the assessment for AY 2003-04 is hereby quashed.

**S.MURALIDHAR, J**

**PRATHIBA M. SINGH, J**

**JULY 26, 2017**

*b'nesh/'anb'*

