THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.04.2013

+ ITA 578/2012

COMMISSIONER OF INCOME-TAX-I ..... Appellant

versus

CHEIL COMMUNICATIONS INDIA PVT. LTD.… Respondent

Advocates who appeared in this case:
For the Appellant :Mr Rohit Madan, Advocate
For the Respondent :Mr Salil Kapoor, Mr Vikas Jain,
Mr Sanat Kapoor and Mr Ankit Gupta, Advocates

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the order dated 31.01.2012 passed by the Income Tax Appeal Tribunal in ITA No. 5161/Del/2011 relating to the assessment year 2006-07. This appeal was admitted for hearing on 31.12.2012 when the following substantial question of law was framed for the consideration of this court:-

> "Did the Tribunal fall into error in holding that the reopening of assessment was bad in law, having regard to the ultimate order made by the AO in that the ground for reassessment was not one of the items added back or disallowed, to the assessee's income assessed?"

2. The learned counsel for the appellant submitted that the reasons for reopening the assessment under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') indicated that the Assessing Officer felt that income had escaped assessment in respect of three items. The first item being the claim of loss on account of foreign exchange fluctuation. The second item being the claim of expenditure under the head "data usage charges", which, according to the Assessing Officer, was not of a revenue nature and had to be treated as being of a capital nature. The third point on which the reopening was contemplated, according to the learned counsel for the appellant, was the question of determination of an Arm's Length Price in relation to the international transactions between the respondent/assessee and its associated enterprises. The notice under Section 148 was issued to the respondent/assessee on 11.09.2008. The purported reasons for reopening were also furnished to the respondent/assessee. Those purported reasons, which have been recorded by the Assessing Officer, were as under:-

"M/s Cheil Communications India Private Limited A.Y. 2006-2007
Reasons for reopening the case u/s 147/148 of the I.T. Act, 1961.

Return of income in this case was filed on 4/12/2006 declaring income of Rs.31611079/-. The return was processed u/s 143(1) on 11/3/2008 at the return income.

On perusal of the assessment record of the assessee following discrepancies have come to the notice;

That during the year the assessee company has claimed the amount of Rs.1182857/- as foreign exchange fluctuation loss. For the purpose of computation of taxable income, the provisions of income-tax Act are to be followed. Liability which will arise only on the happening of an event, in this case, on the remittance of sums payable, should be allowed only at the time of remittance and not before on a notional basis. On this issue, in the case of CIT vs. Woodward Governor (India) (P) Ltd. (2007) 162 Taxman 60,Department has filed SLP, which is pending in the court.

That during year the assessee company has claimed expenses of Rs.12126632/- in schedule 13 annexed with the return of income under the head Data Usage Charges. These expenses are incurred by the assessee for various research purposes, development projects, etc. Since all these expenses are providing enduring benefit to the assessee hence the same should be treated as of capital nature.

As per the form No.3CEB filed along with the return the assessee during the year had international transactions with associated enterprises/ concerns. Hence determination of Arm's Length Price in relation to international transactions is also required.

In view of the facts narrated above, I have reason to believe that income of Rs.13309489/- has escaped assessment

for the assessment year 2006-07 and I am satisfied that it is a fit case for issue of notice u/s 148 of I.T. Act, 1961.

(Dr.Prashant Khambra)
Asstt. Commissioner of Income Tax
Circle 3(1), New Delhi."

3. Subsequent to the issuance of the notice for reopening, the assessment of the respondent / assessee had been reopened and culminated in the assessment order dated 17.10.2011. Prior to that, the Assessing Officer had made a reference to the Transfer Pricing Officer under Section 92CA of the said Act for computation / determination of the Arm's Length Price. In the assessment order, the computation of the total income was done by the Assessing Officer as under:-

"COMPUTATION OF TOTAL INCOME:-

Total income as declared by the assessee:-	Rs 3161107/-
Add:-	
Addition on Arms Length Price u/s 92CA(3):-	Rs 12020160/-
Deemed income on a/c of Short Receipts declared in P/L Account:-	Rs 1503613184/-
Total assessed Income	Rs 1547244423/-
Rounded Off	Rs 1547244420/-

Assessed at income of Rs 1547244420/-. Credit of prepaid taxes given. Demand notice and challan issued. Interest charged as per the provisions of the I.T. Act 1961.Penalty proceedings u/s 271(1)(e) of the I.T. Act have been initiated separately.

(P. K. Sharma)
Asstt. Commissioner of Income-tax
Circle-3(1), New Delhi.

Copy to the Assessee.

