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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.12357 of 2013

Cairn India Ltd.,
(Formerly Known as Cairn Energy
India Private Limited)
Rep.by its Authorised Signatory,
Mr.Navin Jain,
3rd & 4th Floor, Vipul Plaza,
Suncity, Setor-54,
Gurgaon - 122 002,
Haryana.

..Petitioner

vs

Deputy Director of Income Tax-I,
(International Taxation)
Room No.703, IInd Floor,
Annexe Building, Aaykar Bhawan,
121, Mahatma Gandhi Road,
Chennai - 600 034.

..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the respondent in respect of PAN No.AAACC3097L and impugned Notice u/s148 of the Income Tax Act, 1961 dated 29.03.2012 and the consequential Order dated 05.03.2013 passed by the Respondent disposing off the Objections to the initiation of the proceedings u/s 147 of the Act.

For Petitioner : Mr.C.S.Agarwal
Senior counsel
Assisted by Mr.M.V.Swaroop

For Respondent : M/s.Hema Muralikrishnan
Senior Standing counsel
[For Income Tax]

O R D E R

The Notice issued under Section 148 of the Income Tax Act, 1961 [hereinafter referred to as the 'Act'] dated 29.03.2012 and the consequential order, disposing the objections filed by the petitioner in order dated 05.03.2013 are under challenge in the



present writ petition.

2. The petitioner being a Company incorporated in New South Wales, Australia was a subsidiary of Cairn Energy PLC based in Edinburgh and is engaged in the business of exploration and production of oil and gas in India since 1996. By an order of the Bombay High Court dated June 22, 2010 in Company Petition No.155 of 2010, the present petitioner took over the business of Cairn Energy India Private Limited and filed the present writ petition.

3. The petitioner company filed its return of income for the Assessment Year 2007-08 on 30.10.2007, declaring a total income of Rs.6,58,26,875/-. The deduction was claimed. Tax payable on book profit under Section 115 JB was computed at Rs.16,60,48,488 and tax payable under normal provisions of the Act was computed at Rs.2,75,28,799/-. The petitioner claimed a refund in its return of income on the basis of TDS credits and advance tax payments.

4. The petitioner states that they have furnished true and adequate disclosure of the income of the petitioner, was filed along with the audited financial statements, Tax Audit Report as required under Section 44AB of the Act, Audit reports in Form 3CD regarding tax audit, Form 3 CEB concerning transfer pricing Audit and Form I OBB in respect of claim of 80IB deduction under the Act. The return of income was processed under Section 143(1) of the Act. The case of the petitioner was selected for scrutiny. The petitioner answered the queries raised by the Assessing authority. The Arm's length price was determined by the Transfer Pricing Officer. After completing all the procedures, the assessment order was passed on 24.02.2011 under Section 143(3) of the Act. Admittedly, the case of the petitioner is reopened under Section 147 of the Act within a period of four years. After completion of the assessment proceedings, the respondents issued notice under Section 148 of the Act for reopening of assessment on the ground that the Assessing Officer has 'reason to believe' that income chargeable to tax for the Assessment Year 2007-08 has escaped assessment within the meaning of Section 147 of the Act. The petitioner requested to furnish reasons. The reasons furnished reasons in proceedings dated 08.10.2012. Thereafter, the petitioner submitted their objections in detail and the said objections were disposed of in vide letter dated 05.03.2013.

5. The learned Senior counsel appearing on behalf of the petitioner contended that the case of the petitioner though falling within the period of four years, the reopening is made based on change of opinion and therefore, the condition stipulated that the Assessing Officer must have 'reason to believe' is not satisfied and thus, the impugned orders are to be set aside.



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6. The learned Senior counsel elaborately contended that the petitioners have furnished all the details, books of accounts, at the time of scrutiny proceedings and answered the queries raised by the Assessing officer. The Assessing Officer elaborately considered all the materials and passed the assessment order on 24.02.2011. While so, the reopening of assessment is made without any tangible material and based on change of opinion.

