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

Reserved on : 2nd November 2012

% **Date of Decision: 4th December, 2012**

\+ **WRIT PETITON (CIVIL) NOS. 14085/2009**

MEINHARDT SINGAPORE PTE LTD. ..... Petitioner

Through Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

VERSUS

ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE 3(1), INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel & Mr. Puneet Gupta, Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

For detailed order see WP(C) No. 14076/2009 titled Meinhardt Singapore Pte Ltd. vs. Assistant Director of Income Tax, Circle 3(1), International Taxation, New Delhi pronounced today.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

December 4th, 2012
NA/kkb

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WRIT PETITON (CIVIL) NOS. 14077/2009,

MEINHARDT SINGAPORE PTE LTD. ..... Petitioner
Through Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar Advocate.

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ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE 3(1), INTERNATIONAL TAXATION, NEW DELHI ..... Respondent
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VERSUS

ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE 3(1), INTERNATIONAL TAXATION, NEW DELHI ..... Respondent
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel & Mr. Puneet Gupta, Standing Counsel.

WRIT PETITON (CIVIL) NOS. 14096/2009,

MEINHARDT SINGAPORE PTE LTD. ..... Petitioner
Through Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar, Advocate.

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VERSUS

ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE 3(1),
INTERNATIONAL TAXATION, NEW DELHI ..... Respondent
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel & Mr. Puneet Gupta, Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

The present judgment will decide the challenge to the reassessment proceedings initiated against the petitioner Meinhardt Singapore Pte Ltd. for the assessment years 2002-03 to 2005-06 vide reasons recorded on 25th-26th March, 2009. The said reassessment proceedings have been initiated by the Deputy Director of Income Tax, Circle-3(1), New Delhi.

2. Reasons have been separately recorded for each assessment year, but they are virtually identical. For the sake of convenience, we are reproducing the reasons recorded in the assessment year 2002-03, which read as under:-

> "Assessee filed its return of Income declaring an income of Rs.74,77,927 on 26-02-2004. The assessment was completed under section 143(3) on the Returned income on 23-03-2005.
>
> 2. The assessee is a Singapore based company, having a Branch Officer (B.O.) in India and is engaged in providing technical consultancy in the area of road construction in India.

It has offered the income out of its activities in India for tax as Fee for Technical Services (FTS) under section 44D of the Act.

3.1 During the year, the assessee was indulged in providing technical consultancy services to National Highway Authority of India (NHAI) in respect of NHAI Allahabad project, the contract in respect of which was signed on January 30, 2001. In terms of provisions contained under section 44D read with 115A of the Act, the receipts from this project are taxable as FTS on gross basis @ 20%.

3.2 From the Profit & Loss account filed during the assessment proceedings, it is noticed that the Assessee declared total receipts of Rs.74,77,925/- under section 44D which were offered for tax @ 15%. However, in the assessment order u/s 143(3) dated 23-03-2005 the same was taxed @ 20%.

4.1 It is observed that the assessee entered into a Sub-consultancy contract dated February 01, 2001 with respect to the same NHAI Allahabad project with one M/s Quest International Consultants, a copy of which was submitted during the assessment proceedings for the A.Y. 2006-07. It has been the assessee claim that it had only provided team leader to the project whose salary was added back in computation of Income; while other expenses were borne by the Sub-consultants, which were reimbursed directly to it by the NHAI. Enquiries have been conducted with M/s Quest International Consultants and it is seen that following payments have been received directly by the Sub-consultants from the NHAI in various financial years:

Sr. No.	Financial Year	Amount Received by M/s Quest International Consultants directly from NHAI
1	2001-02	Rs.1,16,76,611/-
2	2002-03	Rs.2,38,07,150/-
3	2003-04	Rs.1,61,24,993/-
4	2004-05	Rs.2,46,36,754/-
5	2005-06	Rs.1,32,26,105/-

Copies of Form 16A issued by the NHAI to the Quest International Consultants have also been placed on record.

4.2 During the assessment proceedings for the A.Y. 2006-07, the taxability of payments, received by the Quest International directly from the NHAI, in the hands of M/s Meinhardt (Singapore) Pte. Ltd. was examined. It was seen that the NHAI entered into a contract with the assessee in respect of certain technical services to be provided by latter for its Allahabad

project. There is no agreement/contract between the NHAI and M/s Quest International.

4.3 At page 14 of the contract between NHAI and the assessee, Sub-consultant is defined as any entity to which the Consultants subcontract any part of the services in accordance with GC 3.7, as quoted above. The purpose for including, in clause 3.7, provision for prior approval of NHAI before appointing Key Personnel and entering into any sub-contract was merely to ensure quality control. The ultimate responsibility of the assessee towards satisfactory completion of contract is ensured by way of inserting sub clause (b). As can be seen from the text of GC 3.7(b), it is the assessee which is completely liable for the performance of the Services by the Sub-consultant. It clearly shows that the assesee was to assume all the risk in respect of the contract, even in respect of the portion of services to be rendered by the Sub-consultants and, in the event of failure on latter's part to fulfill its obligations satisfactorily, was to face the consequences.

