R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE DAY 19TH OF DECEMBER 2023

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION No.15061/2013 (T-IT)
C/W
WRIT PETITION No.43236/2013
WRIT PETITION No.43237/2013

IN W.P. NO.15061/2013

BETWEEN:

EIT SERVICES INDIA PVT. LTD.,
FORMERLY HEWLETT PACKARD
GLOBALSOFT PRIVATE LIMITED
NO.39/40, ELECTRONIC CITY, PHASE II
BANGALORE - 560 030
REPRESENTED HEREIN BY ITS
INDIA TAX DIRECTOR
MR. MANOJ BAVLE ... PETITIONER

(BY SRI PERCY PARDIWALLA, SENIOR ADVOCATE FOR
Ms.TANMAYEE RAJKUMAR, ADVOCATE)

AND:

1. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-11(4), ROOM NO.516
5TH FLOOR, RP BHAVAN
OPP. RBI, NRUPATHUNGA ROAD
BANGALORE - 560 001.

2. THE COMMISSIONER OF INCOME TAX-I
CENTRAL REVENUE BUILDING
QUEEN'S ROAD
BANGALORE - 560 001. ... RESPONDENTS

(BY SRI E.I. SANMATHI, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF CONSTITUTION OF INDIA, PRAYING TO DECLARING THAT THE IMPUGNED PROCEEDINGS INITIATED BY THE 1ST RESPONDENT UNDER SECTION 147 READ WITH SECTION 148 OF THE ACT ARE BARRED BY LIMITATION AND OPPOSED TO THE SAID PROVISIONS AND THEREFORE WITHOUT JURISDICTION AND ETC.

IN W.P. NO.43236/2013

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GLOBALSOFT PRIVATE LIMITED
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(BY SRI PERCY PARDIWALLA, ADVOCATE FOR
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THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF CONSTITUTION OF INDIA, PRAYING TO DECLARING THAT THE IMPUGNED PROCEEDINGS INITIATED BY THE 1ST RESPONDENT UNDER SECTION 147 READ WITH SECTION 148 OF THE ACT ARE BARRED BY LIMITATION AND OPPOSED TO THE SAID PROVISIONS AND THEREFORE WITHOUT JURISDICTION AND ETC.

IN W.P. NO.43237/2013

BETWEEN:

EIT SERVICES INDIA PVT. LTD.,
FORMERLY HEWLETT PACKARD
GLOBALSOFT PRIVATE LIMITED
NO.39/40, ELECTRONIC CITY, PHASE II
BANGALORE - 560 030
REPRESENTED HEREIN BY ITS
INDIA TAX DIRECTOR
MR. MANOJ BAVLE
... PETITIONER

(BY SRI PERCY PARDIWALLA, ADVOCATE FOR
MS. TANMAYEE RAJKUMAR, ADVOCATE)

AND:

1. THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-11(4), ROOM NO.516
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CIRCLE-11(4), ROOM NO.516
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CENTRAL REVENUE BUILDING
QUEEN'S ROAD
BANGALORE - 560 001.

... RESPONDENTS

(BY SRI E.I. SANMATHI, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF CONSTITUTION OF INDIA, PRAYING TO DECLARING THAT THE IMPUGNED PROCEEDINGS INITIATED BY THE 1ST RESPONDENT UNDER SECTION 147 READ WITH SECTION 148 OF THE ACT ARE BARRED BY LIMITATION AND OPPOSED TO THE SAID PROVISIONS AND THEREFORE WITHOUT JURISDICTION AND ETC.

THESE WRIT PETITIONS PERTAINING TO PRINCIPAL BENCH, BENGALURU HAVING BEEN HEARD AND RESERVED ON 03.11.2023 AND COMING ON FOR PRONOUNCEMENT OF ORDERS THROUGH VIDEO CONFERENCING AT DHARWAD BENCH, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

S. SUNIL DUTT YADAV. J

This Order has been divided into the following Sections to facilitate analysis:

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The petitioner has filed three Writ Petitions before this Court i.e., W.P. Nos.15061/2013, 43236/2013, 43237/2013. The petitioner who is common in all these Writ Petitions has sought to challenge the re-assessment proceedings initiated pursuant to the notice issued under Section 148 read with Section 147 of the Income Tax Act, 1961 ('I.T. Act').