7. The learned Senior counsel drew the attention of this Court with reference to the reasons recorded and elaborated that the reasons furnished are change of opinion and the answer for such reasons were already placed before the Assessing Officer, who in turn, considered all such materials and passed the assessment order. The learned Senior counsel has elaborately argued to establish that the element of 'reasons to believe' is absent and the case of the petitioner is falling under the change of opinion.

8. In this regard, the following submissions are made:

(a) It is at this stage submitted the reasons to believe are not plenary but are subject to judicial review. In support, the petitioner seeks to rely on the judgment of the Hon'ble High Court of Delhi in the case of Asoke Kumar Sen Vs. ITO reported in 132 ITR 707. This judgment has been rendered on a Writ Petition filed by the petitioner, wherein their Lordships of the High Court of Delhi held at Page.710 as under:

"The words "if the Income-tax Officer has reason to believe" used in s. 147(a) suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO may act under this section on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The powers under this section are not plenary. They are subject to judicial review. The ITO in his affidavit has merely stated his belief but has not set out any material on the basis of which he formed such belief. there is nothing in the affidavit to suggest that the ITO had any material before him that would warrant a belief that a part of the income of the petitioner had escaped assessment by reason of his failure to make a true and full disclosure of the material facts. (See ITO v. Madnani Engineering Works Ltd. [1979] 118 ITR 1 SC.)

The words "reason to believe" appear in most modern statutes. Words such as "reasonable cause to believe" or "has reason to believe" are commonly found when a Legislature or law-making authority confers powers on a minister or official. As Lord Radcliffe said [1980] 2 WLR 1, 22 (HL) :



"However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. (Nakkuda Ali v. Jayaratne [1951] AC 66, 77 (PC))".

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These words do not make conclusive the officer's own honest opinion that he had reasonable cause for the prescribed belief.

The grounds on which the officer acted must be sufficient to induce in a reasonable person the required belief before he can validly reopen a completed assessment under [s. 147\(a\)](#). In England, the majority in *Liversidge v. Anderson* [1942] AC 206 (HL) held that the belief entertained by the officer was not justiciable. Lord Atkin dissented. Now, it had been held by the House of Lords in the recent tax decision of *IRC v. Rossminster Ltd.* [1980] 2 WLR 1, 49 (HL), that Lord Atkin was right and that the majority were wrong. Lord Diplock has said :

"..... I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."

Lord Scarman at p. 104 (of [1980] 1 All ER) said that the ghost of *Liversidge v. Anderson* no longer flutters in the pages of our books and need no longer haunt the law. It was laid to rest by Lord Radcliffe in *Nakkuda Ali v. Jayaratne* [1951] AC 66, 75 (HL) and no one has sought to revive it. It is now beyond recall.

The Supreme Court in a long line of decisions has held that the matter is justiciable. [[See ITO v. Madhani Engineering Works](#) [1979] 118 ITR 1 SC.] (Emphasis Supplied)"

(b) It would be seen from the aforesaid judgment that the Apex Court in its judgment reported in 118 ITR 1 has held that existence of reason to belief on part of the ITO is a justiciable issue. The same opinion had also been expressed by the Constitution Bench of the Apex Court in the case of *Calcutta Discount Co. Ltd., Vs. ITO*, reported in 41 ITR 191.

(c) The petitioner also seeks to rely on the judgment of Apex Court in the case of *ITO Vs. Lakhmani Mewal Das*, reported in 103 ITR 437 at Pg.448, it has been held as under:

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a



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direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in [section 34](#) of the Act of 1922 at one time before its amendment in 1948 are not there in [section 147](#) of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence. (Emphasis supplied)"

In the long line of decisions of the Apex Court, it has been held that the power u/s 147 of the Act are not plenary and are subject to the judicial review.

