

In the High Court of Judicature at Madras

Reserved on: 20.03.2019

Pronounced on: 16.04.2019

Coram

The Honourable Dr.JUSTICE ANITA SUMANTH

W.P.Nos.25328, 25331 and 25336 of 2018
and W.M.P.Nos.29486, 29485, 29475, 29476, 29479 & 29478, of 2018

M/s.Asianet Star Communications Private Limited
No.15, Jaganathan Road,
Vijay TV, Office Building, 3rd Floor
Nungambakkam, Chennai - 600 034,
Tamil Nadu.

(Cause title amended vide
Order dated 20.03.2019 made in
W.M.P.Nos.6554, 6556 and 6558 of 2019

..... Petitioner in the above W.Ps

Vs.

Assistant Commissioner of Income Tax
Non-Corporate Circle - 20(1),
Room No.311, 3rd Floor,
Wanaparthi Block, Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai - 600 034.

..... Respondent in the above W.Ps

PETITIONS filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari calling for the records of the respondent herein pertaining to Notice Nos. (ITBA/AST/S/148/2017-18/1009466009(1) dated 27th March 2018), ITBA/AST/S/148/2017-18/10095121160 (1) dated 28th March 2018 & AAACA2460P/A.Y. 2013-14/ACIT/NCC-20(1)/CHN dated 31 March, 2018, consequential letter No.F.No.31/AAACV4918P/A.Y/2011-12/ACIT-NCC-20(1)/Chennai dated 9 May 2018, 36/AAACV4918P/A.Y/2013-14/ACIT-NCC-20(1)/Chennai dated 9 May 2018 & 59/AAACA2460P/A.Y.2013-14/ACIT-NCC-20(1)/Chennai dated 9th May 2018 and order No.F.No.AAACV4918P/A.Y.2013-14/ACIT/NCC-20(1)/CHN dated 12 September 2018, AAACV4918P/A.Y.2013-14/ACIT/NCC-20(1)/CHN dated 12 September 2018 & AAACV4918P/A.Y.2013-14/ACIT/NCC-20(1)/CHN dated 28th August 2018, quash the same.

For Petitioner : Mr.Porus Kaka, S.C.
For Mr.Srinath Sridevan

For Respondent : Mr.J.Narayanasamy, Sr.Standing Counsel

C O M M O N O R D E R

These three Writ Petitions challenge orders rejecting objections filed by the assessee in regard to assumption of jurisdiction by the Assessing Officer for re-assessment under section 147 of the Income Tax Act, 1961 (in short 'Act').

2. The Petitioner is a company engaged in the business of production, procurement and broadcasting of movies and programmes over satellite channels. Asianet Communication Limited (petitioner in W.P.No. 25336 of 2018) merged with Vijay Television Private Limited (petitioner in W.P.Nos.25328 & 25331 of 2018) vide order of the Mumbai Bench, National Company Law Tribunal dated 30.07.2018 in CP(CCA) 9/230-232/NCLT/MB/MAH/2018, approved by the Ministry of Information and Broadcasting on 17.12.2018. Thereafter, the name, Vijay Television Private Limited, stood changed to Asianet Star Communications Private Limited w.e.f. 7.1.2018. The petitioners sought amendment of cause title and the miscellaneous petitions were ordered on 20.03.2019. Common submissions in regard to the three matters have been advanced by both sides and thus a single order is passed in regard to all three Writ Petitions.

3. I first take up W.P.No.25328 of 2018 pertaining to assessment year 2011-12. The facts relevant to appreciate and adjudicate upon the lis before me are as follows:

(i) A return of income was filed by the petitioner in respect of assessment year 2011-12 on 28.11.2011 and a revised return filed on 28.03.2013. The petitioner amortised certain expenditures incurred on programme costs and film rights. The return of income was accompanied by the required audited financials including profit and loss account and balance sheet reflecting all details of the aforesaid claim.

(ii) Schedule 14 of the profit and loss account set out the details of operating and other expenses in respect of the relevant financial as well the earlier years as Rs.61,49,64,000/- and 37,31,69,000/- respectively.

(iii) The notes on accounts contained a note from the Chartered Accountant in regard to the valuation of the inventories as follows:

'Inventories

1) Program/Film rights

Program/Film rights are stated at lower of unamortised cost or net realizable value.

(i) Cost of programs are amortised based on the expected pattern of realisation of economic benefits.

(ii) Film rights are amortised on the

straight-line basis over the license period of sixty months from the commencement of rights whichever is shorter. Film rights with limitation on the number of telecast during the license period are amortised on a straight-line basis over the license period or on telecast basis whichever is earlier. Management regularly reviews and revises, wherever necessary, its estimates of total revenues by program/film rights, which may result in the change in the rate of amortisation.

- 2) Programs pending completion are carried at cost. Cost comprises production cost and direct overheads.
- 3) Inventory of tapes are stated at lower of cost and net realizable value. Cost is determined on 'First In First Out' basis. Net realizable value is the estimated selling price in the ordinary course of business, less estimated cost of completion and estimated cost necessary to make the sale'

(iv) The financials also included Form 3CD duly certified by the Chartered Accountant confirming that there had been no change in the method of accounting employed in the present assessment year as compared with the immediate preceding years.