2. W.P.No.15061/2013 pertains to the Assessment Year 2005-2006; W.P.No.43236/2013 pertains to the Assessment Year 2006-2007; W.P.No.43237/2013 pertains to the Assessment Year 2007-2008.

I. FACTS:-

A. W.P.No.15061/2013

3. The petitioner has sought for a declaration that the proceedings initiated by the respondent No.1-Deputy Commissioner of Income Tax (DCIT) under Section 147 read with Section 148 of the I.T. Act, as

being barred by limitation and without jurisdiction. The challenge is laid to the notice at Annexure-'G' dated 29.03.2012, under Section 148 r/w Section 147 of I.T. Act for the Assessment Year 2005-2006 which preceded the order of reassessment. The petitioner has also sought for quashing of the order at Annexure-'P' dated 13.03.2013, which is the order passed by respondent No.1 rejecting the objections filed by the petitioner to the notice under Section 148 of I.T. Act for re-opening of assessment for the year 2005-2006.

4. The petitioner's regular assessment for the Assessment Year 2005-2006 was concluded by the Assessing Officer and an order was passed under Section 143(3) of the I.T. Act dated 30.12.2008 at Annexure-'B' and in such order, petitioner's claim for deduction under Section 10A of the I.T. Act came to be allowed for a sum of Rs.114,87,47,042/-. However, portion of the deduction claimed was disallowed on other grounds.

5. As against such order, on 22.12.2009[1], the Commissioner of Income Tax, Bangalore-1, Bangalore ("CIT") initiated proceedings under Section 263 of the I.T. Act on the ground that the assessment completed was erroneous and was prejudicial to the interest of the Revenue and set aside the Assessment Order.

6. Further, the CIT had directed the Assessing Officer to re-examine the claim for deduction under Section 10A/80HHE of the I.T. Act on the ground that part of the petitioner's profits was related to rendering technical services outside India which was not eligible for deduction.

7. The Assessing Officer thereafter taking note of the order of the CIT dated 22.12.2009 and having examined the matter afresh, passed a fresh Assessment Order dated under Section 143 (3) r/w Section 263 of the I.T. Act dated 24.12.2010 (Annexure-'D'), wherein

[1] Annexure-'C'

the Assessing Officer made further disallowances of deductions claimed under Section 10A of the I.T. Act after excluding the expenses incurred in foreign currency from the export turnover to the extent of Rs.74,25,62,786/-, on the ground that the said amount related to the petitioner's personnel rendering technical services outside India.

8. The petitioner thereafter preferred an appeal to the Commissioner of Income Tax (Appeals)-I, Bangalore against the fresh Assessment Order dated 24.12.2010. The said appeal came to be dismissed by its order dated 18.10.2011. It is further submitted that the petitioner has preferred an appeal against the order dated 18.10.2011 before the Appellate Tribunal, which is still pending adjudication.

9. During the consideration of such of the proceedings referred to above, the Additional

Commissioner of Income Tax Range-11, Bangalore, took up the petitioner's assessment for the Assessment Year 2008-2009 and had disallowed the petitioner's claim for deduction under Section 10A of the I.T. Act substantially. It is the case made out by the petitioner that taking note of the assessment for the Assessment Year 2008-2009, the Assessing Officer issued a notice dated 29.03.2012 under Section 148 r/w Section 147 of the I.T. Act proposing to reassess the petitioner's income for the Assessment Year 2005-2006.

10. Insofar as the reassessment under Section 148 of the I.T. Act, the reasons recorded prior to issuance of notice was responded by filing of detailed objections by the petitioner invoking the provisions under Section 147 of the I.T. Act which came to be rejected by an order dated 13.03.2013.

