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

Reserved on: 12th March, 2014
% *Date of Decision: 28th March, 2014*

\+ **W.P.(C) 2326/2013**
\+ **W.P.(C) 2328/2013**
\+ **W.P.(C) 2330/2013**

ADOBE SYSTEMS SOFTWARE IRELAND LTD. ..... Petitioner
Through: Mr. M.S. Syali, Sr. Advocate with Mr. Vishal Kalra, Mr. Mayank Nagi and Mr. Harkunal Singh, Advocates.

versus

ASSISTANT DIRECTOR OF INCOME TAX ..... Respondent
Through: Mr. N.P. Sahni, Sr. Standing Counsel.

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

R.V. EASWAR, J.

1. In this petition presented under Article 226 of the Constitution, the petitioner assails the jurisdiction of the respondent to continue reassessment proceedings initiated by notices dated 30.03.2011 issued by the Dy. Director (Intnl. Taxation), Noida under Section 148 of the Income Tax Act, 1961 ('Act', for short) and the order dated 08.03.2013 passed by the respondent herein, (hereinafter referred to as "the Delhi officer" or

"respondent") dismissing the petitioner's objections to the reassessment notices.

2. The petition arises this way. The petitioner is a non-resident company, incorporated in Ireland. It functions in India from DLF Cybercity, Gurgaon, Haryana. It is engaged in the business of Adobe Products - shrink-wrapped/ off-the-shelf computer software. For the first time it filed a return of income for the assessment year 2008-09 on 31.03.2010 with the respondent declaring "nil" taxable income. A notice under Section 143(2) was served on the petitioner on 20.08.2010 in respect of the return. A draft assessment order under Section 144C was proposed by the respondent on 17.12.2010 and the proceedings were referred to the Disputes Resolution Panel (DRP). In the meantime i.e. after the issue of notice under section 143(2) by the respondent and before the preparation of the draft assessment order, a notice under Section 142(1) was issued on 14.09.2010 by the Deputy Director of Income Tax, International Taxation, Noida (hereinafter referred to as "the Noida officer") calling for a return for the income for the assessment year 2009-10. The petitioner pointed out that the jurisdiction to assess a non-resident company is determined either on the basis of the location of the

"*permanent establishment*" (PE) of the non-resident company or the location of a source of income accruing to the company in India and that the petitioner did not have any source of income in Noida as none of its clients in India were located there, nor did the petitioner have a PE in India. It was accordingly submitted that the notice issued by the Noida officer was without jurisdiction. It would appear that there was no reply to this notice.

3. However, on 30.03.2011 the Noida officer issued notices under Section 148 of the Act seeking to reopen the petitioner's assessment for the assessment years 2004-05, 2005-06 and 2006-07. These notices were received by the petitioner on 07.04.2011 and on 26.04.2011 the petitioner wrote to the Noida officer informing him that the petitioner was already assessed in India by the respondent (Delhi officer) and, therefore, he had no jurisdiction to issue the notices. No reply appears to have been received for a period of 4 months from the Noida officer. However, on 26.09.2011 the Noida officer wrote a letter to the petitioner enclosing the reasons recorded for reopening the assessments for all the three years. The reasons are identical and they are as follows: -

"*<u>Reasons</u>*

The assessee is a company incorporated in Ireland. NO return of income has been filed by the assessee for the A.Y. 2006-07

During the year the assessee has received Rs.301731289 for marketing support services from Adobe India which is AE of the assessee.

Indian company is a dependent agent for non-resident company as it works wholly and exclusively for non-resident and completed contracts of non-residents with the distributors in India.

Without prejudice to the above, the assessee's income is chargeable to tax in India as royalty received by him for licensing software to various customers in India. During the year, the assessee has received Rs.301731289 as fees for marketing and sales commission. Operating Global income of the company is $ 728434 on marketing receipt of $ 593323. Applying the same rate, profit of the assessee on marketing receipt of Rs.301731289 comes to Rs.368112172 for which no return has been filed.

IN the above circumstances, I have reason to believe that income amounting to Rs.368112172/- is chargeable to tax has escaped assessment in terms of Section 147 of the Act.

Submitted to Addl. DIT, Intl. Taxation, Noida for kind approval as escaped income is more than Rs.1 Lakh

Sd/-
DDIT, Intl. Taxation"

4. The above reasons relate to the assessment year 2006-07 and different figures of escapement of income were mentioned in the notices for the other two years.