4.4 The above conclusion is reinforced by clause 1.2 of the contract. As can be seen, it declares that the Consultants (i.e. the assessee) have complete charge of Personnel and Sub-consultants performing the services; and shall be fully responsible for Services performed by them or on their behalf. This shows that the fetters placed on the power of the assessee to appoint personnel and Sub-consultants are only to the extent so as to ensure the desired quality and by no means could it be interpreted as proof of an independent relationship between the NHAI and Quest International.

4.5 Clause 4.1 of the contract requires the assessee to employ and provide for qualified and suitably experienced personnel and sub-consultants to carry out the Services. Had there been an independent relationship between the NHAI and Quest International, this clause would have been meaningless. It clearly shows that it was the assessee who had to decide its team in fulfilling the contract, and role of NHAI was limited to assess their quality only. As per clause 4.3, certain Key Personnel and Sub-consultants, including Quest International are approved by NHAI. If assessee's argument that there was an independent contractual relationship between the NHAI and the Sub-consultant is accepted, it would also infer that the Key personnel by the assessee were also independent, which obviously is ridiculous.

4.6 As per clause 5.5, the NHAI was required to make payments to the assessee in lieu of services rendered. Nowhere, the contract mentions that the payments shall be made to the Sub-consultants. Again in clause 6.2, it is the consultants, i.e. the assessee who is to receive remuneration and

reimbursable expenditure. The import of all this is that the entire payment/receipt shall be accrued to the assessee only, irrespective of who actually receives the payments based on assessee's authorization. During the assessment proceedings, the assessee itself submitted copies of bills raised by Quest International, duly countersigned by the assessee. It clearly shows that for the Client, i.e. the NHAI it is the assessee which matters, and not its sub-consultants. It expects proper fulfillment of contractual obligations from the assessee and releases payments only on assessee's authorization.

4.7 Moreover, in clause 6.4(GC) it is the Consultants i.e. the assessee which is saddled with the responsibility of fulfilling various procedural requirements in order to make a claim of payments due. Nowhere the contract recognizes rights of the Sub-consultants i.e. Quest International of getting paid. As per clause 6.4 (e), all the payments were to be made by the Client in designated accounts, which are listed in Special condition (SC) 6.4 (e). The list indeed includes a local account of Quest International and the Ld. A.R. during the assessment proceedings placed enormous reliance on this fact. However, if one reads all the clauses related to payments in unison (GC 5.5 and 6-page 29 to 32-the relevant extracts of which are reproduced above in para 5.2), the conclusion can't escape the notice that the accounts mentioned in SC 6.4 (e) do not, per se, confer any rights to earn income to the Sub-consultants; and instead just a tool of convenience for the operational benefit of the assessee. It is the assessee who, in the eyes of NHAI is rendering services, and as per the contract, it is the assessee only who is getting paid. Character of income cannot change by mere direction to deliver the payments to a third person.

4.8 The fact that the contract is between the assessee and Quest International and not between the NHAI and Quest International, in itself, supports the conclusions drawn in above paragraphs. It doesn't held assessee's case-that the relationship between the NHAI and Quest International is independent-one bit. Once a contract is signed between the NHAI and the assessee, no matter how much work the assessee sub-contracts, the contractual responsibilities and consequent benefits shall be with the assessee only.

Contract between the Quest International and the assesse

4.8 The fact that the contract is between the assessee and Quest International and not between the NHAI and Quest International, in itself, supports the conclusions drawn in the above paragraphs. It doesn't help assessee's case -- that the relationship between the NHAI and Quest International is independent -- one bit. Once a contract is signed between the NHAI and the assesse, no matter how much work the assessee

sub-contracts, the contractual responsibilities and consequent benefits shall be with the assessee only.

4.9 It can be seen that the contract was entered into after the assessee has already signed a contract with NHAI and the assessee was merely sub-contracting its obligation to the sub-consultants. The sub-contracting cannot possibly be construed as a separate contract between the NHAI and the Sub-consultants;

4.10Further, the true character of the contract comes out clearly if one analyses clause 7. It stipulates that the assessee shall not be liable to pay the Sub-consultants i.e. Quest International in the event that NHAI did not fulfill their obligations to pay the assessee. It clearly shows that it is the assessee who is rightful owner of all the monetary consideration to be received from NHAI under the contract, and the Sub-consultant was to get its share only when the assessee receives its due. Had there been an independent contract between the NHAI and Quest International in respect of payment to be received by Quest International, there was absolutely no need to insert clause 7 in the contract.