(v) The method of valuation of closing stock was detailed in point 12 of the Form No.3CD (Statement of particulars required to be furnished under section 44 AB of the Income tax Act, 1961), as under:

12(a) Method of valuation of closing stock employed in the previous year

- 1) Program/Film rights are stated at lower of unamortised cost or net realizable value.
- i) Cost of programs are amortised based on the expected pattern of realisation of economic benefits.
- ii) Film rights are amortised on the straight-line basis over the license period of sixty months from the commencement of rights whichever is shorter. Film rights with limitation on the number of telecast during the license period are amortised on a straight-line basis over the license period or on telecast basis whichever is earlier.
- 2) Programs pending completion are carried at cost. Cost comprises production cost and direct overheads.
- 3) Inventory of tapes are stated at lower of cost and net realizable value.

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(vi) A notice under section 143(2) was issued picking the return up for scrutiny and questionnaires under section 142(1) were issued to the assessee calling for objections in regard to several proposed additions/disallowances. The petitioner/assessee appeared before the Assessing Authority with its responses to the issues raised by the officer as well as those discussed in the course of assessment proceedings.

(vii) Vide submissions dated 21.03.2014, specific details called for and documents sought were furnished including a copy of the tax audit report called for by the Assessing Officer.

(viii) Then again, a break-up of the details of amortisation of the expenses incurred on television programmes, movie telecast rights and events was sought and the petitioner brought to the notice of the respondent that the break-up was set out in schedule 14 of the financial statements. The schedule was annexed separately, again, for the attention of the officer along with the written reply.

(ix) The petitioner also furnished separately the demarcation in respect of the expenses on amortisation of television programmes, movie telecast rights and events in Annexure-7 to the submission along with the name of the specific programme/movie/event/serial and the cost attributed thereto. Thus, the entire break-up for the expenditures incurred of Rs.61,49,66,084/- was before the Assessing officer along with the list of names of the individual programme/movie/event/serial.

(x) The Revenue does not dispute that the material as aforesaid was furnished by the petitioner along with the return of income or in the course of assessment and constituted part of the records of the assessing officer.

4. Upon consideration of the aforesaid voluminous and detailed material, an order of assessment under the provisions of section 143(3) of the Act came to be passed on 27.03.2004. The Assessing Authority notes therein that the assessee had been called upon to produce various details and every allowance and disallowance that arose in the computation of its income was discussed with the authorised representative. He also confirms that the assessee had produced all the details called for and the same were verified. The valuation and the cost of amortisation in respect of television programmes, movie telecast rights, events and serials was found to be in order and the claim of the petitioner accepted.

5. While this is so, a notice under section 148 of the Act was issued on 27.03.2018 after the elapse of six(6) years from the end of the assessment year in question wherein the Assessing Authority states that he had reasons to believe that income chargeable to tax had escaped assessment and that he proposed to re-assess the same, and calling for a return of income to be filed by the assessee.

6. The Supreme Court in the case of GKN Drive Shafts Private Limited V. Income Tax Officer (259 ITR 19) has set out the procedure to be adopted in the matter of re-assessments as follows:

We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years.

7. In accordance with the above, the petitioner filed a return of income and sought the reasons on the basis of which the assessment had been reopened. The reasons were supplied on 09.05.2018 and read as follows:

'The reasons for reopening of the assessment in your case for the AY 2011-12 are hereby communicated as under:

1. It is noticed from the records that programme/film rights amounting to Rs.61,49,64,000/- for the A.Y.2011-12 were claimed by the assessee under the head - "Operating and Other expenses" (Column -14). The same is required to be capitalized and depreciation at the rate of 25% thereon is to be allowed, since the asset comes under the Category of "Intangible Asset".
2. Therefore, for the reasons discussed in Para (1) above, I have reason to believe that there is escapement of income within the meaning of u/s147 of the income-tax Act, 1961, in the instant case for the A.Y.2011-12 due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment".

8. The petitioner has filed its objections on 06.07.2018 to the proceedings initiated for re-assessment, interalia, objecting on the grounds of (i) expiry of limitation; (ii) reasons for initiation of re-assessment provided after expiry of

six (6) months; iii) review of assessment made earlier under scrutiny; (iv) change of opinion on the part of the Income Tax Department and v) on merits, that the proposal to treat the claim of expenditure as capital, granting depreciation instead, was erroneous in fact and law.

9. The Assessing Authority has rejected the objections by the impugned order dated 12.09.2018. The order impugned is rather brief, and, in summary, states that reasons to re-assess, only requires a prima facie belief of the Assessing Officer that income has escaped assessment. In a nut shell, the proposed re-assessment and the assumption of jurisdiction by the officer are justified on the following basis as extracted from the impugned order:

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- The Assessing Officer had a reason to believe that there was escapement of income based on the information available.
- There was material tangible before the Assessing Officer to form a belief.
- There was no change of opinion as this issue was not dealt with in the original assessment completed.
- Before issue of notice u/s 148, the Assessing Officer satisfied himself by recording the reasons, he relied on for having believed that there is escapement of income.

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10. He concludes by stating that no details in regard to the issue in question have been called for by the officer, none furnished by the assessee and consequently no discussion whatsoever in the order of assessment in regard to whether the expenses incurred and claimed would be revenue or capital in nature. Thus, according to him, and in the absence of any application of mind to, or finding upon this issue, the assumption of jurisdiction in terms of Section 147 was valid.