B. W.P. No. 43236/2013

11. The petitioner has sought for a declaration that the proceedings initiated by the respondent No.1– Assistant Commissioner of Income Tax under Section 147 read with Section 148 of the I.T. Act as being barred by limitation and without jurisdiction. The petitioner has also challenged the notice dated 13.09.2012 (Annexure-'D') under Section 148 read with Section 147 of the I.T. Act for the Assessment Year 2006-2007. Further, the petitioner has also sought for quashing of the order F.No.DCIT-C-11-4/BGL/13-14 dated 22.08.2013 at Annexure-'J' which is the order passed by respondent No.2 rejecting the objections filed by the petitioner to the notice under Section 148 of the I.T. Act for reopening of assessment in respect of Assessment Year 2006-2007.

12. Petitioner's regular assessment for the Assessment Year 2006-2007 was taken up under Section

143(3) of the I.T. Act. In the due course of assessment with regard to certain international transaction and furnishing of Audit Reports under Section 92E reference was made to Transfer Pricing Officer under Section 92CA of the I.T. Act. Thereafter, vide order dated 30.12.2009 a draft assessment order was forwarded to the assessee and the assessee filed objections to it before the dispute resolution panel. Subsequently, the Assessment Order came to be passed vide order dated 11.10.2010 and in such order the petitioner's claim for deduction under Section 10A of the I.T. Act came to be allowed for a sum of Rs.68,26,69,401/-.

13. Being aggrieved by the said Assessment Order, the petitioner preferred an appeal before the Income Tax Appellate Tribunal, Bangalore, which is pending adjudication.

14. In the meanwhile, the Additional Commissioner of Income Tax, Range-11, Bangalore, took up the petitioner's assessment for the Assessment Year 2008-2009 and had disallowed the petitioner's claim for deduction under Section 10A of the I.T. Act. It is the case of the petitioner that taking note of the Assessment Year 2008-2009, the Assessing Officer issued a notice dated 13.09.2012 under Section 148 r/w Section 147 of the I.T. Act proposing to reassess the petitioner's income for the Assessment Year 2006-2007.

15. Insofar as the reassessment under Section 148 of the I.T. Act, the reasons recorded prior to issuance of notice was responded by filing of detailed objections by the petitioner invoking provisions under Section 147 of the I.T. Act which came to be rejected by an order dated 22.08.2013.

C. W.P. No. 43237/2013

16. The petitioner has sought for a declaration that the proceedings initiated by the respondent No.1– Assistant Commissioner of Income Tax under Section 147 read with Section 148 of the I.T. Act for the Assessment Year 2007-2008 as being barred by limitation and without jurisdiction. The petitioner has also challenged the notice dated 08.10.2012 (Annexure-'D') under Section 148 r/w Section 147 of the I.T. Act for the Assessment Year 2007-2008. Further, the petitioner has also sought for quashing of the order bearing F.No.DCIT-C-11-4/BGL/13-14 dated 26.08.2013 (Annexure-'J') which is the order passed by respondent No.2 rejecting the objections filed by the petitioner to the notice issued under Section 148 of the I.T. Act for reopening of assessment in respect of Assessment Year 2007-2008.

17. Petitioner's regular assessment for the Assessment Year 2007-2008 was taken up under Section 143(3) of the I.T. Act. In due course of assessment with regard to certain international transaction and furnishing of Audit Reports under Section 92E reference was made to Transfer Pricing Officer under section 92CA of the I.T. Act. Thereafter, vide order dated 23.12.2010 a draft assessment order was forwarded to the assessee and the assessee filed objections to it before the Dispute Resolution Panel. Subsequently, the Assessment Order came to be passed vide order dated 30.08.2011 and in such order the petitioner's claim for deduction under Section 10A of the I.T. Act came to be allowed for a sum of Rs.67,70,69,653/-.

18. Being aggrieved by the said Assessment Order, the petitioner preferred an appeal before the Income-tax Appellate Tribunal, Bangalore, which is pending adjudication.

19. In the meanwhile, the Additional Commissioner of Income Tax, Range-11, Bangalore, took up the petitioner's assessment for the Assessment Year 2008-2009 and had disallowed the petitioner's claim for deduction under Section 10A of the I.T. Act. It is the case of the petitioner that taking note of the Assessment Order for the Year 2008-2009, the Assessing Officer issued a notice dated 08.10.2012 under Section 148 of the I.T. Act proposing to reassess the petitioner's income for the Assessment Year 2007-2008.

