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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + **WRIT PETITION (CIVIL) NO. 8372 of 2007**

TRACTEBEL INDUSTRY ENGINEERINGPetitioner
 Through Ms. Kaanan Kapur, Advocate.

VERSUS

ASSTT. DIRECTOR OF INCOME TAX
 INTERNATIONAL TAXATION CIRCLE 2(2) Respondent.
 Through Ms. Prem Lata Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

Order
 % **24.1.2011**

The petitioner M/s Tractebel Industry is a body corporate registered under the laws of the Republic of Belgium.

2. For the assessment year 2002-03, the petitioner had filed return of income in India in respect of "Indian operations" declaring total income of Rs.2,53,01,260/-. Assessment order under Section 143(3) of the Income Tax Act, 1961 (Act, for short) dated 24th March, 2005 was passed by the
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Assessing Officer computing the total taxable income at Rs.2,74,78,6

While computing the said taxable income, it was held by the Assessing Officer that Article 12 of the Double Taxation Avoidance Agreement (DTAA) between Republic of India and Republic of Belgium was applicable and the payments received from the "Indian operations" were taxable under the head "Fees for technical services" and was taxable @ 10% on gross basis without allowing any deduction on account of reimbursement of expenses. In view of the above, deduction of Rs.18,56,756/- claimed on account of reimbursement of expenses was disallowed and added back to the income of the petitioner.

3. The petitioner had filed an appeal but the same was dismissed vide order dated 1st December, 2005. No further appeal was filed and the assessment order became final.

4. The Income Tax Department issued notice under Section 147/148 of the Act dated 26th March, 2007 for re-opening the said assessment for the Assessment year 2002-2003. The petitioner after getting copy of the reasons filed objections but by the impugned order dated 28th September, 2007, the objections have been rejected. It may be noted here that the petitioner had earlier filed Writ Petition (C) No. 7045/2007 and had submitted that the Assessing Officer was WP(C) 8372/2007



not dealing with the objections raised by the petitioner for re-opening the assessment. It is during the pendency of the said writ petition that the impugned order dated 28th September, 2007 rejecting the objections was passed.

5. The “reasons to believe” as is recorded by the Assessing Officer before issuing notice under Section 147/148 of the Act read as under:-

“The assessee Company M/s Tractebel Industry Engineering (now known as Tractebel Gas Engineering) is a company incorporated in Belgium. The assessee company is engaged in providing technical services to various customers in India. During the previous year 2001-02 relevant to asstt year 2002-03 the following contracts were executed in India.

Job/work detail	Date of Contract	Duration
1. Engineering of pipeline Meeting Station for IPCL Plant	July 19, 2001	5 months
2. Engineering Services for Pipe-line and metering station GNFC & Vediocon	March 23, 2001	4 months
3. Engineering services for Pipe Line metering station For NTPC Plant	March 23, 2001	4 months
4. Engineering of Dewpoint Control System	March 22, 2001	6 months
5. Engineering services for pipe- line and Metering station for Kribhko Plant	Feb 7, 2001	8 months



6. Engineering services for Feb 7, 2001 10 months
Gas Metering Station at
GPEC Power Plant
7. Engineering services for Nov 30, 2000 18 months
Mora Ultra Pipeline

Thus the assessee was involved in several engineering projects in supervisory capacity simulatenously with GSPNL during previous year 2001-2002. The duration of projects ranged from four to eighteen months. Thus clearly establishes the fact that assessee was doing business in India through a permanent establishment. Hence assessee was not eligible for lower tax @ 10% under Article 12(2) of DTAA and should be taxed @ 20% on gross receipts u/s 44 D of Income Tax Act, 1961. The assessment u/s 143(3) was completed on 24.3.2005 at the tax rate of 10% as per Article 12 of DTAA. As income of the assessee was taxable @ 20% as per Section 9(i)(vii) of Income Tax Act, 1961 because of existence of permanent establishment in India, I have reason to believe that income chargeable to tax has escaped assessment because of application of lower rate of tax. This clearly falls under clause (c) of explanation 2 of Section 147 of the I.T. Act, 1961. Therefore, notice u/s 148 is issued to the assessee for reopening the case.”