(d) The petitioner thus prays that if the reasons recorded are perused for the sake of convenience which are extracted hereinabove, it would be seen that;

(i) The petitioner has disclosed the complete facts in the return of income/books of account/assessment proceedings and there is no allegation that the petitioner had failed to disclose fully and truly all material facts. Infact, admittedly, reasons to believe has been formed on the basis of the return of income/existing material, without any fresh tangible material.

(ii) It is a case where the AO while framing assessment had considered all such material facts which are the basis for initiating the proceedings u/s 147 of the Act. It thus amounts to review as per the judgment of the Apex Court in the case of ACIT Vs. ICICI Securities Primary Dealership ltd., reported in 348 ITR 299 at Pg.301.

(iii) That no fresh material had surfaced from the date of completion of assessment till the proceedings were initiated.

(iv) It is a case of mere change of opinion and there has been otherwise no escapement of any income. The submission is that the initiation of proceedings are without jurisdiction and as such deserves to be quashed.



(v) That no reasons had been recorded before initiating the proceedings u/s 147 of the Act.

(vi) To justify the reopening of the assessment, only reasons recorded has to be looked into.

(e) Scope of provisions of Section 147 of the Income Tax Act: The petitioner, at the outset, submitted that the Apex Court in its judgment in the case of Calcutta Discount Co. Ltd., Vs. ITO reported in 41 ITR 191, examined the scope of provisions of Section 34 of the Act and held at Pg.199 as under:

"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such " under assessment " has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question.(Emphasis supplied)"

(f) It is the submission of the petitioner that if the aforesaid tests as laid down by the Hon'ble Supreme Court (which holds good till date) when is applied, would show that the assumption of jurisdiction by the respondent to issue the notice and initiate the proceedings is outside the scope of the provisions of Section 147 of the Act. It had been held as above that before assuming jurisdiction both the conditions are to be satisfied namely:(i) there had to be omission or failure to disclose fully and truly all material facts; and (ii) that the AO is having a reason to believe. In the instant case both the conditions are not satisfied. Indeed even the reasons had not been recorded and also there had been no failure to disclose fully and truly all material facts. Without prejudice, even the reasons recorded and supplied to the petitioner shows that such reasons are merely based on change of opinion. The petitioner further submitted that in the said judgment of Calcutta Discount Co., Ltd., (Supra) at Pg.202-203, the Hon'ble Apex Court has held as under:

"The only nondisclosure mentioned in the report is that the company had failed to disclose " the true



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intention behind the sale of the shares ". Mr. Choudhury contends that this is not an omission to disclose a material fact within the meaning of s. 34. The question whether sales of certain shares were by way of changing the investments or by way of trading in shares has to be decided on a consideration of different circumstances, including the frequency of the sales, the nature of the shares sold, the price received as compared with the cost price, and several other relevant facts. It is the duty of the assessee to disclose all the facts which have a bearing on the question; but whether the assessee had the intention to make a business profit as distinguished from the intention to change the form of the investments is really an inference to be drawn by the assessing authority from the material facts taken in conjunction with the surrounding circumstances. The law does not require the assessee to state the conclusion that could reasonably be drawn from the primary facts. The question of the assessee's intention is an inferential fact and so the assessee's omission to state his " true intentions behind the sale of shares " cannot by itself be considered to be a failure or omission to disclose any material fact within the meaning of s. 34. Indeed, an assessee whose contention is that the shares were sold to change the form of investment and not with the intention of making a business profit cannot be expected to say that his true intention was other than what he contended it to be.. Dealing with this question the learned Chief Justice has said:-

" The expression that the Respondent had failed to disclose " the true intention behind the sale of shares " may lack directness, but that deficiency of language is not sufficient to enable the Respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the Respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the Respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit, and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to



facts previously known, but was taking notice of a new fact." (Emphasis supplied)

The petitioner submitted that Section 34 of Income Tax Act, 1922, which is pari-materia to section 147 of the Income Tax Act only provides special jurisdiction. In the Income Tax Act, there is no concept of any other assessment other than the assessment or reassessment and that too on specified pre-requisite of Section 147 of the Act.

