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

Reserved on: 17th December, 2012
% *Date of Decision: 2nd January, 2013*

\+ **W.P. (C) 8483/2010**
\+ **W.P. (C) 8485/2010**
\+ **W.P. (C) 8486/2010**

XEROX MODICORP LTD. ..... Petitioner
Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondents
Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

These are three writ petitions filed by the petitioner which is a company engaged in the export of software, manufacture of photocopiers and trading in fax, paper and toner. They are directed against reassessment proceedings initiated by issue of notices under section 148 of the Income Tax Act, 1961.

2. W.P. (C) Nos.8483 & 8486/2010 relate to the proceedings for the assessment years 2002-03 and 2003-04 respectively. They can be dealt with together and separate from W.P. (C) Nos.8485/2010 because for those years the reassessment proceedings were initiated after a period of four years from the end of the relevant assessment years, whereas for the assessment year 2004-05, which is the year involved in W.P.(C) No.8485/2010, the reassessment proceedings were initiated within the period of four years from the end of the said assessment year, and therefore different considerations apply.

W.P.(C) Nos.8483 & 8486/2010:

The relevant dates are set out below:

	Asst.year 2002-03	Asst.year 2003-04
Original assessment made u/s.	143(3)	143(3)
Date of the original assessment	31.03.2005	23.03.2006
Notice u/s.148 issued on	30.03.2009	30.03.2010

3. Under the first proviso to section 147, notice to reopen an assessment completed under section 143(3) may be issued beyond the period of four years from the end of the relevant assessment year only if income chargeable to tax has escaped assessment on account of the failure of the assessee to file returns of income or to furnish fully and truly all material facts relating to his assessment at the time of the original assessment. This is a jurisdictional pre-condition.

4. For the assessment year 2002-03, the reasons recorded u/s. 148(2) for reopening the assessment are as follows:

> *"The assessment of M/s Xerox India Ltd. for the assessment year 2002-03 was completed under scrutiny in March 2005 determining an income of ₹7836.96 lakhs. The assessed income was however reduced under section 250/154 to ₹1136.81 lakhs.*
>
> *2. The assessee company had claimed and was allowed an expenditure of ₹438.59 lakh on account of royalty paid to a foreign company in foreign exchange in lieu of rendering technical assistance. Since this expenditure has provided the assessee a benefit of enduring nature, this expenditure ought to have been treated as capital expenditure in accordance with the judgment of Supreme Court in the case of Southern Switchgear Ltd. vs CIT and another reported at 232 ITR 359. The omission resulted in underassessment of income of ₹438.59 lakh.*
>
> *3. Further, the assessee claimed and was allowed a loss of ₹317.43 lacs on account of provision for securitisation. It being only a provision and the loss being of speculative nature was not allowable.*

> *4. From the above facts, I have reason to believe that income of ₹756.02 lakhs, as above has escaped assessment by virtue of omission on the part of the assessee to disclose the above income. This is therefore a fit case for issuance of notice u/s.148 of the Income Tax Act, 1961".*

The reasons recorded for the assessment year 2003-04 are:

> "*It is seen from records that the assessee company claimed expenses of ₹3,59,59,436 on royalty and ₹2,04,92,135 on a/c provision for securitisation. Whereas expenditure on royalty is liable to be capitalised and provisions for securitisation is contingent liability is inadmissible, both the expenditure(s) are liable to be added to income.*
>
> *Therefore, I have reason to believe that income of ₹5.63 Crores has escaped Assessment.*
>
> *Accordingly, re-Assessment proceedings are initiated under section 147 of Income Tax Act, 1961. Notice is issued under section 148 of Income Tax Act 1961".*

5. It is common ground before us that the assessing officer (respondents herein) has dropped the ground relating to disallowance of the provision for securitisation for both the years; therefore, what survives is only the disallowance of the royalty paid as capital expenditure.