4.11The contract between the NHAI and the assessee was entered into on January 30, 2001. According to the assessee's own admission the services rendered are in the nature of Technical Services under the relevant provisions of Income-tax Act, 1961 and the relevant DTAA. The assessee itself has admitted that the receipts in respect of NHAI Allahabad project are taxable as FTS under Section 44D read with section 115A of the Act on gross basis @ 20%. Under these circumstances, when there was no extra benefit of expenses available to the assessee, the claim of payment of a substantial amount of receipt directly in the hands of the Sub- consultants is nothing but a ploy to avoid payment of taxes by the assessee. Rightfully, entire receipts arising on account of the said contract are taxable in the hands of the assessee on gross basis @ 20% under section 44D read with section 115A of the Act.

4.12There can be no denial to the fact that Contract was awarded to the assessee only and not the assessee and Quest International. After signing the contract with NHAI, the assessee entered into a sub-consultancy agreement with Quest International, but. the responsibility for the total performance from start to successful completion and full compliance with the specification for the performance remained with the assessee. Also, it was the assessee, and not the Sub-consultant, who was asked vide GC 6.4 (a) to provide a bank guarantee.

4.13In the eventuality of any unforeseen event which might have prevented the Sub-consultant from fulfilling its obligations, responsibility was on the assessee to execute the contract. The overall picture which emerges makes it clear that

though contract was later on sub contracted in part, the intention of parties was very clear that the entire gamut of services were to be rendered on the pattern of one composite contract.

4.14The mere fact the Quest International Consultants was assessed to tax is not a reason alliunde to which assessee could be exonerated from the payment of rightful tax dues. Hon'ble Supreme Court in the cases of ITO v. Ch. Atchaiah (218 ITR 239) (SC) and S.P. Jaiswal v. CIT (224 ITR 619)(SC) has held that the right person has to be assessed even if some other person has already filed returns and paid taxes thereon.

4.15For the purpose of ascertaining the intention of parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. It is the duty to construe the contract according to the intention of the parties. The law of contract is intended to ensure that what has been promised shall be performed, and in the event of breach, party at default shall compensate the other. To achieve this task a contract must be capable of being executed independently. The factual details of the contract have been examined. The above analysis clearly shows that the Contract is basically one consolidated contract only. Clause in respect of bank guarantee makes it abundantly clear that the entire responsibility of execution of contract was with the assessee only from beginning to end. Assessee was required to ensure the quality of local manpower, and by mere sub-contracting, it would not take the position that it was not responsible for the execution of the project in Toto. Taking into consideration the entire conspectus of the case, the conclusion can't escape that the ploy of direct payments to Quest International was a façade created for the purpose of taxation, ex consequenti and therefore, veil has to be lifted to tax the correct amount of receipt as FTS under section 44D read with 115A of the Act @ 20% on gross basis.

4.16. During the year, the Quest International received an amount of Rs.1,16,76,611/- directly from the NHAI on behalf of the assessee. As discussed above, this amount should have been taxed in the hands of the assessee. Therefore, I have reasons to believe that an amount of Rs.1,16,76,611/- has escaped assessment.

Approval of the DIT (International Taxation-I), New Delhi is solicited in terms of the proviso to section 151(1) of the Act.

Deputy Director of Income Tax
Intl. Tax. Circle 3(1), New Delhi
Dated:26-03-2009"

3. We may note that the proceedings for the assessment year 2002-03 and 2003-04 are beyond the period of four years and, therefore, the first proviso to Section 147 of the Income Tax Act, 1961 (Act, for short) is applicable. The notices for these two assessment years have been issued after obtaining approval under the proviso to Section 151(1) of the Act from the DIT (International Taxation-1).

4. With regard to the assessment years 2004-05 and 2005-06, we accept that the petitioner-assessee is entitled to succeed and the reassessment proceedings are liable to be quashed on the ground of 'change of opinion'. However, for the assessment years 2002-03 and 2003-04, we have come to the conclusion that the reassessment proceedings have been rightly initiated and accordingly the writ petitions for the said years are liable to be dismissed.

5. While deciding the writ petitions, we have kept in mind that each assessment year is separate and independent. It may be appropriate to reproduce the following observations of the Bombay High Court in Income Tax Reference No. 2/1995 titled ***M/s Unitech Products Ltd. Vs. Commissioner of Income Tax,*** decided on 30th July, 2012:-