Sd/-
ACTT, Circle 3(1), New Delhi."

4. It would be apparent from the above computation of the total income that no addition had been made with regard to the claim of foreign exchange loss. No addition had also been made in respect of data usage charges. However, an addition with regard to the issue of Arm's Length Price to the extent of Rs 1,20,20,160/- had been made. An addition had also been made on account of the deemed income on account of short receipts declared in the profit and loss account to the extent of Rs150,36,13,184/-. It is pertinent to note that the last item, that is, deemed income on account of the short receipts declared in the profit and loss account had not even been mentioned in the purported reasons which had been recorded.

5. The Tribunal observed that on going through the purported reasons, it was apparent that the Assessing Officer allegedly had reason to believe that income of Rs 1,33,09,489/- had escaped assessment and that this income comprised of two components, that is, Rs 11,82,857/- in respect of

the claim of loss on account of foreign exchange fluctuation and an amount of Rs 1,21,26,632/- on account of claim of expenses under the head "data usage charges". The Tribunal noted that in the assessment order, no addition had been made on account of foreign exchange fluctuation loss. However, with regard to the data usage charges, 25% of the same amounting to Rs 30,00,000/- had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. The Tribunal, therefore, observed that it had been correctly contended on behalf of the assessee that no addition on the basis of the reasons recorded for reopening the completed assessment survived.

6. According to the learned counsel for the appellant, this observation of the Tribunal is erroneous inasmuch as the purported reasons also referred to the question of determination of the Arm's Length Price which has been completely ignored by the Tribunal. Therefore, the Tribunal's order, according to the learned counsel for the appellant, suffers from serious infirmity and the same deserves to be set aside and the question needs to be answered in favour of the revenue and against the respondent / assessee. The learned counsel for the appellant had placed reliance on the decision of this court in the case of ***Ranbaxy Laboratories Limited v. Commissioner of***

Income-tax*: 336 ITR 136 (Delhi)**. He submitted that the said decision had been wrongly interpreted by the Tribunal. Referring to the said decision, the learned counsel for the appellant submitted that this court had observed that once the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment and he proceeded to issue a notice under Section 148, it was not open to him to assess or re-assess the income under an independent or unconnected issue, which was not the basis of the notice for re-opening the assessment. He submitted that these were not the facts in the present case. It is not as if the issue of Arm's Length Price was not mentioned in the reasons. It is only if the Arm's Length Price issue had not been mentioned in the purported reasons that the point raised by the respondent / assessee seeking support from ***Ranbaxy Laboratories Limited *(supra)*could be accepted. The learned counsel appearing for the revenue reiterated that the Tribunal had completely ignored this aspect of the matter by not even mentioning that the reasons had specifically referred to the requirement for determination of the Arm's Length Price. The learned counsel for the appellant also referred to Section 92CA of the said Act and submitted that a reference to the Transfer Pricing Officer had been made by the Assessing Officer pursuant to the notice for reopening the

assessment and after following the prescribed procedure, the Transfer Pricing Officer had determined the Arm's Length Price on the basis of which the addition to the extent of Rs 1,20,20,160/- had been made by the Assessing Officer. He submitted that the Tribunal ought not to have cancelled the entire addition on the ground that the re-assessment proceedings themselves were without jurisdiction.

7. The learned counsel for the respondent / assessee submitted that if the purported reasons were to be examined, there were, in fact, only two reasons. One, being the issue with regard to the claim of loss on account of foreign exchange fluctuation amounting to Rs 11,82,857/- and the other with regard to the claim of expenses under the head "data usage charges" amounting to 1,21,26,632/-, both of which amounted to Rs 1,33,09,489/-, which is the exact amount, which the Assessing Officer allegedly had reason to believe, had escaped assessment for the assessment year 2006-07. This would be apparent from the purported reasons itself. The learned counsel for the respondent / assessee submitted that there was no formation of any belief or reason to believe that the Arm's Length Price determined by the respondent / assessee was incorrect in any manner. In fact, there is no mention of any amount with regard to the extent of escapement of

income on the part of a faulty determination of the Arm's Length Price on the part of the respondent / assessee. The learned counsel for the respondent / assessee drew our attention to Section 147 of the said Act which, to the extent relevant, reads as under:-

> **"147. Income escaping assessment.** – If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):
>
> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
>
> **Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(*a*) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(*b*) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been under assessed; or

(*ii*) such income has been assessed at too low a rate ; or

(*iii*) such income has been made the subject of excessive relief under this Act ; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has

> escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

8. Referring to the said provision, the learned counsel for the respondent / assessee submitted that the Assessing Officer must have reason to believe that any income chargeable to tax had escaped assessment before he can embark upon the assessment or re-assessment of such an income. While doing so, he may also assess other income chargeable to tax which had escaped assessment, but which came to his notice subsequently in the course of the proceedings under Section 147. The learned counsel laid stress on the expression "and also" appearing in Section 147. He submitted that unless and until there was an assessment of income which was indicated to have escaped assessment in the reasons, there could not have been any assessment of any other income independently. The assessment of any other income chargeable to tax could only be done in conjunction with the assessment of such income which had been indicated to have escaped assessment in the reasons for invoking Section 147 of the said Act. The learned counsel placed reliance on the Supreme Court decision in the case of ***Commissioner of Income-tax v. Kelvinator of India***

Limited*: 320 ITR 561 (SC)** to submit that unless and until there was some tangible material available with the Assessing Officer to indicate that there was an escapement of income, assumption of jurisdiction under Section 147 was not permissible. He also referred to the decision of this court in the case of ***The Commissioner of Income-tax v. Orient Craft Limited [***ITA No.555/2012*** decided on 12.12.2012], which has followed the decision in ***Kelvinator*** *(supra)*. The learned counsel for the respondent / assessee submitted that while ***Kelvinator*** *(supra)* was a decision of reopening of an assessment which had earlier been completed under Section 143(3) of the said Act, ***Orient Craft*** *(supra)* was a case of reopening where there was an intimation under Section 143(1) and, in that decision, this court had held that the criteria laid down and the pre-conditions stipulated for invoking Section 147 were the same whether it was a case of reopening of an assessment under Section 143(3) or a case of intimation under Section 143(1) of the said Act.

9. The learned counsel for the respondent also referred to the Bombay High Court decision in the case of ***CIT v. Jet Airways*: 331 ITR 236 (Bom)** for the proposition that the expression "and also" had a definite meaning and that in the absence of the assessment or re-assessment of the income

indicated to have escaped assessment in the reasons, no other income could be assessed or re-assessed independently. The said decision in ***Jet Airways*** *(supra)* also examined the effect of the *Explanation 3* to Section 147 which was introduced by the Finance (No.2) Act of 2009 with retrospective effect from 01.04.1989. He submitted that the Bombay High Court in ***Jet Airways*** *(supra)* held that the effect of the said *Explanation 3* was that once the Assessing Officer had formed the reason to believe that income chargeable to tax had escaped assessment and had proceeded to issue notice under Section 148, it was open to him to assess or re-assess the income in respect of any other issue, though the reason for such issue had not been included in the reasons recorded under Section 148(2) of the said Act. However, this was subject to the rider that such other income could be assessed or re-assessed only if there was an assessment with regard to the income which had allegedly escaped assessment and which was part of the reason to believe that income chargeable to tax had escaped assessment.

10. The learned counsel also referred to ***Ranbaxy Laboratories Limited*** *(supra)* and submitted that the decision of the Bombay High Court in ***Jet Airways*** *(supra)* had been accepted by this court also as was apparent from para 18 wherein this court observed that it was in complete agreement with

the reasoning of the Division Bench of the Bombay High Court in the case of ***Jet Airways*** *(supra).*

11. We have considered the arguments at length. We agree with the learned counsel for the respondent that insofar as the issue of the Arm's Length Price is concerned, that was no reason at all. If we look once again at the purported reasons, we find that the Assessing Officer has only mentioned that as per Form No.3CEB filed alongwith the return, the assessee, during the year, had international transactions with associated enterprises and, therefore, determination of the Arm's Length Price in relation to the international transactions was also required. In our view, this is no reason at all. The scheme of the Act for determination of the Arm's Length Price is given in Chapter X. Section 92(1) specifically stipulates that any income arising from an international transaction is to be computed having regard to the Arm's Length Price. Section 92C prescribes the methodology for computation of the Arm's Length Price. Section 92C(1) stipulates that the Arm's Length Price in relation to an international transaction is to be determined by following any of the methods stipulated therein, whichever is the most appropriate method, having regard to the nature of transaction or class of transactions or class of associated persons

or functions performed by such persons or such other relevant factors as may be prescribed. One of the methods prescribed is the transactional net margin method. Insofar as the present case is concerned, a look at Form No.3CEB which was filed alongwith the return by the respondent / assessee would indicate that the transactional net margin method had been followed as the most appropriate method.