11. The facts in W.P.No.25331 of 2018 relating to proceedings for re-assessment in regard to assessment year 2013-14, are identical in all respects to the facts in W.P.No.25328 of 2018 excepting for the amounts involved. Since the amounts are not material for deciding the legal dispute in question, I do not propose to repeat the facts yet again but adopt the narration as above in regard to this assessment year as well. In law, the proceedings for re-assessment have been initiated within a period of four (4) years as stipulated in terms of Section 147.

12. Further, the petitioner has also placed on record a copy of a communication dated 15.11.2017, which, according to it, was furnished to it by the Assessing Officer. This note, signed by the Sr. Receipt Audit Officer/ITRA Review Party, is to

the effect that the Audit Department has noticed that programme/film rights for AY 2013-14 and AY 2012-13 were claimed as revenue, but was of the view that the expenditure ought to have been capitalised with depreciation granted at the rate of 25% as in the case of an intangible asset. According to the petitioner, it is this audit note that forms the basis for the reasons recorded by the Assessing Officer, triggering the proceedings for re-assessment.

13. W.P.No.25336 of 2018 also relates to assessment year 2013-14. The relevant facts are as follows:

(i) A return of income was filed by the petitioner in respect of assessment year 2013-14 on 28.11.2013 and a revised return filed on 31.03.2015. The return was accompanied by the required audited financials including profit and loss account and balance sheet.

(ii) Note 19 of the profit and loss account set out the details of operating and other expenses in respect of the relevant financial and earlier year at Rs.175,41,000/- and Rs.1,55,17,700/- respectively.

(iii) The notes on accounts also include a note from the Chartered Accountant at point (f), in regard to the valuation of the inventories as follows:

'Program/Film rights and inventories

1) Program/Film rights

Program/Film rights are stated at lower of unamortised cost or net realizable value.

(i) Cost of televised events including programs are fully expenses on telecast, which is based on the expected pattern of realization of economic benefits.

(ii) In case of films whose right commence after April 1, 2008 are amortised equally over 5 years or license period, whichever is less, which is based on the expected pattern of realization of economic benefits. Films whose rights have commenced prior to April 1, 2008 and which has value in inventory are written off based on the number of telecasts. Management regularly reviews and revises, wherever necessary, its estimates of total revenues by film rights, which may result in the change in the rate of amortisation.

2) Inventories of raw material (Tapes) are valued at cost is taken on FIFO basis.

(iv) The Form 3CD duly certified by the Chartered Accountant confirmed that there had been no change in the method of accounting employed in the present assessment year as compared with immediate preceding years.

(v) A notice for scrutiny under section 143(2) was issued and questionnaires under section 142(1) issued to the assessee calling for responses on various issues that were duly provided. The scrutiny commenced with a personal hearing on 11.09.2014.

(vi) The petitioner/assessee appeared before the Assessing Authority with its responses as sought for in the course of assessment proceedings. Vide reply dated 15.09.2014 copies of the audited financials as well as the Tax Audit Report under Section 44AB of the Act, Form 3CA and complete annexures as called for by the Assessing Officer were furnished to the officer under acknowledgement.

(vii) The officer had, in addition to the issue of amortisation of expenses, also raised an issue in regard to tax deduction under section 195 of Act on foreign remittances. The petitioner, vide its reply dated 30.03.2016 pointed out that the expenditures incurred in foreign currency had been duly debited to the profit and loss accounts. Moreover the remittance had, in fact, been subject to tax deduction in all cases except where such deduction was not required in law. To this effect, Certificates of the Accountant had been obtained in Form 15CB. All material in support of the aforesaid position was available on record and, in any event, were yet again furnished for the perusal of the officer.

14. Upon consideration of the aforesaid material, an order of assessment under the provisions of section 143(3) of the Act came to be passed on 30.03.2016. The Assessing Authority accepted the revised return filed by the assessee and completed the assessment.

15. While this is so, a notice under section 148 of the Act was issued on 31.03.2018 wherein the Assessing Authority stated that he had reasons to believe that income chargeable to tax had escaped assessment, that he proposed to re-assess the same and calling for a return to be filed by the assessee.

16. In accordance with the procedure set out by the Supreme Court in the case of GKN Driveshafts (supra), the petitioner filed a return of income and also sought the reasons on the basis of which the assessment had been reopened. The reasons have been supplied on 09.05.2018 as follows:

'The reasons for reopening of the assessment in your case for the AY 2013-14 are hereby communicated as under:

It is verified from Annexure that foreign expenditure debited to the P & L Account for the period April 2012 to March 2013 was GBP2,875 (Rs.88 Approx.), USD 1,01,812 (Rs.59 Approx.) and AED 26,34,985 (Rs.55 Approx.) for which no tax was withheld. However, tax is required to be deducted u/s 195. According to Section 40(a)(i) of the Income Tax Act, the entire expenses amounting to Rs.15,11,84,260/- is required to be

disallowed. Further, it was noticed that programme/film rights amounting to Rs.175,41,00,000/- for A.Y.2013-14 were claimed by the assessee under Note 19 - "Operating and Other Expenses". The same is required to be capitalized and depreciation at the rate of 25% only to be allowed as the asset is in the nature of "intangible asset".

17. The petitioner has filed its objections on 06.07.2018 to the proceedings for re-assessment, inter alia, objecting on the grounds that: (i) there was no new or tangible material or information on record; (ii) the proceedings were a mere review of the earlier scrutiny assessment; (iv) the reassessment proposed constituted a change of opinion on the part of the Income Tax Department and v) on merits, (a) that the amortisation as revenue expenditure is correct; the Principal Commissioner had accepted this stand of by the assessee in revision proceedings under section 263 of the Act for assessment year 2010-11 and (b) that tax had been deducted on all foreign remittances excepting the one made to the UAE that did not call for any deduction in law.