20. Insofar as the reassessment under Section 148 of the I.T. Act, the reasons recorded prior to issuance of notice was responded by filing of detailed objections by the petitioner invoking provisions under Section 147 of the I.T. Act which came to be rejected by an order dated 26.08.2013.

II. CONTENTIONS OF THE PETITIONER :-

21. The petitioner has raised common contentions in all these writ petitions, which are as follows:-

(a) That the present matter is covered by the judgment of this Court in **Infosys Ltd.** v. **Deputy Commissioner of Income Tax, Circle-11 (4), Bangalore**[2]**.**

(b) That jurisdictional conditions for exercise of power are absent and accordingly, the authority could not have initiated reassessment without (i) there being reason to believe that income has escaped assessment of the assessing officer; (ii) such escapement as being on account of failure on part of the assessee to disclose fully and truly all material facts; (iii) that the belief is not on the basis of change of opinion; (iv) a valid sanction has been obtained

[2]W.P.No.29828/2011 c/w W.P.Nos.14424 and 53886/2013 (TIT) dated 17.06.2009

from the sanctioning Authority after application of mind.

III. CONTENTIONS OF THE RESPONDENT/REVENUE:-

22. The Revenue has raised common contentions in these Writ Petitions, which are as follows:-

(a) The reassessment proceedings are taken up by the Authority on the basis of valid reasons recorded which satisfies the conditions for invoking reassessment proceedings and such reason is based on the tangible material noticed in the assessment for of the year 2008-2009. That the materials, such as, Master Service Agreements (MSA), Works Contracts/ Scope of Work (SCW), Invoices and other details related to claim of rebate under Section 10A of the I.T. Act establishes that the assessee has earned income from Deputation of Technical Manpower (DTM) and not from export of

software. Such material was not part of the assessment proceedings for the Assessment Years in question.

(b) The Tangible material that has come forth during the assessment proceedings for the Assessment Year 2008-2009 was not a part of the records during the earlier assessment proceedings and accordingly, on the basis of such material re-assessment is permissible.

(c) That the aspect of deputation of technical manpower was not dealt with by the Assessing Authority in the earlier assessment proceedings and such DTM came to light only in the assessment year 2008-09 and hence subject matter is different and accordingly third proviso to Section 147 is not attracted.

(d) The re-assessment notice cannot be said to be on the basis of change of opinion as assessment proceedings never dealt with the issue of eligibility of Section 10A deduction, but only dealt with type of

expenditure that has to be excluded as per Section 10A(4) of the I.T. Act and the definition of export turnover.

(e) There is no nexus between the software developed in India which has emerged from Software Technology Park (STP) unit of assesee and technical manpower deputed outside India.

(f) Petitioner has failed to give primary facts and details relating to DTM Activity were not forthcoming at the relevant period of time which is now evident from MSA, SCW and Invoices submitted during assessment proceedings for the year 2008-2009. When assessee is substantively in business of providing of deputation of technical manpower services, it should have disclosed the same before the Assessing Officer and not having done so, can be construed to be withholding of facts and making of a wrongful claim of deduction under Section 10A of the I.T. Act.

IV. ANALYSIS:-

23. The following points arise for consideration:-

(i) Whether the petitioner assessee has failed to "disclose fully and truly all material facts necessary for assessment"?

(ii) Whether the re-assessment notice under Section 147 r/w Section 148 of the I.T. Act is merely a product of change in opinion and accordingly is impermissible in law?

(iii) Whether the re-assessment notice under Section 147 r/w Section 148 amounts to borrowed satisfaction as it places reliance on findings recorded in the assessment proceedings recorded in the Assessment Year 2008-2009?

(iv) Whether the bar under third Proviso to Section 147 of the I.T. Act is a legal impediment insofar as the present re-assessment notice is concerned?

24. The analysis of the points for consideration raised hereinabove is as follows:-

(i) Whether the petitioner assessee has failed to "disclose fully and truly all material facts necessary for assessment?"