(g) Change of opinion: It is submitted that in the case of the petitioner, a notice u/s 148 of the Act has been issued by the respondent on reviewing the assessment record on account of reason that petitioner had debited a sum of Rs.14,91,73,063/- towards the payment of loan guarantee fee and on the said sum, no tax had been deducted at source and thus, he was of the view that provisions of Section 40(a) of the Act, the said guarantee fees was not allowable. It is submitted that the issue of allowability of the loan guarantee fee was specifically examined during the course of the assessment. It is further submitted the in the notice dated 19.07.2010 issued u/s 142(1) of the Act was issued, when the respondent raised a following query:

"(h) Particulars of loan guarantee fee with particulars of guarantor, copy of agreement and amount."

(h) In respect of the aforesaid query, the petitioner filed its reply on 10.08.2010, wherein it was submitted as under:

"Cairn Energy India Private Limited ["CEIPL"] and Cairn Energy Plc["CEPLC"] has entered into a Guarantee Fee agreement on 1st April 2005 in terms of which CEPLC has guaranteed the loan facility of US\$ 48 mn extended to CEIPL by Royal Bank of Scotland Plc.

Further CEIPL and CEPLC have entered into another agreement on 27 June 2006 in terms of which CEPLC has guaranteed the revolving credit facility of upto US\$ 425 mn extended to CEIPL by a syndicate of banks being the Royal Bank of Scotland Plc, IFC, ABN Amro NV, Barclays Bank Plc, Citibank NA, HSBC Bank Plc, ICICI Bank UK Limited, SocieteGenerale, Sumitomo Mitsui Finance Dublin Ltd., Standard Chartered Bank and the Bank of Scotland.

During the year under assessment the assessee company has paid Rs.149,173,063/- to CEPLC as guarantee fee charged @ 1.5% of the loan facility guaranteed as per the Guarantee Fee Agreement. This fee is paid in



lieu of the risk undertaken by CEPLC in providing the guarantee on behalf of CEIPL.

Detail of Guarantee Fee working along with copy of agreement is enclosed as Annexure - 10."

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(i) It would therefore be seen that the petitioner has given complete details in respect of loan guarantee fee and also submitted the agreement as well as the working of the Guarantee Fee. Thereafter, another notice was issued on 26.11.2010, wherein the following query was raised:

"d) Bank loan and Guarantee Fee; Please state how the bank loan has been utilized. Reference is also invited to the terms of bank guarantee fee. As per the terms, "Plc shall invoice CEIPL before 25th day of April succeeding the last month of the Financial year (March) in respect of the Fee for the entire financial year or as mutually agreed. Payment of the undisputed portion of invoices submitted by Plc in accordance herewith shall be made by CEIPL to Plc within 30 days of the receipt of the invoice by CEIPL"

With reference to the above and the payment details as per Annexure 10 to your reply, please further elaborate,

(i) Whether there as any disputed portion

(ii) Satisfaction of 'accrual principle in respect of the claim of the expenditure'

In this notice, query was also raised regarding the TDS compliance."

(j) In response to the aforesaid query, the petitioner filed its reply on 07.12.2010, wherein it was submitted as under:

"The Company has accrued guarantee fee amount in books of accounts amounting to INR 149,173,063 based on the agreement entered into with its parent company Cairn Energy Plc. The same has also been claimed as allowable expenditure under the provisions of Section 37(1) of the Act. TOP has considered this to be at arm's length in his order dated October 25 2010 (Annexure-2). As per section 92CA (4), Assessing officer has to compute the total income in conformity with the arm's length price determined by TPO

"On receipt of the order under Sub-Section (3), the assessing officer shall proceed to compute the



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total income of the assessee under sub-section (4) of section 92 in conformity with the arm's length price as so determined by the Transfer Pricing Officer"