18. The petitioner specifically drew attention to the fact that the issue of amortisation of the program cost/film rights had been a subject matter of revision proceedings under section 263 of the Act for assessment year 2010-11. The Principal Commissioner of Income Tax had examined the issue in detail and accepted the stand adopted by the assessee. The copy of the order was supplied to the officer in course of the proceedings for the proposed, impugned re-assessment.

19. The Assessing Authority rejected the objections by the impugned order dated 28.08.2018. The impugned order, in summary, states that the officer, to initiate proceedings for re-assessment only requires prima facie belief that income has escaped assessment that is present in the instant case. His justification for the assumption of jurisdiction to re-assess, is extracted as follows:

- The Assessing Officer had a reason to believe that there was escapement of income based on the information available.
- There was material tangible before the Assessing Officer to form a belief.
- There was no change of opinion as this issue was not dealt with in the original assessment completed.
- Before issue of notice u/s 148, the Assessing Officer satisfied himself by recording the reasons, he relied on for having believed that there is escapement of income.

20. He concludes by stating that there is no discussion whatsoever about any issue in the assessment order in regard to the issues in question indicating nil application of mind and as such, the assumption of jurisdiction for re-assessment was valid. He placed reliance on the decisions in A.L.A.Firm vs CIT (102 ITR 622), Ess Kay Engineering Co. (P) Ltd vs CIT (247 ITR 818 and EMA India Ltd vs ACIT (30 DTR 82).

21. The petitioner has filed a return of income within time enclosing all particulars in regard to amortisation of expenditure on programmes/film rights and foreign remittances and tax deducted thereupon where applicable. These documents have been taken into account by the Assessing Officer at the time of scrutiny and there is no new material that has come to the notice of the Assessing Authority, despite which he comes to the conclusion that there is escapement of income. The methodology of valuation of the assets and details of claim of the expenditure was reflected in the financial statements filed along with the return of income as well as discussed in detail in the course of scrutiny assessment. The impugned proceedings for re-assessment are thus, nothing but a review of the original order of assessment apart from not being based on any new or tangible material.

22. That apart, the petitioner has placed on record two notes signed by the Sr.Receipt Audit Officer/ITRA Review dated 15/11/2017 pointing out modifications required to be made the assessment dated 30.03.2016 in regard to disallowance under section 40(a)(i) for alleged non-deduction of tax at source and disallowance of operating and other expenses and suggesting capitalisation of the same with grant of depreciation. Thus, according to the petitioner, the proceedings are based on audit objections and are liable to be quashed on this ground as well.

23. Heard Mr.Porus Kaka, learned senior counsel for Mr.Srinath Sridevan, learned counsel for the petitioners and Mr.J.Narayanasamy, learned Senior Standing Counsel for the respondent.

24. The notice under section 148 in respect of AY 2011-12 has been issued by the respondent after the expiry of four years but before expiry of six years from the last date of the assessment year in question. The provisions of section 147 set out a limitation of four years for proceedings to be initiated for escapement of income, and a further period of two years provided that the Revenue is in a position to establish that the escapement had been occasioned by virtue of failure on the part of the assessee to either file a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or 148 or to disclose fully and truly all material facts necessary for the assessment for the relevant assessment year.

25. The question to be determined would thus be whether there has been a full and true disclosure of income by the

assessee in the assessment year in question. The admitted facts, as narrated above, reveal that the assessee has been regularly amortising expenditures incurred on programme and movies costs and a consistent method of accounting is being followed in this regard over the years. All details of the claims, such as the break-up of the amounts of the specific programmes/events/movies that the expenditure relates to, have been provided along with the returns of income and at the time of original assessment and are a matter of record. The aforesaid information has been duly noted by the assessing officer who has specifically called for the same during the original assessment proceedings thus, confirming the disclosure made by the petitioner. It is thus, amply clear that a full and true disclosure has been made by the petitioner in the present case. The petitioner has been categorising and claiming expenditure incurred on programmes/film rights as revenue for several years and this stand has not been found fault with by the Department. Such expenses are also reflected faithfully in its financials that have been circulated specifically in the course of the original assessment proceedings, notwithstanding that the same have been filed along with the return of income. I am thus of the view that the statutory condition imposed for availment of the extended period of limitation has not been satisfied in the present case and as such, the proceedings for re-assessment for AY 2011-12 are barred by limitation.

26. In similar circumstances, the Supreme Court, in the case of ACIT V. ICICI Securities Primary Dealership Ltd. ([2012] 348 ITR 299) has held as follows:

The assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. Rejection of the objections of the assessee to the re-opening of the assessment by the Assessing Officer vide his Order dated 23rd June, 2006, is clearly a change of opinion. In the circumstances, we are of the view that the order re-opening the assessment was not maintainable.

27. The Supreme Court, in Commissioner of Income Tax Vs. Corporation Bank [254 ITR 791] has had occasion to consider a similar issue holding as follows:

Turning attention to the first question as regards the provisions under Section 147(a) be it noted and as the facts depict, there is no failure on the part of the assessee in furnishing the particulars pertaining to the above noted sum as not recoverable for the

relevant accounting year and the statements filed along with the original return disclosed the full details of the aforesaid account. There is, therefore, no failure on the part of the assessee to disclose fully and truly the material facts necessary for the assessment years for the respective years and as such Section 147(a) has no manner of application and is not attracted in the facts of the matter under consideration. The High Court on consideration of the facts came to the conclusion that the Tribunal was justified in coming to the said finding and we also record our concurrence therewith.