12. We may point out that Form No.3CEB is nothing but the report from the accountant to be furnished under Section 92E relating to international transactions and the same form is prescribed under Rule 10E of the Income-tax Rules, 1962. The said form, as pointed out above, had been filed alongwith the return and, therefore, there was compliance on the part of the respondent / assessee with the provisions of Section 92E. Under the normal circumstances, under a regular assessment, if the Assessing Officer, on the basis of the material and information or document in his possession, was of the opinion that the price charged or paid in an international transaction had not been determined in accordance with sub-sections (1) and (2) of Section 92C or any information and document relating to an international transaction had not been kept and maintained by the assessee in accordance with the provisions contained in Section 92D(1) and the Rules made in that

behalf or the information or data used in computation of the Arm's Length Price was not reliable or correct or the assessee had failed to furnish within the specified time any information or document which he was required to furnish by a notice issued under Section 92D(3), the Assessing Officer could, then, proceed to determine the Arm's Length Price in relation to the said international transaction in accordance with the provisions of sub-Sections (1) and (2) of Section 92C on the basis of such material or information or document available with him. This was, of course, subject to the Assessing Officer giving the assessee an opportunity to show cause as to why the Arm's Length Price should not be determined on the basis of the material or information or the document in the possession of the Assessing Officer.

13. It is, therefore, clear that even in the course of a regular assessment, the Assessing Officer would have to have some material, information or document in his possession on the basis of which he could come to any of the four opinions indicated above. In other words, the Assessing Officer could proceed to determine the Arm's Length Price only if there was a fault found with the determination of the Arm's Length Price by the assessee. If the Assessing Officer were to form such an opinion, then he could either

determine the Arm's Length Price himself or he could refer the matter for computation of the Arm's Length Price to the Transfer Pricing Officer under Section 92CA.

14. It is well settled that the Assessing Officer has power to reopen the assessment provided there is "tangible material" to come to the conclusion that income has escaped assessment. In the case of ***Kelvinator*** *(supra)*, the Supreme Court considered the effect of amendments made to section 147 of the Act by Direct Tax Laws (Amendment) Act, 1987 and Direct Tax Laws (Amendment) Act, 1989 and held as under:-

> "On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 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-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-

> conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 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 arbitrarty powers in the Assessing Officer."

15. In the present case, we find that there was no material whatsoever before the Assessing Officer when the purported reasons were recorded to indicate that the Arm's Length Price determined by the assessee was not correct. In fact, there is not even an allegation that the Arm's Length Price determined by the assessee was not correct. Therefore, we are in agreement with the learned counsel for the respondent / assessee that the purported reason of determination of the Arm's Length Price, as given in the reasons for reopening the assessment, was not a reason at all.

16. In view of the above, there were only two purported reasons and they were pertaining to (a) the claim of loss on account of foreign exchange fluctuation and; (b) the claim of expenses on account of data usage charges. Both these items have not resulted in any addition.

17. In the case of ***Jet Airways*** *(supra)*, the Bombay High Court held as under:

> "….Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has the power to assess or reassess the income which he has reason to believe had escaped assessment, and also may other income chargeable to tax. The words 'and also' cannot be ignored. The interpretation which the court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words 'assess or reassess such income and also any other income chargeable to tax which has escaped assessment', the words 'and also' cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word 'or'. The Legislature did not rest content by merely using the word 'and'. The words 'and' as well as 'also' have been used together and in conjunction."
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> xxxx xxxx xxxx xxxx xxxx
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> "…..Evidently, therefore, what Parliament intends by use of the words 'and also' is that the Assessing Officer, upon the

formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess : (i). 'such income' ; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The word 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from April 1, 1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment the former, he cannot independently assess the latter."

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> "….. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ('such income') which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

18. In the case of ***Ranbaxy Laboratories Limited*** *(supra)*, the Division Bench of this High Court has also expressed its complete agreement with the above reasoning of the Bombay High Court.

19. We are in agreement with the contention of learned counsel for the respondent that, following the decisions in ***Jet Airways*** *(supra)* and ***Ranbaxy Laboratories Limited*** *(supra)* [which has confirmed ***Jet Airways*** *(supra)*], there could not have been an addition on account of Arm's Length Price as the only two purported reasons regarding claim of loss on account of foreign exchange fluctuations and the claim of expenses on account of "data usage charges" had not resulted in any addition.

20. Consequently, we find that, although the Tribunal had not adequately dealt with the issue of Arm's Length Price, which was raised by the parties, the conclusion arrived at by the Tribunal is correct. Therefore, the question is answered in favour of the assessee and against the revenue. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

April 17, 2013
rk/dutt