> "21. Once the absence of the relevant material before the AO is established, the burden is on the assessee to establish that the AO in some manner and for some reason had knowledge of such material and considered it while making the assessment orders. There may well be circumstances which would lead to such an inference. That, however, would depend on the facts of each case. In the facts of this case, we are not inclined to speculate in the respondent's favour.
>
> 22. An AO is not concerned with only one assessee or three assessment orders. If judicial notice may be taken it must be of the fact that an AO has considerable other work including the assessment proceedings of several assessees. We see no reason to presume that the AO would remember all the material and all the facts in respect of the assessment proceedings for a particular year while dealing with the assessment proceedings of another year even in respect of the same assessee. There is nothing to suggest that the AO

while making the assessment orders in each of the said years, in fact, considered the material available in respect of the other years. That the assessment orders were made in different dates albeit within a gap of only few days indicate the contrary. The exigencies and the burden of the work may well result in his inability to correlate the material between various assessment proceedings even though made only within a few days of each other. The burden would rest heavily upon the assessee to establish otherwise. There is nothing on record that persuades us to come to a conclusion that the AO while making the assessment orders for the A.Ys. 1981-82 and 1982-1983 recollected Note 16 to its Accounts for year ending 31.12.1982 included in the return of income for the A.Y. 1983-1984."

6. At the same time, we are cautious of the fact that if the issue in question permeates, is a germane and live issue for all the assessment years, it can be overlapping. There can be cases when an issue/question may have been examined even when the Assessing Officer had not raised a written query etc. especially when assessment proceedings for two or more years are pending or have been decided by the same Assessing Officer or the question/issue was raised/examined in the immediately preceding year. In spite of the said position, for the reasons set out below, we have reached two different conclusions by applying the legal principles applicable to Section 147/148 of the Act.

7. We have already set out in detail the reasons for reopening, for AY 2002-03. The petitioner, as noted in the said reasons, is a Singapore based company having a branch office in India, and during the assessments years in question, it had provided technical consultancy services to National Highway Authority of India (NHAI) under a contract dated 30th January, 2001. For each assessment year, the assessee had filed returns declaring total receipts from NHAI. For first two yeas, the gross receipts from NHAI were offered to tax @ 15% under Section 44D of the Act. For the assessment years 2002-03 and 2003-04, the Assessing Officer, in the assessment orders dated 23rd

March, 2005 and 22nd February, 2006 passed under Section 143(3), observed and held that the gross receipts were taxable @ 20%. For the assessment year 2004-05, the assessee had declared total receipts of Rs.1,61,24,993/- under Section 44D, which was offered to tax @ 20%, whereas the remaining receipts of Rs.65,48,410/- were offered to tax under Section 44DA on net basis. For the same assessment year, i.e. 2004-05, the petitioner-assessee had also claimed indirect expenses of Rs.1,11,65,895/- against the receipts offered for tax under Section 44DA. Similarly, for the assessment year 2005-06, the petitioner had declared total receipts of Rs.1,08,96,441/- under Section 44D, which were offered to tax @ 20%. The remaining receipts of Rs.3,45,30,515/- were offered to tax under Section 44DA on net basis. The assessee had claimed indirect expenses of Rs.3,83,31,294/- against the receipts offered for taxation under Section 44DA. On this amount, the assessee had itself disallowed Rs.51,18,679/- being expenses incurred in relation to projects taxable under Section 44D. The assessments for AY 2004-05 and 2005-06 were completed under Section 143(3) on the returned income on 5th December, 2006 and 24th December, 2007, respectively.

8. From the reasons recorded, it is apparent that the Assessing Officer was of the opinion that payments made to Quest International Consultants (Quest, for short), a sub-contractor, should be included in the receipts or the taxable income under Section 44D read with Section 115A of the Act and have to be taxed in the hands of the petitioner @ 20%. In the assessment years in question, Quest had received Rs.1,16,76,611/-, Rs.2,38,07,150/-, Rs.1,61,24,993/- and Rs.2,46,36,754/- respectively from NHAI. This, according to the Assessing Officer, is the escaped income and is taxable in the hands of the assessee. The Assessing Officer, in this connection, has referred to the clauses of the contract between NHAI and the petitioner as well as

the contract between the petitioner and Quest. He has quoted, examined and interpreted the said agreements to justify initiation of the reassessment proceedings. For the assessment year 2006-07, the Assessing Officer has held in the assessment proceedings that the amounts received by Quest from NHAI are taxable in the hands of the assessee. It is apparent that the assessment order for the assessment year 2006-07 became the starting point for initiation of the reassessment proceedings.