28. The Supreme Court in the case of Commissioner of Income Tax Vs. Kelvinator of India Ltd. and another [(2010) 320 ITR 561 (SC)] has held thus:

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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment 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 re-opening 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, Assessing Officer has power to re-open, 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.

29. I am thus of the view that, in the light of the proviso to section 147, the assessee having made a complete disclosure of all relevant facts along with the return of income, the impugned proceedings are barred by limitation and also constitute a review of the original order of assessment, impermissible in law. In fact, the Assessing Officer is seen to have applied his mind to the issue in question and the original order of assessment confirms the position that various materials have been called for, such as accounts, financials, tax audit

report, etc. and the assessee has also engaged in discussions with the Assessing Officer in regard to the issues that arise therefrom. The full and true disclosure of the assessee is thus not in doubt.

30. I also draw support in this regard from the decisions in the cases of the Bombay High Court in 3I Infotech Ltd. and Assistant Commissioner of Income-Tax and others [(2010) 329 ITR 257] and Madras High Court in Cholamandalam Investment & Finance Co. Ltd. Vs. Assistant Commissioner of Income Tax, Corporate Circle-1(2), Chennai [(2018) 89 Taxmann.com 337] and Mobis India Ltd. Vs. Deputy Commissioner of Income Tax, LTU-II, Chennai [(2018) 90 Taxmann.com 389].

31. As regards AY 2013-14, (W.P.Nos. 25331 and 25336 of 2018), the proceedings have been initiated within four (4) years from the end of the relevant assessment year. The argument advanced is that all materials in regard to the issues raised for re-assessment have been furnished to the officer even during the original assessment proceedings and thus the present proceedings constitute a review of the original order of assessment, impermissible in law.

32. Mr.Narayanaswamy counters that there is nothing in the orders of assessment, no discussion of any nature whatsoever, to indicate that there has been application of mind by the Assessing Officer to the issues in question and as such, the orders of assessment passed originally, though under section 143 (3), cannot be said to have considered the issues at all. The question of review of such an order does not arise in these circumstances.

33. I disagree. The records contain all relevant details in regard to the issues in question, being the expenditures amortised as well as foreign remittances and deduction of tax thereof. Counsel for the revenue has, very fairly, not disputed this factual aspect even slightly. In the present case, the two questions proposed for reassessment, being amortisation of programme/movie cost and deduction of tax on foreign remittance, arise from a perusal of the financials itself. The audited financials, including the profit and loss accounts and audit report, present clearly all details in regard to the aforesaid two issues.

34. An assessing officer, in the course of assessment proceedings encounters several issues arising from a return of income filed by the assessee. Courts have consistently held, that the burden laid upon the assessee in the matter of framing of assessments and the extent of role to be played by it, would be restricted to making a full disclosure of all relevant items and issues from its end. The mantle, thereafter, shifts to the Assessing Officer, who is expected to exercise due diligence in appreciating the material furnished by the Assessee and draw his inferences from the same. It is a legitimate expectation that the assessing officer has done this, particularly in a situation

such as the present, where all material particulars are available in open sight. The identical situation came to be considered by the Full Bench of the Delhi High Court in the case of Kelvinator (I) Limited V. CIT Commissioner of Income Tax Vs. Kelvinator of India Ltd. (256 ITR 1) (affirmed in 320 ITR 651) where the Division Bench of the Delhi High Court held as under:

The question posed for consideration of this Larger Bench is, as to whether even for a mere change of opinion by the Income-tax Officer (in short 'ITO') action under Section 147 of the Income-tax Act, 1961 can be brought into operation

.
We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.

35. The Full Bench has specifically gone into the question whether an order of assessment must contain detailed discussion in regard to a specific issue in order that the Assessing Authority may be said to have initially 'considered the issue'. The Bench cites the provisions of section 114(e) of the Indian Evidence Act 1872 to bring home the position that all acts performed by a Judicial Officer in the discharge of his regular functions would be legally presumed to have been properly and regularly performed and executed. Thus, even in cases where there is no discussion in regard to specific issues, if it is established by the assessee that all material relevant and germane to that issue were available before the Assessing

Officer, easily discernible and part of the record, reassessment is impermissible. Then again, it does not stand to reason that an officer, once convinced by the submissions of an assessee, will proceed to devote time to recording his agreement in a detailed and reasoned fashion. The legitimate and reasonable expectation is that a detailed and speaking order is passed in cases where he differs and dissents from the stand of the assessee. On this score, the arguments of Mr.J.Narayanasamy in this regard have no merit and are rejected.

36. Mr.Narayanaswamy next relies on Explanation (1) to section 147, which states that production 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.

37. However, I do not believe that the explanation is at all applicable in the present case. The Explanation targets those situations where relevant details are camouflaged in some part of the voluminous documents filed so as to lead to the inference that the Assessing Authority would be justified having in missing the same. This is, however, a case where the assessee has staked its claims and has produced all documentation in support thereof transparently and conclusively, right from the start.

38. In this regard, I draw useful reference, and quote from the judgement of the Supreme Court in the case of Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) that has become locus classicus as an exposition of the position in law in regard to re-assessments.