25. In W.P.No.15061/2013, for the purpose of initiating proceedings under Section 147 of the I.T. Act, as the Assessment Year in question is 2005-2006 and notice at Annexure-'G' seeking to initiate proceedings was issued on 29.03.2012, in terms of the proviso to Section 147 of I.T. Act, any action taken after the expiry of four years from the end of relevant assessment year would require that the assessee has failed to disclose fully and truly all material facts necessary for assessment.

26. The relevant extract of Section 147 of I.T. Act prior to its substitution reads as follows:-

"147. 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:

xxx"

Accordingly, the jurisdiction to re-open the assessment is only if there is statement of income filed by the petitioner failing to fully and truly disclose all material facts necessary for assessment.

27. The law laid down by the Constitution Bench of the Apex Court in **Calcutta Discount Company Ltd.** v. **Income Tax Officer**[3] on the above aspect regarding disclosure requires to be noticed. The validity of notice under Section 34 of Indian Income Tax I.T. Act, 1922 (corresponding to Section 147 of the Income Tax Act, 1961), whereby re-assessment proceedings was sought to be initiated was called in question by the assessee on the ground that the said notice was issued without the existence of necessary condition precedent which confers jurisdiction under Section 34 of Indian Income Tax I.T. Act, 1922. The relevant observations are as follows:-

[3] (1961) 41 ITR 191 (SC)

"8. Before we proceed to consider the materials on record to see whether the appellant has succeeded in showing that the Income Tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. 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.

9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — "I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the

documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to "omission to disclose fully and truly all material facts necessary for his assessment". Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them—including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

10. Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to

decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else — far less the assessee — to tell the assessing authority what inferences whether of facts or — law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences — whether of facts or law he would draw from the primary facts.

11. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?

12. It may be pointed out that the Explanation to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income Tax Officer could have discovered them from the facts

actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences" to draw the proper inferences being the duty imposed on the Income Tax Officer.

13. We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this."

28. From the above, it can be stated as follows:-

a) Assessee is to disclose the primary facts in his possession and the Assessing Authority on the basis of such recovery or facts discovered on the basis of facts disclosed or otherwise, could draw inferences regarding such other facts.

b) The duty to disclose does not extend beyond full and truthful disclosure of all primary facts.

c) It is not the duty of the assessee to tell the Assessing Authority what inferences whether of facts or law should be drawn.

d) There is no duty cast on the assessee to disclose inferences which is a duty imposed on the Income Tax Officer.

e) The duty to disclose primary facts extends to making a disclosure which is full and true and excludes falsity.

29. It is to be noted that as the profits derived from export of computer software is eligible for deduction under Section 10A of the I.T. Act which has been claimed by the petitioner, at the same time profits derived from business of rendering technical services outside India are eligible for deduction under section 80HHE of the I.T. Act.

30. Further, in terms of Explanation-2 to Section 10A(iv), the term export turnover excludes *"… expenses, if any incurred in foreign exchange in providing the technical services outside India".* Section 80HHE provides for deductions in respect of profits from export of computer software where the business entity provides technical services outside India in connection with developments or production of computer software. Hence, the aspect of deduction under Section 10A or under Section 80HHE of the I.T. Act as the case may be, has been a subject matter of litigation between the petitioner and the Revenue. Whether the petitioner is eligible for deduction under Section 10A under the head of 'Profits' derived from export of computer software or under the head of 'rendering technical services outside India' and having a nexus with export outside India of computer software is an unresolved issue between the petitioner and the Revenue. It is the case of Revenue

that unless a nexus is shown, the assessee cannot claim deduction and that the tangible material that was made available during the assessment proceedings for the Assessment Year 2008-2009 including MSAs, Work Orders, SCWs and Invoices has led to the initiation of proceedings under Section 147 of the I.T. Act. The case made out by the Revenue is that there is non-disclosure as contemplated under Section 147 of the I.T. Act of the tangible material that was placed before the assessing authority with respect to the proceedings in Assessment Year 2008-2009 and on such ground of non-disclosure fully and truly, that the re-assessment proceedings have been initiated. It is in such context that a finding is to be recorded as to whether the assessee has failed to "disclose fully and truly all material facts necessary for assessment".

