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

+ **W.P.(C) 8164/2010**

HCL TECHNOLOGIES LTD.

..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha & Mr. Vaibhav
Kulkarni, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX

CENTRAL CIRCLE-2 & ANR.

..... Respondents

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel for the Revenue.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

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20.07.2017

Dr. S. Muralidhar, J.:

1. This writ petition by HCL Technologies Limited ('the Assessee') challenges a notice dated 30th March, 2010 issued by the Assistant Commissioner of Income Tax, Central Circle-2/Assessing Officer ('AO') under Section 148 of the Income Tax Act, 1961 ('Act') seeking to re-open the assessment for the Assessment Year ('AY') 2003-04 as well as the order dated 19th November, 2010 passed by the AO dismissing the objections filed by the Petitioner thereto. The cause title and the writ petition wrongly describe the Respondent.

2. The background facts are that the Petitioner, a public limited

company, is engaged in the business of development and export of computer software and rendering ITES services. The Petitioner filed its return of income for AY 2003-04 on 28th November, 2003 declaring an income of Rs. 47,43,47,000. In the original return, the Petitioner claimed deduction of Rs. 2,35,63,91,105 under Section 10A of the Act. This claim was supported by a certificate issued by a Chartered Accountant ('CA') in Form 56F. It is stated that on 31st March, 2005, the Assessee filed a revised return declaring an income of Rs. 47,20,54,224. A deduction in the sum of Rs. 12,93,67,448 under Section 80HHE of the Act was further claimed by the Assessee.

3. In the course of the assessment proceedings under Section 143(3) of the Act, the AO by a notice dated 6th December, 2005 under Section 142(1) of the Act, sought answers to specific queries *inter alia* in respect of the deductions claimed under Section 10A/80HHE of the Act. The Petitioner replied to the said queries on 21st December, 2005 and 28th December, 2005.

4. The AO after examining the return, the audited accounts and other documents accompanying them in the light of the replies furnished by the Assessee accepted the deductions claimed under Sections 10A and 80HHE of the Act. Thereafter, on 31st January, 2006 the AO passed the assessment order under Section 143(3) of the Act at a net taxable income of Rs. 47,20,54,224 after allowing deduction under Section 10A of the Act at Rs. 2,35,63,91,105.

5. More than four years thereafter on 30th March, 2010, the AO issued the impugned notice under Section 148 of the Act proposing to re-assess the income of the Assessee for the AY in question on the ground that certain income had escaped assessment. In response to the said notice, the Assessee filed the same return of income originally filed and requested the reasons for the re-opening of the assessment.

6. The objections raised by the Assessee for re-opening the assessment were rejected by the AO by the order dated 19th November, 2010. Thereafter, the present petition has been filed.

7. Mr. Ajay Vohra, learned Senior Counsel appearing for the Petitioner, referred to each of the reasons for re-opening of the assessment. He submitted that since the re-opening was after four years from the end of the relevant AY, and the return for the AY in question had been picked up for scrutiny and an assessment order passed under Section 143(3) of the Act, the jurisdictional requirement of the Revenue to show that there was a failure by the Assessee to make a full and true disclosure of all material facts necessary for the assessment for that AY in terms of the first proviso under Section 147 of the Act was a *sine qua non*.

8. Mr. Vohra submitted that there was no failure whatsoever by the Assessee to make a full or true disclosure of all material facts. The

assessment was finalised for the AY in question under Section 143(3) of the Act after the AO sent a questionnaire which was duly answered by the Assessee and those answers were considered by the AO. The reasons given by the AO for forming the belief that income had escaped assessment were based on a mere change of opinion and not on any fresh tangible material. All the relevant records including the balance sheet, books of accounts, certificates of the CA in Form 56F etc. were available with the AO during the assessment proceedings. Re-opening of an assessment on the mere change of opinion and that too on the same material was clearly impermissible in law.