'The words used are 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year'. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts ; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the

taxing enactment, the proper tax leviable. Does the duty, however, extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.'

39. I may also refer to the decision of the Division Bench of the Kerala High Court in the case of Pala Marketing (243 ITR 499) that supports my view as aforesaid. The relevant portion of the judgment is extracted hereunder:

At this juncture it is to be taken note of that Explanation 1 to Section 147 of the Act is explicit and clear that books of account or other evidence has to be traced out to disclose further facts which could be discovered by the Assessing Officer. Nor will the assessee be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence which might have been discovered by the Assessing Officer if he had pursued the investigation on the basis of what has been disclosed. The position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them--including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

It is to be noted that Explanation 1 has nothing to do with inferences and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Assessing Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose inferences--to draw the proper inferences being the duty imposed on the Assessing Officer. It is to be noted that the obligation of the assessee is to disclose only primary facts and not inferences. If some material for the assessment lay embedded in the evidence which the Revenue could have uncovered but did not, then it is the duty of the assessee

to bring it to the notice of the assessing" authority. The assessee knows all the material and relevant facts--the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. The principles have been well settled and reiterated in numerous decisions of the apex court in Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638 (SC); ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 and Indo-Aden Salt Mfg. and Trading Co. P. Ltd. v. CIT [1986] 159 ITR 624..

40. Finally, and in addition to my reasoning as aforesaid for assessment year 2011-12, the placement of the Explanation, after the Proviso to Section 147 is also, in my view, relevant. This indicates the scheme of the section and the interplay of the components thereof. To my mind, the application of the Explanation would be subject to, and post the application of the Proviso itself. Thus, in cases, where the benefit of the Proviso is claimed by the revenue, it would first have to satisfy the condition under the proviso and validate the assumption of jurisdiction beyond four years. Only thereafter can the Revenue seek application of the Explanation to Section 147. In order of sequence, the Proviso comes first and only thereafter, does the Explanation. In the present case, where the Revenue has not satisfied the statutory condition imposed by the Proviso, the door to re-assessment remains conclusively shut. There is no occasion left for the Revenue to look any further, either at the Explanation or otherwise, to justify the proceedings for re-assessment, and the assumption of jurisdiction falls, at the very threshold.

41. In fine, all relevant, primary particulars have been produced/filed/furnished by the petitioner at the first instance before the authorities, in a transparent fashion. It is for the officer to have appreciated the same and arrived at the necessary and appropriate inferences at that juncture. Having missed the bus at that point, the Department cannot seek to re-assess the income as culled from material already on record, as this constitutes a review of the original assessment. Admittedly, and even as per the reasons stated, there is no new material that has come to the notice of the authorities and the impugned exercise is undertaken solely on the basis of the materials already supplied by the petitioners and available on the records of the department. This argument of the revenue is also consequently rejected.

42. Mr. Narayanasamy, relies on the decisions relied upon by

the officer in the impugned orders as well as the judgment of the Supreme Court in the case of Raymond Woollen Mills Ltd. V. Income-tax Officer ([1999] 236 ITR 34 (SC)) and the Delhi High Court in the case of AGR Investment V. Additional Commissioner of Income Tax (333 ITR 146) for the proposition that where there is prima facie material on the basis of which the Department has reopened an assessment, the sufficiency or the correctness of the material cannot be questioned.

43. The Courts in the aforesaid case were of the view that prima facie, material had been placed disclosing some basis for re-assessment. These judgments are thus distinguishable on facts, the admitted position in these cases being that no new material has come to light after the completion of the original assessment proceedings. The reasons for reopening in the present case have not been challenged on the ground of sufficiency or adequacy, but on various other grounds that I have dealt with in extenso above. In the light of the detailed discussion as above, the aforesaid decisions relied on by Mr.Narayanasamy do not advance his case.

44. Moreover, the impugned proceedings for re-assessment have been initiated on the basis of an objection raised by an audit party. The proposals for re-assessment are, couched along identical lines as suggested by the audit officer. The audit objections are extracted below alongside the reasons for re-assessment for A Y 2011-12 and 2013-14 to enable effective comparison between the two documents:

Audit Objection (AY 2013-14)
IT Entt. Sector Review As.No.18
Dt.15.11.2017

Name of the Asessee	M/s.Vijay Television Pvt.Ltd.,Chennai
PAN	AAACV4918P
Status	COMPANY
Assessment Year	2013-14
Date of Filing Return of Income	27/11/2013
Date of Assessment	30/03/2016
Section and sub Section	143(3)
Total Income	Rs.105.60/-
IAP seen	No

The assessee filed the ROI on 27/11/2013 for A/Y 2013-14 admitting a total income of Rs.105.60 crore and the scrutiny assessment was completed on 30/03/2016 accepting the ROI.

During audit, it was noticed that programme/film rights amounting to Rs.974.36 (million) for A/Y 2013-14 and Rs.595.34 (million) for A/Y 2012-13 were claimed by the assessee under note 20-operating and

other expenses. However, the same requires to be capitalised and depreciation at the rate of 25% be allowed as in the case of intangible asset.

CIT may please consider

....Sd/-

15.11.2017

SR.RECEIPT AUDIT OFFICER/ITRA REVIEW

PARTY

Reasons for re-assessment (AY 2011-12)

1. It is noticed from the records that programme/film rights amounting to Rs.93,43,60,000/- for the A.Y.2013-14 were claimed by the assessee under the head - "Operating and Other expenses" (Column -14). The same is required to be capitalized and depreciation at the rate of 25% thereon is to be allowed, since the asset comes under the Category of "Intangible Asset".