6. On examination of the said reasons show that as per the assessing officer, the facts/material on record reveal/indicate that the petitioner had a permanent establishment in India during the previous year 2001-2002 relevant to the assessment year 2002-2003 and therefore, Article 12 of DTAA was not applicable and the entire income was chargeable to tax @ 20% as per Section 9(i)(vii)/44D of the Act and the income should not



have been taxed @ 10% by treating the same as income from “fe technical services”.

7. The case of the petitioner is that the reasons recorded disclose mere change of opinion and the question whether the petitioner had a permanent establishment in India was dealt with and examined before the original assessment order dated 24th March, 2005 was passed. The case of the Revenue is that this is not the case of change of opinion but the assessing officer had not properly appreciated the legal concept and the term “permanent establishment” and in this connection reference is made to the fact that the petitioner had deputed its staff in India for periods of 4 months to 18 months. Reference was made to OECD commentary on Article 5, paragraph 3 relating to DTAA.

8. There is merit in the contention raised by the petitioner. During the course of the original assessment proceedings, the respondent by letter dated 4th October, 2004 had called upon the petitioner to furnish information and details with regard to their entire nature of business activities in India. The relevant portion of the said letter reads as under:-

“Please refer to the ongoing assessment proceedings in your case for assessment year 2002-03 (Financial Year 2001-02). In this regard, you are requested to furnish the following information:



1. Give a detailed note regarding nature of your business activities. Furnish details regarding Tractebel Industry Engineering Group and its related entities operating in India. Also furnish copy of the global accounts of M/s. Tractebel Industry Engineering NV, Belgium.
2. Furnish details regarding share holding of your company along with name and address of all its directors.
3. Furnish copy of agreements as well as confirmed copy of account in respect of following persons:
 - (i) M/s Gujrat State Petronet Ltd.
 - (ii) M/s Indian Oil Corporation Ltd.
4. Explain the method of accounting employed in your case.
5. Explain taxability of services rendered by the assessee and the process-step by step as to how these services are being provided by the assessee to Indian concerns.
6. Explain whether you have a permanent establishment in India.
7. Furnish details of all expatriates which visited your company during the year.
8. Please given copies of invoices raised by you against which payments were made by various parties in India.
9. Explain allow-ability of deduction of Rs.18,56,785/- received by you towards reimbursement of expenses. Furnish details of these expenses incurred by you along with copy of bills raised.
10. Furnish details of salary paid during the year along with name and address of the persons to whom the salary was paid.
11. Furnish a brief summary of the expenses incurred during the year.”

(emphasis supplied)

9. The petitioner filed a detailed response dated 27th December, 2004 on each of the points raised by the Assessing Officer. It was stated that the petitioner did not have any permanent establishment in India. The



Assessing Officer, therefore, had specifically raised and examined the issue whether or not the petitioner had a permanent establishment in India during the period relevant to the assessment year 2002-03. The question of permanent establishment was not ignored. It was given due consideration. One of the questions, which were considered and decided by the Assessing Officer, was whether income from the “Indian operations” of the petitioner were taxable as “fee from technical services” or if the petitioner had permanent establishment as business income. It is clear from the assessment order dated 24th March, 2005 that the receipts were disclosed by the petitioner as “fee from technical services” and were accepted by the assessing officer as “fee from technical services” and were taxed on the gross receipt basis without allowing any deduction on account of reimbursement of expenses at a flat rate of 10%. Addition of Rs. 18,56,756/- was made by disallowing all expenses as claimed. The addition was upheld in the appeal. The said income/receipts could not have been taxed as “business income” under Article 7 as well as “fee from technical services” under Art 12 of DTAA. The assessing officer had, therefore, examined and decided the issue whether the petitioner had a permanent establishment and could be taxed accordingly or the amount



received was taxable as “fee from technical services”. Relevant portio

the said Articles of DTAA read:-

“Article 7 Business Profit

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) the permanent establishment; (b) sales in that other State of goods of merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall be attributed to such permanent establishment the profits which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

Article 12 Royalties and fees for technical services

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other state.