Without prejudice to above, we submit as below:-

a) As per the Point 2 "Compensation and Invoicing" of the 'Guarantee Fees Agreement' entered into by the assessee "2.1 As consideration for the loan facility guaranteed, CEIPL shall pay to PLC in accordance with the schedule attached hereto". As per the attached schedule, the consideration payable is 1.5% of the loan amount as guarantee fee (refer page 5 of Guarantee agreement filed with your office as an annexure to letter dated 10th Aug 2010).

b) The point 2.2 deals only with the invoicing which is nothing but procedural

(c) There is no disputed portion

In lieu of above, the assessee company has rightly claimed the guarantee fees as allowable expenditure under section 37(1) of the Act."

(k) The petitioner also filed the reply on 22.12.2010 in respect of the TDS compliance. It would therefore be seen that issue of loan guarantee fee was examined in detail after due enquiry by the respondent in the original assessment proceedings, and it is only after being satisfied, expenditure in respect of loan guarantee fee was allowed.

(l) It is therefore submitted that reopening of the assessment to examine the same issue is nothing but the change of opinion. The petitioner further submitted that though a statutory amendment had been made in section 148 of the Income Tax Act w.e.f.01.04.1989, however, the Apex Court in 320 ITR 561, while affirming the judgment of Delhi High Court in the case of CIT Vs. Kelvinator of India Ltd., reported in 256 ITR 1 (FB) held as under:

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment,



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confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer. We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:

"7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in



the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

(emphasis supplied)

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(m) The petitioner however adds that the Division Bench of High Court of Delhi in its judgment reported in 256 ITR 1 had held as under:

"We, however, may hasten to add that if "reason to believe" of the Assessing Officer is founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act.

We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the Income-tax Officer, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself. We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an 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 judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong." (Emphasis supplied)

(n) The petitioner submitted that recently the Apex Court in



the case of ITO Vs. Techspan India Pvt limited, reported in 404 ITR 10, in para 12 has held that there would be a change of opinion when either specifically or by necessary implication a re-look is being made. In the instant case this is where the respondent has attempted to.

"Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings".(Emphasis supplied)

(o) The Apex Court in its judgment in the case of ACIT Vs. ICICI Securities Primary Dealership Ltd., reported in 348 ITR 299 at Pg.301 has while upholding the judgment of Bombay High Court which reads as under:

"In the facts of the present case, there is nothing new which has come to the notice of the Revenue. The accounts had been furnished by the petitioner when called upon. Thereafter the assessment was completed under Section 143(3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to Section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record. In the circumstances, we allow this petition in terms of Prayer (a) and quash and set aside the notice dated 27-3-2006 directing reopening of the assessment for the year 1999-2000.

It thus held as under:

"Leave granted.

We have heard learned counsel on both sides.

The assessee had disclosed full details in the



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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 23-6-2006, is clearly a change of opinion. In the circumstances, we are of the view that the order re-opening the assessment was not maintainable." (Emphasis supplied)

(p) It is submitted that it is settled law that if an order of the assessment has been framed and AO during the assessment proceedings issued questionnaire/queries and same was replied by the assessee though the same was not explicitly recorded in the order of the assessment, reopening of the assessment will amount to change of opinion:

1. CIT vs. Eicher Ltd., 294 ITR 310 HC Del
2. Satnam Overseas Limited and Anr. Vs. ACIT 329 ITR 237 HC Del
3. Munjal Showa Ltd., Vs. DCIT W.P.(C).4753/2011 HC Del 14 May 2012
4. Tulsi Developers Vs. DCIT 246 CTR 106 HC Guj
5. Mrs. Parveen P. Bharucha Vs. The Deputy Commissioner of Income Tax (W.P.No.10437 of 2011) HC Bom 27th June 2012
6. General Motors India Pvt., Ltd. Vs. DCIT (Special Civil Application No.1773 of 2012) dated 23.08.2012 HC Guj
7. CIT Vs. Usha International Limited. 348 ITR 485 FB (Del)

(q) That even if for the sake of an arguments, it is assumed that there was insufficient enquiry or there was any error then too, the same would not clothe the respondent to assume jurisdiction to initiate proceedings u/s.147 of the Act. It has been held in the following judicial pronouncement that any remissness, error or mistake does not clothe the respondent to assume jurisdiction u/s.147 of the Act more particularly in the case wherein the proceedings have been initiated beyond a period of four years from the end of the assessment year.