6. Let us examine the disclosure made by the petitioner. In respect of the assessment year 2002-03, the return of income was accompanied by the audited accounts along with the notes and schedules. In the profit and loss account for the year ended on 31.03.2002, "material and manufacturing expenses" of ₹31,341.04 lakhs was debited and the details thereof were given in Schedule N; in the schedule, royalty of ₹438.59 lakhs was shown as part of the expenses. It is not in dispute that the royalty was paid under a technical services agreement entered into on 22.03.1984 with Xerox Ltd. of England and was being allowed in all the assessments made from the assessment year 1984-85. It is stated in the counter-affidavit that no query was raised by the respondent in the course of the original assessment proceedings with regard to the royalty payment, that the petitioner did not submit the information or copies of the relevant documents showing the terms and nature of the benefit accruing from the royalty agreements in this assessment

year, that each year is a separate year and the rule of *res judicata* is not applicable to income-tax proceedings, that the rule of consistency does not hold good on the facts of this case and that in these circumstances the reopening was valid. It is pointed out that the contents of the supplementary agreements 1 & 2 were not submitted by the petitioner during the original assessment proceedings.

7. In respect of the assessment year 2003-04 also, the royalty of ₹359.59 lakhs was separately shown in the Schedule-O which sets out the details of the "material and manufacturing expenses". A questionnaire was issued by the AO on 06.02.2006 in which 28 queries were raised by him, including query No.23 in which the petitioner was directed to furnish "evidence that royalty has been paid within the time prescribed u/s. 43B and file evidence of TDS from royalty". The petitioner submitted the details asked for under cover of letter dated 15.02.2006. On 23.03.2006 the petitioner again gave certain clarifications about the TDS from royalty payments in response to the queries raised by the respondent by letter dated 17.03.2006. The assessment was completed on 23.03.2006. The counter-affidavit filed by the respondents is substantially the same as in the writ petition for the assessment year 2002-03.

8. It is seen that it is in the counter-affidavit, for the first time, that the respondent has taken the stand that there was failure on the part of the petitioner to furnish the royalty agreements including the supplementary agreements in the course of the assessment proceedings for the years in question; no such reason was stated in the reasons recorded u/s. 148(2). All that was said in the reasons recorded was only that in the view of the assessing officer, the royalty payments ought to have been held to be capital in nature.

9. It is settled law that the assessing authority cannot keep improving his case from time to time and that the reassessment proceedings have to stand or fall on the basis of what was stated in the reasons recorded u/s. 148(2) and nothing more. No failure to furnish full and true particulars relating to the royalty payments, including the failure to file the relevant agreements, has been alleged in the reasons recorded. If anything, the reasons are an admission that it was the assessing officer who did

not draw the inference that the royalty payments were capital in nature. It was for him to draw the appropriate inference and not for the assessee to tell him what inference of fact or law should be drawn from the primary facts furnished. That is the ratio of *Calcutta Discount Co. Ltd.*, (1961) 41 ITR 191 (SC).

10. Accordingly, the reassessment notices for the assessment years 2002-03 and 2003-04 are quashed as also the consequent proceedings.

W.P. (C) No.8485/2010:

11. The facts in this petition are slightly different. The original assessment was completed u/s. 143(3) on 27.12.2006. Notice u/s. 148 was issued on 30.03.2009 which is within the period of four years from the end of the relevant assessment year (2004-05). The reasons recorded are:

> *"The assessment of M/s. Xerox India Ltd. for the assessment year 2004-05 was completed under section 143(3) vide order dated 27.12.2006 determining an income of ₹27,39,40,490/-.*
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> *2. The assessee company had claimed and was allowed an expenditure of ₹3,79,50,791/- on account of royalty paid to a foreign company in foreign exchange in lieu of rendering technical assistance. Since this expenditure has provided the assessee a benefit of enduring nature, this expenditure ought to have been treated as capital expenditure.*"

12. The other reasons recorded relating to provision for securitisation, contingent liability, gratuity/superannuation etc. are not reproduced since the objections of the petitioner with respect to those issues were accepted by the respondent by order passed u/s.154 on 11.02.2010.

13. The contention of the petitioner is that the notice issued u/s. 148 is without jurisdiction on the basis of the Full Bench judgment of this court in *CIT v. Kelvinator of India Ltd.*, (2002) 256 ITR 1, which stands affirmed by the Supreme Court in *CIT v. Kelvinator of India Ltd.*, (2010) 320 ITR 561. The contention is that once an assessment is completed under sec. 143(3), the assessing officer is presumed to have applied his mind to all the issues and he cannot thereafter reopen the assessment on the ground that he did not form any opinion with respect to any

particular issue; he must have tangible material before him on the basis of which he can entertain a reason to believe that income chargeable to tax has escaped assessment. It is contended that there is no reference to any tangible material in the reasons recorded and that all that is stated therein is that the expenditure by way of royalty conferred an enduring benefit to the assessee and ought to have therefore been disallowed as capital expenditure. That is, argues counsel for the petitioner, nothing but a change of opinion without any tangible material coming to the possession of the assessing officer subsequent to the completion of the original assessment.