2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they may arise and according to the laws of that State, but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed *[10%] of the gross amount of the royalties or fees for technical services.

3. xxxx

4. The provisions of paragraph 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which, or the contract under which, the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be shall apply.”

10. Thus the Assessing Officer came to the conclusion that the income earned from “Indian operations” was taxable as “fee from technical services” and not as “business income”. In other words, the assessing officer has held that the petitioner assessee did not have permanent establishment in India. The decision of the assessing officer may not be correct, but the same cannot be made subject matter of reopening of assessment under Section 147/148 of the Act. Scope of Section 147/148 of WP(C) 8372/2007



the Act, howsoever wide, do not confer jurisdiction on the Assessing Officer to reopen assessment on change of opinion on interpretation of a particular provision. The scope of Section 147/148 of the Act does not permit review of an earlier order on second thoughts suo moto, when there is no new factual material, to come to a different conclusion. The aforesaid position has not undergone a change even after Sections 147-148 were amended after 1st April, 1989. In *Jindal Photo Films Ltd. Vs. Commissioner Income Tax (1998) 234 ITR 170*, Delhi High Court had observed as under:-

“The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly rose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods.

.....

Reverting back to the case at hand, it is clear from the reasons placed by the Assessing Officer on record as also from the statement made in the counter affidavit that all that the Income-tax Officer has said is that he was not right in allowing deduction under section 80-I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase ‘reason to believe’ in his order, admittedly, between the date of the orders of assessments ought to



be re-opened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Officer has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under section 147 of the Act.

It is also equally well settled that if a notice under section 148 has been issued without the jurisdictional foundation under section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If 'reason to believe' be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under section 147/148 of the Act."

11. This view was followed by a Full Bench of Delhi High Court in *Commissioner of Income Tax Vs. Kelvinator of India Ltd.* (2002) 256 ITR 1 (FB) and the contention of the Revenue that the amended provisions with effect from 1st April, 1989 do not bar or prohibit reassessment



proceedings on the ground of change of opinion was rejected and accepted. This decision of Delhi High Court was taken up in appeal and has been affirmed in *Commissioner of Income Tax Vs. Kelvinator of Indian Limited* (2010) 2 SCC 723 and it has been observed as under:-

“5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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, confers jurisdiction to re-open the assessment. Therefore, post-1-4-1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. 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 fulfillment 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.

7. 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, 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. 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer.

8. We quote herein below 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 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.'"



12. Reliance placed on *GRUH Finance Ltd. Vs. Joint Commis*
of Income Tax (Assessment) (2000) 243 ITR 482, a judgment of the Gujarat High Court, is misplaced and distinguishable. The said case is prior to the decision of Delhi High Court and the Supreme Court in the case **Kelvinator India Ltd** (supra). The Gujarat High Court has recorded a specific finding that at the time of the original assessment, there was no conscious consideration of material and a mistake was made. It has been observed that conscious application of mind to the material and the issue in question is required. Change of opinion necessarily means examination on an earlier occasion.

13. We have quoted above the questionnaire raised and the answers given by the petitioner at the time of original assessment proceedings. It is clear that before the original assessment order dated 24th March, 2005 was passed, the Assessing Officer had specifically raised and examined the issue whether the petitioner had permanent establishment in India. The contention of the petitioner that they did not have permanent establishment in India was accepted. The present case is not one where there was no consideration or examination of the issue at the time of the original assessment proceedings. This is not a case in which there was no



application of mind by the Assessing Officer to the issue in que
Proceedings on record, the questionnaire raised and the answers given at
the time of original assessment proceedings show conscious application of
mind on the facts and material available before the Assessing Officer. The
present case is one of change of opinion.

14. In view of the aforesaid discussion, the petitioner is entitled to
succeed and a writ of certiorari is issued quashing the notice dated 26th
March, 2007, Annexure P-5 and all subsequent proceedings emanating
therefrom including the order dated 28th September, 2007. No costs.


SANJIV KHANNA, J.


CHIEF JUSTICE

JANUARY 24, 2011
KKB