- i. CIT Vs. Bhanji Lavji 79 ITR 582 (SC)
- ii. Mohini Bai M. Sarda Vs. First ITO 190 ITR 541 (Karnataka)
- iii. Fenner India Limited. Vs. DCIT 241 ITR 672 (Mad)
- iv. CIT Vs. Indian Sugar & General Industries 303 ITR 155 (Delhi)
- v. Gordon Woodroffe & Co. Ltd., Vs. ITO 51 ITR 12 (Mad)
- vi. Gemini Leather Store Vs. Income-Tax officer 100 ITR 1 (SC)
- vii. Parashuram Pottery Works Co., Ltd. Vs. ITO 106 ITR 1 (SC)
- viii. Techman Buildwell (P) Ltd., Vs. Assistant Commissioner



of Income -Tax 370 ITR 771 (Delhi)

ix. Indian And Eastern Newspaper Society, Vs. Commissioner of Income Tax, New Delhi - 119 ITR 996 (SC)

x. Chemicals and Fibres of India Limited vs. M.K.N.Pillai and another 146 ITR 280 (Bom)

xi. Addl.Commissioner of Incometax Vs. Ganeshilal Lal Chand 154 ITR 274 (Rajasthan)

xii. ITO Vs. Sirpur Papers Mills Ltd., 113 ITR 393 (AP)

(r) It is significant to be noted that their Lordships considered in its judgment that where a petitioner had challenged the initiation of proceedings u/s 148 of the Act and filed objections, the Assessing Officer was required bylaw to consider such objections, to enable the Court to examine whether it is a case of change of opinion or otherwise. It is submitted that if the aforesaid principles of law as laid down is complied, it is evident that an order on objection deserves to be examined by the Court before expressing its discretion under Article 226 of Constitution of India.

(s) There is no liability to deduct tax on loan guarantee fee as such, section 40(a)(i) is inapplicable: It is to be submitted that the Respondent in the purported reasons to believe has alleged that payment of guarantee fees is in the nature of fees for technical services and accordingly, the same is subject to tax in India under the Income-tax Act. However, such assumption of the respondent is legally unsustainable, since respondent has failed to appreciate that Article 13 of the India-UK DTAA, which categorically includes a 'make available' clause i.e., to say that the definition of Fees for Technical Services as given in the treaty brings to tax an amount as FTS only if the consideration received is for making available a service. Relevant extract of the Article 13(4) is reproduced below:

"For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in



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paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

9. The learned Senior Standing counsel opposed the contentions raised on behalf of the petitioner by stating that the reopening in the case of the petitioner is made within a period of four years and therefore, the conditions stipulated in the proviso clause to Section 147 is not applicable. If the Assessing Officer has 'reason to believe' that income chargeable to tax escaped assessment, then jurisdiction is conferred for reopening of assessment.