31. In the present case, the assessee has filed his declaration in Form-56F in terms of Rule 16D of the

Income Tax Rules, 1962 whereby, assessee who seeks to claim deduction under Section 10A of the I.T. Act has to make a declaration in Form-56F in the form of report of an accountant along with the return of income[4]. The omission of Rule 16D was only later and was in existence on the relevant date when the assessee has filed the return of Income. In terms of the declaration, the accountant has certified that the petitioner was engaged in export of computer software and the relevant details relating to deduction under Section 10A of the I.T. Act has been detailed in Annexure-'A'. The further declaration in Annexure-'1' annexed to Annexure-'A' which provides details relating to claim by the exporter for deduction under Section 10A of the I.T. Act contains a declaration as follows:-

[4] Rule 16D has been omitted by IT(21st Amendment) Rules, 2021 w.e.f. 29.07.2021

Name of the undertaking	**Software Technology Park Unit-I**	**Software Technology Park(India Development Centre)Unit-II**	**Software Technology Park(India Engineering Centre)Unit-III**	**Software Technology Park Unit-IV**	**Software Technology Park Technical Support Contact Centre Unit-V**
Location and address of undertaking	Digital GlobalSoft Limited 45/14 Tumkur Road Yeshwanthpur, Bangalore-560 022	Digital GlobalSoft Limited 45/14, Tumkur Road Yeshwanthpur, Bangalore-560 022. Digital Globalsoft Limited 93A, Industrial Suburb, Yeshwanthpur II Stage, Bangalore-560 022.	Digital GlobalSoft Limited 45/14, Tumkur Road Yeshwanthpur, Bangalore-560 022. Digital Globalsoft Limited 93A, Industrial Suburb, Yeshwanthpur II Stage Bangalore-560 022.	Digital GlobalSoft Limited 3rd floor, Khanija Bavan, 49, Race Course Road, Bangalore-560 001. Digital GlobalSoft Limited Plot No. 39/40, Electronics City Hosur Road, Bangalore-560 100	Digital Globalsoft Limited Plot No. 39/40, Electronics City Hosur Road, Bangalore-560 100 Digital Globalsoft Limited "Surya Park", Electronics City Hosur Road Bangalore-560 100
Nature of Business of the undertaking	Development of Computer software and software services	Development of Computer software and software services	Development of Computer software and software services	Development of Computer software and software services	IT Enabled Services (Technical Support)
Date of Initial Registration in FTZ/EPZ/SEZ	October 21, 1992	April 22, 1996	December 18, 1997	March 10, 2000	March 22, 2002
Date of commencement of Manufacture or production	September 13, 1993	September 1, 1996	September 1, 1998	March 10, 2000	June 30, 2002

Number of consecutive years of which deduction is claimed	Note 1	Nine	Seven	Six	Third
Amount of sale proceeds, if any that are credited to separate account maintained by the assessee with any bank outside India and the reference number of Reserve Bank of India according permission for the same	13,484,517 Reference Number of permission EC.BY.OPL363/2541 (1256)-92/93 EC.BY.OPL.53/2541 (1793)-93/94	163,088,699 Reference Number of permission EC.BY.OPL363/2541 (1256)-92/93 EC.BY.OPL.53/2541 (1793)-93/94	231,579,813 Reference Number of permission EC.BY.OPL363/2541 (1256)-92/93 EC.BY.OPL.53/2541 (1793)-93/94	1,350,964,255 Reference Number of permission EC.BY.OPL363/2541 (1256)-92/93 EC.BY.OPL.53/2541 (1793)-93/94	32,231,736 Reference Number of permission EC.BY.OPL363/2541 (1256)-92/93 EC.BY.OPL.53/2541 (1793)-93/94