9. Mr. Vohra referred to the decision in ***Commissioner of Income Tax-II v. Maruti Suzuki India Ltd. (2013) 31 taxmann.com 184 (Delhi)***. He further pointed out that in the order rejecting the objections, the AO placed reliance on the decision of this Court in ***Consolidated Photo & Finvest Ltd. v. ACIT (2006) 281 ITR 394***, which has been expressly overruled by this Court subsequently in ***KLM Royal Dutch Airlines v. ACIT (2007) 292 ITR 49 (Del)*** which fact was noted by the Full Bench of this Court in ***Commissioner of Income Tax v. Usha International Ltd. (2012) 348 ITR 485 (Del)***.

10. Mr. Rahul Chaudhary, learned Senior Standing Counsel for the Revenue, began by referring to Explanation 2(c) to Section 147 of the Act which states that where income chargeable to tax has been under-assessed; or such income has been assessed at too low a rate; or such

income has been made the subject of excessive relief under this Act; or excessive loss or depreciation allowance or any other allowance under this Act has been computed; then that should also be deemed to be case where “income chargeable to tax has escaped assessment.”

11. Mr. Chaudhary submitted that while computing the deduction under Section 10A of the Act, the Assessee excluded telecommunication charges both from the export turnover as well as total turnover whereas it should not have been excluded from the total turnover. This wrong claim of the Assessee should, according to Mr. Chaudhary, be considered to be a failure to make a ‘true’ disclosure. He submitted that the reasons adduced by the AO for re-opening the assessment did not have to be based on any definitive conclusion at this stage. The AO had to be *prima facie* satisfied at this stage that income had escaped assessment. He relied on ***Phool Chand Bajrang Lal v. ITO (1993) 203 ITR 456 (SC)*** and ***Raymond Woollen Mills Ltd. v. ITO & Ors. 236 ITR 34.***

12. The above submissions have been considered. The reasons recorded by the AO for re-opening the assessment were as under:

- i. The Petitioner claimed exempt income aggregating to Rs.25,81,52,005 in the return of income but did not disclose all material facts relating to the expenses (incurred in earning such exempt income). The Petitioner has claimed excess expense and no such expense has escaped assessment. The Petitioner has earned exempt income but did not disallow any expense under section 14A. The Petitioner failed to disclose fully and truly all material facts necessary for its assessment and claimed excess

expenses.

ii. Annexure-A of Form No. 56F filed by the Petitioner did not contain working sheet of deduction under section 10A of the Act. While computing deduction claimed under Section 10A of the Act, the Petitioner did not reduce from the "export turnover" the amount of expenses incurred in convertible foreign exchange in connection with the delivery of technical services rendered outside India and on account of expenses incurred on insurance, telecommunication and freight.

iii. The Petitioner has claimed deduction under section 35D of the Act amounting to Rs.4,97,58,627. The Petitioner did not claim such deduction during the assessment years 2001-02 and 2002-03. Apparently, the claim under section 35D is incorrectly claimed.

iv. The entire payment of software license made by the Petitioner during the relevant year was not allowable as revenue expenditure and is apparently capital expenditure. The Petitioner has wrongly claimed the same as revenue expenditure.

v. Depreciation on certain items of computer peripheral was wrongly claimed @ 60% instead of 25% since the same was wrongly treated as a part of "computer system" instead of "Plant and Machinery."

vi. The Petitioner did not furnish details of payment exceeding Rs. 1 lakh as required by the Respondent No.1 in the course of assessment proceedings. The Petitioner has simply stated that such details were voluminous in nature. The Petitioner has failed to disclose the nature of expenses claimed by not furnishing details of expenses claimed exceeding Rs. 1,00,000.

13. There are two jurisdictional requirements as far as the first proviso to Section 147 of the Act is concerned. One is the satisfaction that income chargeable to tax has escaped assessment. For this purpose,

Explanation 2 (c) to Section 147 of the Act states that where any assessment has been made but the income chargeable to tax has been under-assessed [clause (i)]; or assessed at too low a rate [clause (ii)] ; or has been made the subject of excessive relief [clause (iii)]; or excessive loss or depreciation allowance or any other allowance [clause (iv)] then it shall be deemed that income chargeable to tax has escaped assessment.