10. Regarding the point of change of opinion raised, the learned Senior Standing counsel solicited the attention of this Court with reference to the reasons furnished and such reasons have live link with the tangible materials and the order, disposing of the objections would reveal that the objections raised by the petitioner in this regard are elaborately considered and findings in paragraph 4.3 & 4.4 of the impugned order would reveal that the case of the petitioner is a fit case for reopening of assessment. The reasons recorded in proceedings dated 08.10.2012 would also reveal that the assessee has represented that there is no item of expenditure falling under Section 40(a) of Income Tax Act, 1961, which have been debited to the profit & Loss account. However, the above does not include deferred tax credit of Rs.85,37,56,383/- as per financial statements. In respect of section 40(a)(ia) the auditors have test checked material items and also relied on management representation for the purpose of reporting under this clause". Therefore, it is apparent that for the payment effected in foreign currency towards loan guarantee fee/ interest, no tax was deducted by the assessee at source. This provided for the Assessing Officer has 'reason to believe' for reopening of assessment. Thus, reopening of assessment in the present case is based on tangible material and the directives issued by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., Vs. ITO, reported in 259 ITR 19 has been scrupulously followed and therefore, the petitioner / assessee has to participate in the process of reopening of proceedings in order to defend their case.

11. Though the learned Senior counsel for the petitioner elaborately argued and submitted umpteen number of judgments, the principles laid down by the Hon'ble Supreme Court in those cases are not disputed by the respondents. The learned Senior Standing counsel also emphasized that there is no dispute on the principles submitted on behalf of the petitioners. However, the



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application of the principles with reference to the facts and circumstances of the case is important for the purpose testing the validity of reopening proceedings initiated under Section 147 of the Income Tax Act. The relevant portion of the reasons recorded for reopening of assessment in proceedings dated 08.10.2012, reads as under:

"In the Guarantee fees agreement enclosed to the return that the assessee had entered into Loan facility agreement on 20th January 2004 with M/s.The Royal Bank of Scotland, PLC. The assessee's share of facility was 48000000 US Dollars for which M/s.Cairn Energy, PLC, a company incorporated under the laws of Scotland has extended guarantee. According to the guarantee fee agreement for such guarantee provided, the assessee was required to pay PLC 1.5% of the amount of Loan facility guaranteed for each fiscal year. On this score, in the Profit and Loss account for the year ended 31.03.2007, under "interest and bank charges", the assessee has debited a sum of Rs.14,91,73,063/- towards the payment of loan guarantee fee. However, it has debited a sum of Rs.14,91,73,063/- towards the payment of loan guarantee fee. However, in the Notes on Accounts, the gross sum of Rs.14,91,73,063/- was fully exhibited as interest expanded in foreign currency.

In Form 3CD, against column 17(1), about the amount inadmissible, under Section 40(a), the Accountant has stated as follows:-

- (i) Provision for current tax Rs.17,00,00,000/-
- (ii) Fringe benefit Tax Rs.2,30,00,000/-
- (iii) Provision for audit fee Rs.2,30,00,000, on which tax has not been deducted at source.

Except the above, the assessee has represented that there is no item of expenditure falling under Section 40(a) of Income Tax Act, 1961, which have been debited to the profit & Loss account. However, the above does not include deferred tax credit of Rs.85,37,56,383/- as per financial statements. In respect of section 40(a)(ia) the auditors have test checked material items and also relied on management representation for the purpose of reporting under this clause"

Therefore, it is apparent that for the payment effected in foreign currency towards loan guarantee fee/ interest, no tax was deducted by the assessee at source.

For the purpose of "Fees for Technical Services" under clause 40(a), the explanation provides that it shall have the same meaning as in explanation 2 to



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clause (vii) of sub section (1) of Section 9 explanation 2 to clause (vii) of sub section (1) of 9 defines the term "Fees for technical services" to include any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy service (including the provision of services of technical or other personnel). So, in this case, the payment of loan guarantee fee to the PLC is covered by the term "fee for technical services."

Hence, either in the name of fee for technical services or interest, the assessee was duty bound to deduct tax at source. As no tax was deducted at source, the loan guarantee fee/interest of Rs.14,91,73,063/- paid to M/s.Cairn Energy PLC, Scotland needs to be disallowed under section 40(a) in computing the business income of the assessee."