Audit objections (AY 2013-14)

OFFICE OF THE PRINCIPAL DIRECTOR OF AUDIT CENTRAL, CHENNAI

IT Entt. Sector Review As NO.1

Dt.23.10.2017

Name of the Asessee	Asianet Communications Ltd., Chennai
PAN	AAACA246OP
Status	COMPANY
Assessment Year	2013-14
Date of Filing Return of Income	31/03/2015
Date of Assessment	30/03/2016 (revised)
Section and sub Section	143(3)
Total Income	Rs.227.63/-
IAP seen	No

The assessee filed the revised return on 31/03/15 admitting a total income of Rs.227,62,85,940/- and the scrutiny assessment was completed n 30/03/2016 accepting the ROI.

During audit, it was observed from Annexure that foreign expenditure debited to the P&L accounts for the period April 2012 to March 2013 was GBP 2,875 (Rs.88 approx.), USD 1,01,815 (Rs.59 approx.) and AED 26,34,985 (Rs. 55 approx.) for which no tax was

withheld. However, tax is required to be deducted u/s195. If not according to Section 40(a)(i) IT Act, the same requires to be taxed. N the absence of non-deduction, the entire expenses amounting to Rs.15,11,84,260/- requires to be disallowed. If this is considered, there would be a tax effect of Rs.4,90,51,733/- and interest u/s 234B of Rs.1,76,58,624/- totalling to Rs..6,67,10,357/-.

ACIT may kindly consider.

...Sd/-

SR.RECEIPT AUDIT OFFICER/ITRA REVIEW PARTY

IT Entt. Sector Review As NO.1
Dt.15.11.2017

Name of the Asessee	Asianet Communications Ltd., Chennai
PAN	AAACA2460P
Status	COMPANY
Assessment Year	2013-14
Date of Filing Return of Income	31/03/2015(revised)
Date of Assessment	30/03/2016
Section and sub Section	143(3)
Total Income	Rs.227.63/-
IAP seen	No

The assessee filed the revised return on 31/03/15 admitting a total income of Rs.227,62,85,940/- and the scrutiny assessment was completed on 30/03/2016 accepting the ROI.

During audit, it was noticed that programme/film rights amounting to Rs.1754.10 (million) for A/Y 2013-14 and Rs.1551.77 (million) for A/Y 2012-13 were claimed by the assessee under note 19-operating and other expenses. However, the same requires to be capitalised and depreciation at the rate of 25% be allowed as in the case of intangible asset.

ACIT may please consider.

...Sd/-

SR.RECEIPT AUDIT OFFICER/ITRA REVIEW PARTY

Reasons for re-assessment (AY 2013-14)

`The reasons for reopening of the assessment in your case for the AY 2013-14 are hereby communicated as under:

It is verified from Annexure that foreign expenditure debited to the P & L Account for the period April 2012 to March 2013 was GBP2,875 (Rs.88 Approx.), USD 1,01,812

(Rs.59 Approx.) and AED 26,34,985 (Rs.55 Approx.) for which no tax was withheld. However, tax is required to be deducted u/s 195. According to Section 40(a)(i) of the Income Tax Act, the entire expenses amounting to Rs.15,11,84,260/- is required to be disallowed. Further, it was noticed that programme/film rights amounting to Rs.175,41,00,000/- for A.Y.2013-14 were claimed by the assessee under Note 19 - "Operating and Other Expenses". The same is required to be capitalized and depreciation at the rate of 25% only to be allowed as the asset is in the nature of "intangible asset".

45. A comparison of the audit objections with the reasons for re-assessment in the respective years reveal that the assessing officer has done nothing more than simply extract/adopt the audit objection itself as the basis for re-assessment. The inescapable conclusion is that the proceedings are bereft of any 'reason to believe' emanating from the assessing authority as statutory mandated under Section 147.

46. It is well settled that while the objection of the audit in regard to errors of fact, may be taken cognizance of by the assessing authorities, the audit officials cannot raise a flag in relation to a point of law. The reference by audit in the present cases is to the allowance of the claim for amortisation of programme/film rights and deduction of tax on foreign remittances. Both issues constitute questions of law.

47. The Supreme Court in the case of Indian Eastern Newspaper Society V. Commissioner of Income Tax, New Delhi (119 ITR 998) considers the veracity of an audit objection in the matter of re-assessments, stating as follows:

'Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual, we hold that the opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961.'

48. The Assessing Officer in this case, is seen to simply reproduce the audit query as his reasons for reopening, which indicate categorically that there has been no independent application of mind in the least to the issues raised. It was incumbent upon the Assessing Officer to have had independent 'reasons to believe' that there is escapement of tax, even if the initial nudge did emanate from the audit department. The 'recording of reasons' is mechanical and robotic and the mandate under Section 147 has not been complied with.

49. On merits, as far as the issue relating to the deduction of tax at source on foreign remittances is concerned (AY 2014-14), admittedly, tax was deducted in respect of the payments effected by the petitioner to Nagie James Associates Ltd (UK), Mark Monitor INC (USA), Cososys SRL (USA) and Buena Vista International (USA). The sole remittance upon which tax was not deducted was in respect of the payment to Asianet Global FZ LLC, UAE, as the payment was in connection with production related fees and the Agreement for Avoidance for avoidance of Double Taxation between India and the UAE does not contain an Article providing for the taxation of Fees for Technical Services. In any event, the details of the remittances as well as the certification in Form 15B to this effect were duly furnished to the assessing authority even during the original proceedings and are, admittedly, on record.