14. However, this begs the question whether it will straightaway be presumed that there has been an underassessment of tax and therefore an escapement of income without there being any tangible material to come to such a conclusion. Therefore, while it might be enough for the AO to show that one of the above factors exist, that opinion even *prima facie* at the stage of re-opening the assessment will have to be based on some tangible material. In a case like the present one where the initial assessment has taken place under Section 143(3) of the Act with the AO undertaking a full-fledged inquiry, if in the absence of any tangible material another AO were to come to the conclusion more than four years later that there has been an under-assessed income or a wrong claim of deduction only on the basis of the same material, then it would not satisfy the jurisdictional requirement of there having to be some tangible material which should form the basis of the belief that the income had escaped assessment.

15. The second requirement is regarding the AO having to show that

there was a failure on the part of the Assessee to make a full and true disclosure of all material facts necessary for the assessment. Here, Mr. Chaudhary's argument was that even a wrong claim of deduction would make the earlier disclosure to be one that is not 'true'. The Court is unable to agree with the above submission. As far as the Assessee is concerned, whatever he has claimed as deduction in the first instance was examined by the AO. It might be a moot question whether the situation would have been any different if during such examination the AO did not issue any questionnaire and simply accepted all the figures put forth by the Assessee along with his balance sheet, books of accounts, etc. However, in a case like the present one where the AO, after examining the return and the documents submitted along with it (including the balance sheet, books of accounts, certificates of the auditors and statutory forms, etc.), did not simply accept the version of the Assessee but issued a detailed questionnaire asking for specific inputs and information in relation to some of the claims, it can no longer be said that such a disclosure would still be considered to be a disclosure which is not 'true' or 'full' only on the basis of the same material more than four years later. That, again, would be a mere change of opinion and nothing more. It would, therefore, not satisfy the jurisdictional requirement of Section 147 of the Act.

16. The AO has not made the effort of disclosing, in the reasons, what according to him constituted the failure by the Assessee to make a full and true disclosure. A mere reproduction of the language of the provision will not suffice. Also, although making such an averment

either in the order rejecting the objections of the Assessee or subsequently in the counter-affidavit in the answer to a writ petition will not satisfy the requirement of the law. The reasons will have to speak for themselves. For complying with the jurisdictional requirement under the first proviso to Section 147 of the Act, the reasons would have to show in what manner the Assessee had failed to make a full and true disclosure of all the material facts necessary for the assessment. The failure to do so would not be a mere irregularity. It would render the reopening of the assessment after four years vulnerable to invalidation.

17. Even while Explanation 1 to Section 147 of the Act states that the production before the AO of the account books or other evidence will not “necessarily amount to disclosure within the meaning of the foregoing proviso”, it still does not relieve the AO of the burden of having to record in the reasons that there was a failure by the Assessee to make a full and true disclosure of all material facts. The deeming provision does not lead to a presumption about the disclosure not being true or full. That burden is still on the AO notwithstanding Explanation 1 to the first proviso to Section 147 of the Act.

18. The Court has examined each of the reasons for re-opening the assessment. The first reason pertains to the Petitioner earning exempt income but not disallowing any expense under Section 14A of the Act. The allegation is that the Assessee failed to disclose fully and truly all

material facts relevant for the assessment and claimed excess expenses. In this regard, it is seen that the AY in question is AY 2003-04. During the AY dividend income was not exempt. As regards the other items of exempt income, the Assessee furnished a detailed computation in which it showed that the interest on tax-free bonds was fully furnished. There were queries raised by the AO in this regard which were answered. These were considered by the AO and thereafter the assessment was framed under Section 143 (3) of the Act. In the circumstances, the blanket statement by the AO that the Petitioner failed to disclose all material facts is not supported by any evidence on record.