5. On receipt of the reasons recorded for reopening the assessments the petitioner wrote to the Noida officer on 02.11.2011 on the subject and in this letter it again reiterated its earlier objections i.e. that the Noida officer did not have jurisdiction over the petitioner since the petitioner was already being assessed to income tax by the respondent at Delhi. On 04.11.2011 the Noida officer transferred the proceedings and records to the respondent. Thereafter on 14.11.2011 the respondent issued notices under Section 142(1) calling upon the petitioner to file returns of income for the assessment years in respect of which notices were earlier issued under Section 148. Predictably, the petitioner's response was; (a) the notices under Section 148 were issued without any jurisdiction by the Noida officer and at the time when they were issued i.e. 30.03.2011 the jurisdiction to assess the petitioner was with the respondent; (b) notice issued under Section 142(1) for the assessment year 2004-05 was barred by limitation since it was issued beyond the period of six years from the end of the relevant assessment year; (c) even assuming that the notices under Section 148 were validly issued by the Noida officer, the time limit to complete the reassessments under Section 153 of the Act would expire on 31.12.2013 and (d) the petitioner would need more time to comply

with the notices issued under Section 142(1) for the assessment years 2005-06 and 2006-07.

6. On 07.01.2013 the respondent wrote to the petitioner pointing out that no returns had been filed in response to the notices issued on 30.03.2011 under Section 148 and also pointing out that despite issue of notices under Section 142(1) on 14.11.2011 "*to enforce compliance to the requirement of filing the return in response to notice u/s 148*", the petitioner did not file any return and calling upon the petitioner to show-cause "*as to why the assessment in your case may not be completed u/s. 144 read with Section 147 of the Act*". The petitioner replied on 21.03.2013 and pointed out to the respondent that the notices issued under Section 148 by the Noida officer were without jurisdiction, that he had not disposed of the petitioner's objections till date, that no communication has been received by the petitioner as to how the proceedings pending with the Noida officer were transferred to the respondent and that therefore the proceedings cannot be continued by the respondent. It was further submitted that the petitioner had filed returns in response to the notice issued by the respondent under Section 142(1) for the assessment years 2005-06 and 2006-07 on 30.03.2012 and 11.09.2012 respectively and that

these returns had been filed without prejudice to the contention that the issuance of the notices themselves was barred, being beyond limitation and, therefore, no assessment is permissible. It was also pointed out that the notice issued under Section 142(1) for the assessment year 2004-05 was beyond limitation and, therefore, no return had been filed. It was requested that the petitioner should be supplied with a copy of the communication or the basis for the transfer of the records from Noida to Delhi. In support of these submissions several authorities were cited. It was ultimately requested that the proceedings be dropped and a formal order dropping the proceedings be communicated.

7. On 01.02.2013 another letter was addressed by the petitioner to the respondent. In this letter there is reference to the discussions which took place between the petitioner and the respondent sometime in January, 2013; during that discussion, it would appear that the respondent had stated that the objections filed by the petitioner to the jurisdiction to reopen the assessments would be considered only after returns of income were filed by the petitioner in response to the notices under Section 148 as held by the Supreme Court in the case of "*G.K.N. Drive Shafts (India) Ltd. vs. ITO*", (2003) 259 ITR 19. After referring to the observations of

the respondent, the petitioner submitted that the aforesaid judgment was not applicable since the very assumption of jurisdiction by the Noida officer was invalid according to the petitioner and, therefore, the only course open to the respondent was to drop the proceedings.

8. On 08.03.2013, the respondent passed the impugned order which is identical for all the three assessment years for which notices were issued under Section 148. In this order the respondent disposed of the objections filed by the petitioner to the reasons recorded for reopening the assessments. The points made by the respondent in this order are as follows: -

(a) The petitioner has not filed any return in response to the notices issued under Section 148 and, therefore, was not entitled to file objections at this stage nor was the respondent bound to dispose of the objections, if any filed.

(b) In any case the petitioner is not correct in law and on facts in asserting that the Noida officer did not have jurisdiction over the petitioner, and therefore the notices under Section 148 issued by him were invalid, and consequently the proceedings cannot be continued.

(c) As per CBDT's notification No.263 issued on 14.09.2001 the jurisdiction of Directors of Income Tax (International Taxation) over a foreign company lay with the assessing officer in whose area the foreign company has a PE or a business connection. Examination of records reveals that the petitioner had a "dependent agent PE" in Noida in the form of Adobe India, which was also the petitioner's associated enterprise. Therefore, the Noida officer had valid jurisdiction over the petitioner and was entitled to issue the notices under Section 148.

(d) During the previous years relevant to the assessment years for which the notices under Section 148 were issued, the petitioner had not obtained any "permanent account number" (PAN) nor had it filed any return of income. The permanent account number was obtained only in 2009, prior to the filing of the return of income for the assessment year 2008-09 declaring "nil" income. In this view of the matter also, the Noida officer had valid jurisdiction over the petitioner.