9. For the sake of convenience, we will first deal with W.P.(C) Nos.14085/2009 and 14076/2009, which relate to the assessment years 2004-05 and 2005-06. As observed above, as far as the assessment years 2004-05 and 2005-06 are concerned, the petitioner's case falls in the category of 'change of opinion'. It is an accepted and admitted position that in the assessment year 2004-05, both, the agreement between the petitioner and NHAI, and the agreement between the petitioner and Quest, are available on the records of the Assessing Officer. Therefore, the Assessing Officer was aware and had knowledge of the said agreements. From the reasons quoted above, it is clear that the Assessing Officer has referred to the clauses of the two agreements and has interpreted them to hold prima facie and tentatively that receipts by Quest from NHAI were taxable in the hands of the assesse, and should be included in the net income of the assessee. Once the two agreements were with the Assessing Officer, during the course of the assessment proceedings for the assessment year 2004-05, the said aspect as a sequitor would have been examined and dealt with by him. The respondents in their additional affidavit filed on 19th April, 2012, have accepted the position that the agreement between the petitioner and Quest is available in the records for the assessment year 2004-05. They cannot question their own records and state that they do

not know how the agreement is available on record for the said year, without valid, good reason and justification. The onus is on them. It is claimed and stated that this by itself does not show that the Assessing Officer had applied his mind to the said question of taxability of receipts of Quest in the hands of the assessee. It is not possible to accept the statement made by the learned counsel for the Revenue. There are a number of reasons for the same. Firstly, the fact that the contract between Quest and the petitioner is available on record shows that the Assessing Officer must have called for the same. Secondly, there is correspondence, in the form of a letter dated 30th October, 2006, written by the petitioner to the Assessing Officer in the AY 2004-05 on the issue in question. The petitioner, in paragraph 4 of the said letter, had stated as under:-

> "4. Copy of the Audited accounts of M/s Quest International, Allahbad and the certificate for them certify that M/s Quest International are raising bills directly to NHAI, Allahabad and getting payments directly from NHAI, Allahabad."

10. Thereafter, in the letter dated 14th November, 2006, again for the AY 2004-05, the petitioner had stated as under:-

> "1. During the year under assessment company has paid the total salary of Rs.31,88,801.82 to the staff working at New Delhi for the various projects except project at NHAI, Allahabad. The Head Officer has simply remitted certain funds to the branch office in India for maintaining various expenses in India. The Delhi Branch office staff has been engaged for the functioning of Indian branch. The details of salary paid by the India branch and by the Quest International is enclosed which establishes the fact that staff at Delhi are not attending any work for NHAI project. These are two different staffs having different duties and nature of work. TDS of Rs.507223/- has been deducted and TDS returns have been filed by the company. The amount so paid has been debited to Profit & Loss account and has been claimed as deduction being an expenditure incurred or execution of contracts entered after April 2003.
> 2. .....
> 3. Copy of NHA project, Allahabad is enclosed for your ready reference and record. From this agreement with the National Highway Authority of India, you will observe that the provisions of sub-consultancy in the name of Quest

International Consultants is given under the organization chart at page no.54 of the contract. The organization chart clearly defines and establish the fact that the Quest International has been appointed as sub-consultant for undertaking day to day work as directed by NHAI.

4. .....

5. Every month company is raising professional bill in Indian currency. As informed to your earlier that Quest International has been appointed by NHAI as sub-consultant for undertaking local work as per the requirement of NHAI from time to time. Accordingly, Quest International is raising bill in Indian Currency. The Indian currency bill consist of manpower provided by Quest International and other expenses incurred by Quest International. The bill relating to supply of man-power is being shared between Meinhardt Singapore and Quest International as per their mutual agreement which work out to be at 25% of the bill related to providing of manpower. Reimbursement of expenses are not shared between Quest International and Meinhardt Singapore Pte. Ltd."

11. Thirdly, the order sheet entry dated 30th December, 2005 for the assessment year 2004-05 reads as under:-

"30/12/05

Sh Saxena appeared and discussed the case. The counsel contends that in the profit & loss a/c no expenses have been claimed for NHAI-Allahabad project as this project agreement was entered into before 31/3/03. Proof in respect of this is to be given as the expenses appear to be common. Also, details of contract between M/s Meinhardt Singapore and M/s Quest International are to be given. Since the counsel has stated that M/s Quest International is handling the NHAI project and bearing all expenses.

Fixed for 6/1/06".

12. It may be relevant here to refer to the questionnaire served on the petitioner on 20th November, 2006, in which the petitioner was questioned:-

"1. Please refer to the computation of income & documents filed during the asstt. proceedings of the case. Please submit the following:-

" The copy of agreements entered into with the South city Projects Calcutta Ltd., Bengal silver spring project, Queens Park Estate Pvt. Ltd. & NHAI, New Delhi to show that these agreements are entered after 31st March, 2003.

2. Please explain as to why not the payments made to Quest International consultants be considered as expenses with

r/t sub-contract and the same be treated as receipt for the purpose of computing tax u/s 44D r/w s 115A of IT 1961. This is in view of the fact that the company is raising invoices to NHAI.

2. From the audited a/cs of the branch it is seen that during F.Y. 02-03 the company has incurred expenses of Rs.322662/-. The company has also submitted that it has PE in the form of branch office in India. These expenses were not claimed as deduction during A.Y. 03-04.