19. The second reason pertains to deduction under Section 10A of the Act. The case of the Assessee is that it did not pass on telecommunication charges to its customers by billing them for it. It claimed it as an expense and debited to the P&L Account. Consequently, the question of including the telecommunication charges in the total turnover did not arise. Schedule 15 to the balance sheet clearly indicated what the telecommunication costs debited to the P&L account were. The assessment order passed by the AO in the first instance shows that there was a detailed discussion leading to the allowing of the deduction under Section 10A of the Act.

20. The AO's reason for re-opening is that along with the certificate in Form 56F, which was the certificate of the CA, the working sheet of deduction was not enclosed. That was not a requirement of law. What Form 56F has to be accompanied with is specified under the Income Tax Rules itself. The mere fact that the working sheet may not have

been enclosed does not amount to a failure by the Assessee to make a full and true disclosure of all material facts. Consequently, the Court is satisfied that the second reason for re-opening is also unsustainable in law.

21. The third reason concerns a deduction under Section 35D of the Act. The only reason given by the AO is that the Assessee did not make a similar deduction for the earlier two AYs i.e., 2001-02 and 2002-03. As explained by Mr. Vohra, it is not the case of the Revenue that the Assessee was not eligible to claim the deduction under Section 35D of the Act. The mere fact that the Assessee may not have claimed such deduction for two of the five years it was entitled to, cannot deprive it of its legitimate claim for such deduction in the AY in question. In an answer to a query raised by the AO in this behalf, the Assessee has explained how in the revised return it included a claim for the said deduction which was inadvertently left out while filing the original return. This was permissible for the Assessee to do. Consequently, even this reason appears to be untenable in law.

22. The fourth reason pertains to the payment made by the Assessee for software licence. The AO formed the opinion contrary to what was formed when the original assessment was framed that the deduction claimed was capital expenditure and not revenue expenditure. This was the very ground on which in *Commissioner of Income Tax-II v. Maruti Suzuki India Ltd.* (*supra*) a re-opening of the assessment was sought to be made. This Court held that such a reason for re-opening was based on a mere change of opinion since all the necessary relevant

facts were fully and truly disclosed when the initial assessment proceedings took place. Even here, there was no basis for the AO to form an opinion that the software license expenses were not revenue expenditure but capital expenditure. The question of there being any failure by the Assessee to make full and true disclosure of all material facts in this regard has not even been mentioned by the AO. Even this reason, therefore, is untenable in law.

23. The fifth reason is about the claim for depreciation on computer peripherals. This Court in *Commissioner of Income Tax v. BSES Yamuna Power Ltd. (2013) 40 taxmann.com 108 (Delhi)* upheld the claim of 60% depreciation on computer peripherals. In the compilation filed before the AO as well as in the tax audit report, the basis of such claim has been clearly set out by the Assessee. There is no indication by the AO in the reasons for re-opening about the failure, if any, by the Assessee to make a full and true disclosure of any material facts. This reason for re-opening also, therefore, is based not on any tangible material but on a mere change of opinion.

24. The last reason concerns the alleged failure by the Assessee to furnish the details of payment exceeding Rs. 1 lakh in the course of the original assessment proceedings. The Court finds that one of the queries raised by the AO in its communication to the Assessee in the course of the assessment proceedings completed under Section 143(3) of the Act was asking it to furnish details of purchases of more than Rs. 1 lakh accompanied by ledger extracts of such persons. In reply thereto, the Assessee pointed out that this involved voluminous records. The AO

appears to have not pursued the matter thereafter. Therefore, there was no failure by the Assessee to make a true and full disclosure.

25. For all the aforementioned reasons, it is plain to the Court that the legal requirement to justify the re-opening of the assessment for the AY in question was not fulfilled by the Revenue in the present case.

26. The writ petition is, accordingly, allowed. The impugned notice dated 30th March, 2010 issued by the Assistant Commissioner of Income Tax, Central Circle-2/Assessing Officer as well as the order dated 19th November, 2010 passed by the AO dismissing the objections filed by the Assessee thereto are hereby quashed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 20, 2017

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