14. The learned standing counsel for the revenue strongly relies on the following observations of the majority opinion in paragraph 23 of the judgment of the Full Bench of this court in *CIT v Usha International Ltd.*, (2012) 348 ITR 485 and contends that having regard to those observations of the majority, the notice issued by the AO is valid: -

> *"23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined".*

15. In the accounts the royalty of ₹379.51 lakhs was debited to the profit and loss account along with several other items of expenditure under the head "material and manufacturing expenses". Schedule-O to the accounts gives the break-up of the expenditure and shows royalty separately.

16. In the counter-affidavit, it has been stated that the relevant agreements under which the royalty was paid were not furnished by the petitioner along with the return or during the original assessment proceedings, that the facts of the past years showed that no technology was ever developed by the petitioner in India and it was dependent on the technical inputs supplied by the parent company and thus there arose an enduring benefit to the petitioner, that the petitioner omitted to state that it derived such enduring benefit, that the petitioner failed to deduct tax from the

royalty payments which attracted the provisions of section 40(a)(i) of the Act under which the royalty payments could have been disallowed, that since there was no query raised or any discussion made on the issue of allowability of the royalty in the original assessment proceedings no opinion was formed by the assessing officer and therefore the petitioner cannot allege that the reopening was prompted by a mere change of opinion. It is also averred that the assessing officer received information by way of revenue audit report from the DG Audit, Central Revenue, IP Estate, New Delhi vide letter dated 03.09.2007 accompanied by a "statement of facts" which was *"thoroughly examined by the AO and only after he was fully satisfied and formed an opinion that income chargeable to tax had escaped assessment by way of Royalty payment that reasons were recorded and notice u/s 148 was issued on 30.03.2010...."*, that thus the reopening was *"based on information received from Revenue Audit"* and that *"an examination of records with reference to the Revenue Audit Objection also revealed that the petitioner had not disclosed full and true facts about the capital nature of Royalty payments".* It is denied that the reopening is based on a mere change of opinion.

17. It is difficult to sustain the notice issued u/s. 148. The audit objection is only an inference that the royalty payment resulted in a capital benefit; such an opinion expressed by the audit cannot constitute tangible material on the basis of which the assessment can be reopened. In the case of *Indian Eastern and Newspaper Society v. CIT*, (1979) 119 ITR 996 the Supreme Court expressed the view that information as to correct legal position must come from a formal source or body which is competent to pronounce upon the issue and that revenue audit is not competent to pronounce on issues of law. There is no averment that the revenue audit only pointed out to any factual aspect or material or primary fact that was omitted to be disclosed by the petitioner.

18. The alleged non-deduction of tax from the royalty which would authorise the disallowance under section 40(a)(i) is a fact that is mentioned for the first time in the counter-affidavit and it does not find place in the reasons recorded. As noted earlier, it is impermissible to look into any record other than the reasons recorded to judge the validity of the reopening of the assessment. Further, the statement in the counter-

affidavit that the facts relating to the past years disclosed that the petitioner was wholly dependent on the parent company for the technical inputs goes against the revenue, in the sense that it was always known to the revenue that the petitioner did not develop any technology of its own but was dependent on the technology from the parent company. Moreover, it is not for the petitioner to advise the assessing officer as to what inference he should draw as to nature of the expenditure – whether it is revenue or capital in nature.

19. Since the reasons recorded have been prompted by the revenue audit's opinion as admitted in the counter-affidavit, it is not necessary to examine the contention of the revenue based on the observations of the majority in paragraph 23 of the judgment in *CIT v. Usha International Ltd. (supra).*

20. In the light of the foregoing, we are of the view that the notice issued u/s. 148 for the assessment year 2004-05 is also without jurisdiction. The same is quashed as also the consequent proceedings.

21. In the result, all the writ petitions are allowed. The notices u/s.148 and the consequent proceedings are quashed. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JANUARY 2, 2013
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