Considering the provisions of S. 44D, please state on what a/c the expenses are made

What were the such expenses in F.Y. 2000-01, 2001-02 also considering the fact that the B.O. didn't have any project other than NHAI in earlier years it can be said that these expenses were incurred in connection with NHAI project Allahabad due to this please also explain as to why an expense of Rs.3226621/- be reduced from the current year expenditure also treating the same as incurred for NHAI Allahabad project.

4. Please explain on what a/c the advance to Quest International and Arch Consultancy be made since when the advance was made submit the copy of documents in this regard."

13. Similarly, the order sheet entry dated 7th November, 2006 records:-

"2. Why the total receipt from NHAI in respect of Allahabad project in Indian currency be treated as a receipt and taxed as per provision of Section 44D read with 115A of the Act".

14. The letters/responses of the petitioner, when read with order sheet entry dated 30th December, 2005 and questionnaire dated 20th November, 2006, gives a clear indication that the Assessing Officer was aware that payments had been made by NHAI to Quest. Secondly, both the agreement between NHAI and Quest, as well as the agreement between the petitioner and NHAI were on record.

15. In the assessment year 2005-06 vide order sheet entry dated 14th December, 2007, the petitioner was asked the following question:-

"Please explain how have you confirmed that no expenses have been incurred for the services offered to tax under Section 44D read with Section 115A, except the salary paid to the Headquarter?

16. Relevant portion of the earlier questionnaire with respect to AY 2005-06 dated 19th November, 2007 was as under:-

> "2. Please furnish copies of all the agreements contracts with the Indian parties, if not furnished alongwith the returned of income. Also furnish copies of invoices raised on these parties.
>
> 3. Details of your employees and the employees of the associated enterprises (AEs) who visited India during the financial year 2004-05, purpose of their visit and duration of stay in India (support with documentary evidence).
>
> 4. Name and address of the AE in India and details of transaction with such AE."

17. The petitioner claims that it had filed replies dated 29th November, 2007, 6th December, 2007 and 20th December, 2007. However, the same are not on records/files of the respondents. Order sheet entries dated 30th November, 2007, 6th December, 2007 and 20th December, 2007 state that letters were filed. The questionnaire and order sheet entries themselves disclose that the issue in question was examined by the Assessing Officer. In the letter dated 17th December, 2007, the petitioner in response to one of the queries had stated:-

> "1. x x x x x x
>
> 2. **Explain the two contracts with NHAI**
>
> a) We have entered in the first contract with NHAI in January' 2001 for supervision of National Highway Construction Supervision for 4 Laning and Strengthening of Existing Two Lane Stretches from KM, 115 to 158 KM and from KM245 to kM317 on NH 2. (Copy of agreement is attached for your reference). The above said contract was in association with local consultant namely M/s Quest International, the work was distributed as Meinhardt has to provide expat Team leader and Quest to provide all the local staff. All the expenses except salary of Team Leader is being paid by Quest International. On the similar pattern NHAI pays Team Leader's remuneration direct to Meinhardt and fee for local staff and expenses is paid to Quest International. The above said income to Meinhardt has been offered for tax under section 115A read with section 44DA as the contract was signed before 1st April' 2003."

18. It is the contention of the petitioner that the contract with Ques dated 1st February, 2001 was furnished and, therefore, the query wa raised. We agree as it is obvious and it would be incongruous to hold to the contrary. That the contract dated 1st February, 2001 is on record in the immediate preceding year 2004-05 is accepted. The answer given was pertinent and specific. It is indicative of the application of mind on the factual matrix.

19. Consequently, the respondent's claim that these letters are not on record, and therefore should not be taken into consideration, cannot be accepted. This cannot be a ground to reject, and to not take into consideration, the letters. Record maintenance of the respondents leaves much to be desired. Departmental files and records are neither page numbered nor in seriatim. There is no concept of a filing counter and issuance of a proper receipt. The petitioner-assessee has taken a categorical stand that these letters were written to the Assessing Officer. The respondents cannot deny receipt of the said letters merely on the basis that they are now not on record, once the order-sheets record filing by the petitioner. We, therefore, opt and accept the statement of the petitioner that the agreement between them and Quest was furnished to the Assessing Officer. Time has come for the respondent to start digitization, and to have proper Dak receipt counters and registers. The denial by the respondents that the agreement with Quest was not furnished in the proceedings for AY 2005-06 is rejected. Without the letters, the respondents cannot deny the existence and availability of the agreement between the petitioner and Quest, on their record.