12. The reasons would reveal that for the payment effected in Foreign currency towards loan guarantee interest, no tax was deducted by the assessee at source. Based on such material, which is tangible, the reopening of assessment is made in the present case. The order, disposing of the objections would reveal that the objections raised in this regard by the petitioners are considered and the following findings are made:

"4.3 Section 147 of the Income Tax Act requires that there is reason to believe that the income has escaped assessment. There is no question of sufficient or insufficient reason to believe but only the existence of reason to believe that income has escaped assessment as per facts on record and as per provisions of IT Act 1961. The belief can be verified, ascertained and confirmed only after verifying various details/factors during the assessment proceedings.

4.4 As regards the change of opinion, it is submitted that the change of opinion arises when the assessing officer forms an opinion that decides not to make an addition and holds that the assessee is correct. The reassessment proceedings under section 147 is pending and the issue can be examined during the course of proceedings only. The submission of the assessee company is incorrect and misleading. This view is supported by the Delhi High Court decision in the case of Dalmia Pvt Ltd., Vs. CIT in which the court has held that "despite specific and pointed queries in section 143(3) assessment, the Assessing officer cannot be said to have formed any opinion if explicit opinion not recorded."



13. The authority competent categorically made a finding that the submission of the assessee company is incorrect and misleading in respect of the materials furnished and therefore, the Assessing authority has 'reason to believe' and consequently, assessment is reopened.

14. The respondents have clearly stated that the merits of the assessment proceedings only and need not be considered at this point of time.

15. This Court is of the considered opinion that based on the return of income filed by the petitioner / assessee, the assessment order has been passed and subsequently certain new tangible materials were traced out for the purpose of reopening as the Assessing Officer has 'reason to believe' that income chargeable to tax has escaped assessment. Under these circumstances, the assessee cannot say that he has produced all the material facts and books of accounts etc., Even if such materials are produced, if the authorities found that the tax escaped assessment, then they are empowered to initiate reopening proceedings. In the present case, the assessment is reopened within a period of four years and therefore, mere availability of tangible material would be sufficient for the purpose of invoking the powers under Section 147 of the Act. As pointed out in the reasons, the petitioner has represented that there is no item of expenditure falling under Section 40A of the Income Tax Act. However, the respondent subsequently found that the payment effected in Foreign Currency / interest, no tax was deducted by the assessee at source. This failure on the part of the petitioner was considered for reopening of assessment and the finding is given that the assessee company has misleading the assessing authorities by furnishing incorrect particulars. However, this Court cannot arrive a finding in this regard. It is for the assessee to establish his case during the course of reassessment proceedings. The writ petition is filed, challenging the reopening proceedings. Thus, objective satisfaction would be sufficient for the purpose of allowing the Assessing authority to proceed with the reopening proceedings. Once, the materials are available and such materials were not taken into consideration by the original assessing authority, or any findings are given in the assessment order, which would be sufficient for the purpose of reopening of assessment and once such reopening is made based on tangible materials, then the assessee has to defend his case by furnishing further particulars or explanations or documents during the course of reopening proceedings. High Court cannot form any opinion in respect of such findings to be made. Only endeavour of the High Court is to ensure that, whether the conditions stipulated and the process adopted for the purpose of reopening of assessment in consonance with the provisions of the Act and in accordance with the Directives of the Hon'ble Supreme Court of India in the



case of GKN Driveshafts (cited supra) are not. If the conditions are fulfilled, then it is for the assessee to defend their case in the manner known to law.

16. As discussed in the aforementioned paragraphs, the reasons furnished in the case of the petitioner would be sufficient for the purpose of reopening of assessment as the case of the petitioner is initiated within a period of four years and therefore, the petitioner is bound to participate in the reopening proceedings for the purpose of defending their case by availing the opportunities to be provided by the authorities in accordance with law.

17. With these observations, the writ petition stands dismissed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Kak

To

Deputy Director of Income Tax-I,
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+1cc to M/s.Hemamuralikrishnan, Senior Standing Counsel,
S.R.No.43876

W.P.No.12357 of 2013

LN(CO)
RGA(21/09/2021)