(e) An order dated 06.03.2013 had been issued by the DIT (International Taxation)-II, New Delhi in F.No.DIT[Intl. Tax.]-

II/2011-12/3187 by which the jurisdiction over the petitioner for the assessment year 2004-05 to 2006-07 was transferred from Noida to the respondent at Delhi in order to avoid multiplicity of proceedings and the possibility of orders passed by two different authorities. Therefore, the respondent was entitled to continue the reassessment proceedings which were validly initiated by the Noida officer.

(f) On 04.11.2011 itself the records were transferred to the respondent from the Noida officer when the return of the petitioner for the assessment year 2008-09 was assessed by the respondent. It was only thereafter that the respondent issued notice under Section 142(1) which was only a continuation of the proceedings validly initiated under Section 148.

9. For the aforesaid reasons the respondent concluded that the objections raised by the petitioner were without merit and dismissed them. From what has been narrated above, it seems clear that the validity of the proceedings which were continued by the respondent depends upon the validity of the initiation of the proceedings for reassessment by notices issues on 30.03.2011 by the Noida officer. If the notices are valid, then

the case having been transferred from the Noida officer to the respondent at Delhi under Section 127(1) of the Act, the respondent can validly continue those proceedings which have to ultimately terminate in orders of reassessment. The question whether the initiation of reassessment proceedings by the Noida officer was valid or not would depend upon whether the petitioner had a PE within the jurisdiction of the Noida officer in which case the notification No.263 issued on 14-9-2001 would apply. Whether this jurisdictional fact existed or not cannot be examined in these proceedings taken under Article 226 since the question is hotly contested, the revenue alleging that the petitioner did have a PE at Noida by the name Adobe India and the petitioner emphatically denying the same. In the absence of any evidence unmistakably and indisputably establishing the existence or otherwise of the PE, we would hesitate to enter this prohibited arena in writ proceedings. It needs no citation of authority to support the proposition that the Court exercising its jurisdiction under Article 226 of cannot enter into disputed questions of fact which is best left to be resolved in the alternative remedies available to the petitioner. In fact the assessment and appellate authorities, including the Income Tax Appellate Tribunal, constituted under the Act as

fact-finding bodies are best suited to examine whether the petitioner had a PE in Noida or not and the question of jurisdiction would depend upon the findings of those authorities. Moreover, when we are exercising discretionary jurisdiction, it is not impermissible to consider whether any real prejudice has been caused to the petitioner to justify the exercise of the extraordinary jurisdiction which is to be sparingly wielded. We do not see any such prejudice to the petitioner. If really it had no PE in Noida and if it is able to establish that, then certainly there would be no case of escapement of income. In that case the reassessment proceedings will be without jurisdiction. If on the other hand, the petitioner is found to have a PE at Noida as alleged by the revenue, and if the revenue is able to establish that fact, the petitioner not having filed any returns of income for the assessment years 2004-05 to 2006-07, there was escapement of income which the revenue is entitled, subject to the provisions of the Act, to bring to assessment.. There can be no vested right that escaped income cannot be taxed, provided all the jurisdictional conditions and the procedural requirements of the Act are satisfied. This fundamental question is purely one of fact which ideally should be determined in

proceedings relating to assessment and appeal prescribed under the Act. This Court cannot, on the facts of the present case, enter that domain.

10. It is also noticed that the petitioner did not file any returns of income in response to the notices issued under Section 148. We are inclined to agree with the view taken by the respondent that even under the judgment of the Supreme Court cited supra, the petitioner would get the reasons recorded for reopening the assessment only upon filing the return of income pursuant to the notice issued under Section 148. The conduct of the petitioner has been one of defiance; it did not file returns in response to the notices issued under Section 148. The mere filing of the return can never amount to submitting to the jurisdiction. The filing of the return in response to the notice under Section 148 defines the stand taken by the assessee. Section 148 says that the return called for by the notice issued under that section shall be treated as if such a return were a return required to be furnished under Section 139 of the Act. Under the scheme of the Act, a return of income conveys the position taken by the assessee to the assessing authority - whether he has taxable income or not. It is not a mere scrap of paper. There is a sanctity attached to the return. If the assessing authority calls upon the assessee to file a return of income,

the same shall be complied with by the assessee and it is no answer to the notice to say that since in his (assessee's) opinion there is no taxable income, he is under no obligation to file the return. The petitioner, not having made the Noida officer aware that no income chargeable to tax had escaped assessment and having merely told him that he has no jurisdiction to issue reassessment notices, was not acting strictly in accordance with law. The writ remedy being a discretionary remedy, the discretion can be exercised in favour of the writ petitioner only if his conduct has been in conformity with law. If it is not, the Court may refuse to exercise the discretion in favour of the writ petitioner.

11. For the aforesaid reasons the writ petitions with all connected applications are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 28, 2014
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