20. Thus, for the assessment years 2004-05 and 2005-06, the Assessing Officer in the original proceedings had examined and was aware of the two agreements. He was also aware that Quest had received payments from NHAI and that these were not included in the

taxable income or receipts of the income. He was also aware that the petitioner's income was taxed on the gross receipt basis under Section 115J. There was no lapse or fault on the part of the assessee. Full facts were on record and the Assessing Officer accepted the returns. If at all, there was a lapse on the part of the Assessing Officer to understand the legal position. At best, the case of the Revenue can be that the Assessing Officer had wrongly applied, and did not appreciate the legal position. This cannot be a ground to reopen finalised regular assessments for the said years. The Supreme Court in the case of ***CIT Vs. Kelvinator India Ltd.*** *(2010) 2 SCC 723* has held has under:-

> "5. 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 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 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.
>
> 6. 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 fulfillment of certain preconditions 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.
>
> 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, 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."

21. For the assessment years 2002-03 and 2003-04, the agreement between the petitioner-assessee and Quest is not in the assessment records. The petitioner, however, contends that the agreement between them and Quest was filed before the Assessing Officer. However, no letter enclosing the said agreement has been placed on record, and neither is there any order sheet entry on the basis of which it could be stated that the agreement between the petitioner and Quest was filed on record. There is otherwise no material or evidence to show that the agreement between the petitioner and Quest was filed with the Assessing Officer in the said two assessment years. The Assessing Officer vide letter dated 27th December, 2004 for the AY 2002-03 had called upon the assessee to give the details of their business relationship with M/s Quest International Consultants, Faridabad along with copy of agreement with this concern, if any. The petitioner was also asked to confirm whether any supplies were made by the petitioner or any of its associate entity, to any other concern in India. If yes, details were asked to be provided.

22. By its response dated 24th January, 2005, the petitioner had categorically stated that "M/s. Quest International Consultant is a sub Consultant of M/s NHAI and the company is not having any business relationship with them." It was also stated that the petitioner had not made supplies in India, and the petitioner did not have any other business associates in India. The contention of the petitioner, that they

accepted and admitted contractual relationship and business association with Quest in this letter, is playing and hedging with words. The queries raised were simple and straight-forward, and a clear reply was mandated. The contention of the petitioner, at best, shows a deliberate and intentional attempt to conceal and not state true and correct relevant facts. For the sake of completeness, the query raised and the reply given are reproduced below:-

Query

> "11. Give the details of business relationship with M/s Quest International Consultants, Faridabad along with copy of agreement with this concern if any.
> 12. Please confirm whether any supplied were made by you or any of your associate entity to any concern in India. If yes. give details thereof."

REPLY

> "With reference to your notice dated 27.12.2004 and as desired by you please find enclosed herewith the followings:-
> a) x x x x x x
> b) x x x x x x
> c) x x x x x x
> d) M/s Quest International Consultant is a sub Consultant of M/s NHAI and the company is not having any business relationship with them.
> e) It is clarified that the Company has not made any suppliers in India and further it may be inform to you that the Company does not have any other business Associates in India."

23. Another query in the aforesaid letter, dated 27.12.2004, asked for a copy of the contract between the petitioner and NHAI, and with any other entity for whom services were rendered by the petitioner for utilisation in India. In the response, dated 24.01.2005, a copy of the agreement between the petitioner and NHAI was enclosed, and it was further clarified that the petitioner had not entered into any contract with any other organization/company for rendering professional services in India.

24. It is clear from the aforesaid reply that the petitioner had denie any contract or business relationship between them and Quest. This is in spite of the fact that they had an agreement, and it is an accepted and admitted position that they had entered into an agreement with Quest dated 1st February, 2001. The aforesaid fact was clearly concealed, and incorrect factual information was circulated to the Assessing Officer. Learned counsel for the petitioner in this connection has drawn our attention to the various clauses of the agreement between the petitioner and NHAI, and submitted that these clauses refer to Quest as a sub-contractor. The agreement between the petitioner and NHAI does refer to, and state that, Quest is the sub-contractor. This became the basis, or the starting point, from which the Assessing Officer made a query from the petitioner regarding their association or business relationship with Quest. The petitioner, however, took an affirmative and categorical stand that they had no business relationship with Quest. The Assessing Officer, therefore, did not examine the said question. The present case would, therefore, be one where there has been concealment of fact, and the Assessing Officer has proceeded on the basis of the wrong factual statement made by the assessee. The plea, and submission, that the agreement with Quest was filed, is not correct. There is no proof or letter filing the agreement. The reply dated 24.1.2005 does not state that agreement with Quest was being filed. The agreement is not on record. In this situation the following observations of the Full Bench in ITA No. 2026/2010 titled ***CIT Vs. Usha International,*** decided on 21st September, 2012 are apposite and applicable:-

> "16. Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle

of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts."

25. The condition of the first proviso is also squarely satisfied, as the petitioner had failed to fully and truly disclose such material facts. In the case of ***Usha International*** (*supra*), the term "material fact" has been elucidated and explained as under:-

"The expression 'material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment."