50. Coming to the issue of amortisation of cost of programmes/films, the annexures to the returns of income reflect the expenditures incurred and claimed on programmes/film rights. In fact, the petitioner has been following a consistent method of claiming expenditures in a particular fashion and the Department has accepted the methodology of valuation and claim for all years except the assessment years in question, being AY 2011-12 and 2013-14. In fact, even after the initiation of the present proceedings for re-assessment, orders under scrutiny have been passed in respect of AY 2015-16 accepting the petitioners' claim.

51. The view proposed to be adopted in the impugned re-assessments is thus a deviation, an aberration so to say, from the regular and consistent view taken by the Income Tax Department in regard to this issue. The petitioner has produced orders of assessment for the years prior to the assessment years in question, an order 2012-13 dated 19.03.2015 and an order for the subsequent year viz., 2015-16 dated 31.12.2017, in support of the position. In these orders, the expenditures incurred on Programme/film rights have been found to be revenue in nature and the stand of the assessee accepted. Thus, quite apart from the fact that I have rejected the legal arguments put forth by the respondent to support the impugned proceedings, they are also found to be contrary to the settled principles of consistency.

52. I am conscious of the fact that the principle of res judicata would not apply in matters of assessment under the Income tax Act, as each assessment year is separate and distinct, to be looked into independently and without reference to other years. Be that as it may, it is too well settled that there should be no deviation with respect to a consistent view except where such deviation is justified in law or on facts. As far as the present matters are concerned, there is no dispute

that the view of the Department has remained consistent through the years, except for the assessment years before me now.

53. In this regard, I may usefully refer to the observations of the Supreme Court in the case of Parashuram Pottery Works Co. Ltd. V. Income Tax Officer (106 ITR 1), the relevant portion being extracted hereunder:

'It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted

Dr.Anita Sumanth,J.,

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with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, 'this cannot be said in the present case. The appeal is consequently allowed; the judgment of the High Court is set aside and the impugned notices are quashed.'

54. In all, the impugned proceedings fail and are quashed. All writ petitions are allowed. Consequently, connected miscellaneous petitions are closed with no order as to costs.

Sd/-

Assistant Registrar(CS)

//True copy//

Sub Assistant Registrar

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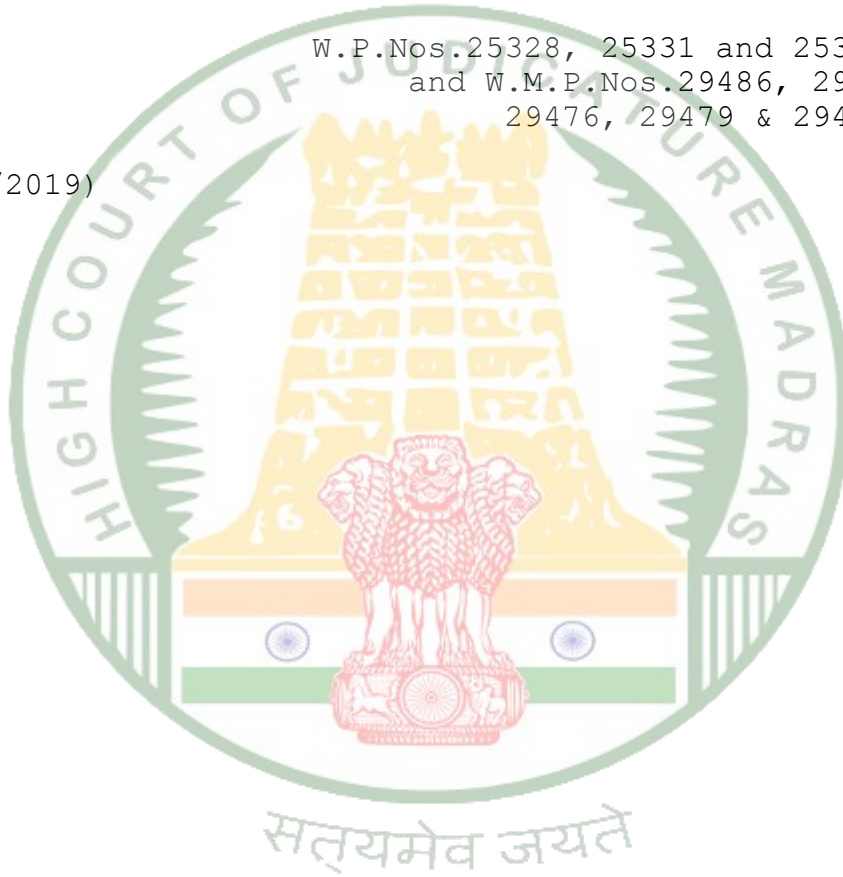
To
Assistant Commissioner of Income Tax
Non-Corporate Circle - 20(1),
Room No.311, 3rd Floor,
Wanaparthi Block, Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+1cc to Mr.Srinath Sridevan, Advocate SR.No.38962

+3cc to Mr.J.Narayanasamy, Advocate SR.No.37830, 37831, 37832

W.P.Nos.25328, 25331 and 25336 of 2018
and W.M.P.Nos.29486, 29485, 29475,
29476, 29479 & 29478, of 2018

KAN(CO)
GMY(06/06/2019)



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