26. We may also refer to the decision in the case of ***Calcutta Discount Company Ltd. Vs. ITO*** *(1961) 41 ITR 191*, wherein the term "material fact" was examined and it was held:-

"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. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be."

27. The position in the assessment year 2003-04 is that the agreement between the petitioner and Quest is not on record. The petitioner again claims that they had filed a copy of the said agreement with the Assessing Officer, but they do not have any letter, or any other proof, that they had filed the same. The Order sheet entries also do not make any reference to the filing of the agreement between the petitioner and Quest. The petitioner squarely relies upon the questionnaire written by the Deputy Director of Income Tax, the Assessing Officer. The aforesaid questionnaire does not make any reference to the agreement between the petitioner and Quest. In fact, the said questionnaire can be used against the petitioner for concealing and not stating the true and full material facts, as the Assessing Officer had asked the petitioner to state how the taxable income under Section 115J had been computed. The petitioner had also been asked to furnish all invoices of consultancy income of Rs. 2,26,73,403/-. From the aforesaid position, it is clear and apparent that the petitioner had not furnished a copy of the agreement between them and Quest and the Assessing Officer did not go into the said question and examine the same.

28. Learned counsel for the petitioner in these circumstances submitted that the reasons to believe recorded by the Assessing Officer on 26.03.2009 do not record or state that the agreement between the petitioner and Quest was not on record, and that there was failure on the part of the assessee to fully and truly disclose the material facts. We feel that the contention, though attractive, must fail for various reasons. Whether or not the agreement between the petitioner and Quest was

available with the Assessing Officer is a matter of record and when disputed, must be examined and decided on preponderance of probabilities. Factually, it is correct that, as per the record, the agreement is not on record. On examination of the said dispute on the preponderance of probabilities with reference to the evidence/material available, we have to hold that the agreement with Quest was not filed with the assessing officer in the assessment years 2002-03 and 2003-04. Secondly, we have quoted above the reasons to believe recorded for the assessment year 2002-03, which are similar to the reasons recorded for the assessment year 2003-04. In paragraph 4.1 it is recorded that a copy of the agreement between the assessee and Quest dated 1st February, 2001 was submitted during the course of assessment proceedings of AY 2006-07. Thereafter, the Assessing Officer had made queries and came to know about the payments received by Quest directly as a sub-contractor from NHAI. Copies of Form 16A for AYs 2002-03 to 2005-06 were also placed on record i.e. on record for the assessment year 2006-07. Thereafter, the Assessing Officer has referred to the contract between Quest and the petitioner in paragraph 4.8 onwards. The reasons to believe have to be read holistically and in a pragmatic manner. No doubt the reasons to believe should be clear and not ambiguous and should show a nexus between escapement of income and under assessment, but it is not just and fair to read the reasons to believe in such as manner as to examine them under a magnifying lens, with a view to find fault. Some latitude and play in the language can be granted, when it is justified and required. Dogmatic approach should not be adopted. The assessment records are also required to be examined and considered, along with the reasons to believe. Read in this manner, we do not think that the Revenue is trying to build up a new case, or is supporting the reasons to believe on the basis of grounds

which are not stated or recorded in the reasons to believe. The decision in the case of ***Mohinder Singh Gill and Another Vs. Chief Election Commissioner*** *1978 (1) SCC 405,* is, therefore, not applicable.

29. Lastly, it was submitted on behalf of the petitioner that the reasons to believe do not show any nexus, or formation of belief, that income had escaped assessment. It is not possible to accept the said contention. At this stage, only a prima facie or tentative view has to be formed by the Assessing Officer, that income has escaped assessment. The prima facie view must have some foundation or basis. The Assessing Officer has formed such tentative opinion. He has interpreted the clauses of the two agreements to reach a prima facie opinion. Whether or not, ultimately, the addition is sustained, is a different matter, and need not be examined at this stage.

30. Several issues/contentions raised could have been answered by mere examination/verification of the documents on record/files of the Revenue. Unfortunately, the respondent concede and do not rely upon their own records/files. This is serious and requires effective and urgent remedial and corrective action by the Board.

31. In view of the aforesaid findings, we allow Writ Petition (Civil) Nos. 14085/2009 and 14076/2009, which pertain to assessment years 2004-05 and 2005-06. The reassessment proceedings for the said years are quashed and subsequently the assessment orders passed shall be treated null and void. Writ Petition (Civil) Nos. 14077/2009 and 14096/2009 pertaining to the assessment years 2002-03 and 2003-04 are dismissed. As assessment orders have been passed, the petitioner is at liberty to file appeals before the appellate authority within a period of one month from today. In case appeals are filed within the said period, they will not be dismissed on the ground of limitation. However, in the appellate proceedings, the petitioner will not be entitled to challenge the

reopening of the assessments. As both the parties have part succeeded, there will be no orders as to costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

December 4th, 2012
NA/kkb