32. The obligation of disclosure extends to disclosing fully and truly material facts necessary for assessment. Pursuant to the order passed by CIT, Bangalore-1 under Section 263 of the I.T. Act dated 22.12.2009 the assessment proceedings were directed to be re-done by recording a finding as to eligibility of deduction under Section 10A/80HHE of the I.T. Act. In

the fresh assessment proceedings initiated culminating in passing of the Assessment Order by the order dated 24.12.2010 as regards the expenditure relating to providing technical services outside India, the material was placed before the Assessing Officer on such aspect as is revealed from the observations at paras-9 and 10 of the order, which are extracted hereinbelow:

> *"9. When the above issues are raised before the AR of the assessee, AR of the assessee made a detailed submission. The gist of the submission made by the assessee are that the activities regarding which the expenditure incurred in foreign exchange do not amount to providing of technical services outside India regarding exclusion of communication expenses from both export turn over and total turn over, the same was claimed to be done on the basis of parity between export turn over and total turn over and also on the basis of definition of total turn over elsewhere in the provisions of the IT Act.*
>
> *10. In light of the above submissions, on verification of the details collected in respect of*

expenditure incurred in foreign exchange, it is clear that the company's employees visit the clients' location and provide software development services to the clients which are group companies. Therefore all these services rendered by the company are of the nature of technical services and therefore expenditure incurred in providing these services amounting to Rs.263,01,80,361/- are required to be reduced from the export turn over as per the definition of export turn over contained in the provisions of Section 10A of the I.T. Act."

33. Accordingly, it is clear that there has been declaration including of expenditure relating to providing technical services. Once such primary facts have been declared and the assessee had made the declaration and claimed deduction under Section 10A of the I.T. Act, there was no further obligation on the assessee. If the Assessing Officer was of the view that details furnished would fall within Section 80HHE and not under Section 10A of the I.T. Act and accordingly, assessee was not

entitled to claim such expenditure under Section 10A of the I.T. Act, the non-drawing of such legal inference by the assessing officer at the relevant point of time cannot result in holding that there is no true and full disclosure of primary facts.

(ii) Whether the re-assessment notice under Section 147 r/w Section 148 of the I.T. Act is merely a product of change in opinion and accordingly is impermissible in law?

34. In W.P.No.15061/2013, the notice at Annexure-'G' under Section 148 of I.T. Act came to be issued on 29.03.2012 seeking to reassess the income which has escaped assessment in terms of Section 147 of the I.T. Act with respect to the Assessment Year 2005-2006, the assessee was called upon to deliver return within 30 days. Subsequently, the reasons for initiating proceedings under Section 147 of the I.T. Act for

re-opening the assessment was communicated, which reads as follows:

"2. The said return had been taken up for scrutiny and an order u/s 143(3) dated 30.12.2008 had been passed arriving at a total income of Rs.72,52,77,770/-. The various issues of additions and disallowances made in the assessment order are as below:

1. Recomputation of deduction u/s 10A *a. Reduction of communication charges is restricted to export turn over only.* *b. Loss of one 10A unit was set off against the profits of other 10A units*
2. Capitalization of Software Expenditure

On account of additions and disallowances as above, the deduction of claim under Section 10A had been reduced to Rs.114,87,47,042/-. Further order u/s 143 (3) rws 263 was passed on 24.12.2010 reducing the expenditure incurred in foreign currency for providing technical services from export turn over only and the deduction u/s 10A was revised to Rs.74,25,62,786/-

3. During the course of scrutiny proceedings conducted for A.Y.2008-09 various information

including a large number of Master Service Agreements, Work Contracts/Scope of works, Invoices and other details related to the deduction claimed u/s 10A of the Income-tax Act were called for. On account of detailed fact finding during the course of this scrutiny proceedings for A.Y.2008-09, the following additions/disallowances to the returned income for A.Y. 2008-09, were made

a. It is noticed that the assessee company is rendering a large body of work onshore abroad related to software developmental activities. However, it was detected that none of the said software development activities onshore abroad had any link whatsoever with the STP Undertakings in India. It had been noticed that the assessee had claimed all revenue from Software developmental activities under STPs based in India only. No part of the income had ever been admitted as generated out of the company's activities abroad. During the course of investigation conducted, it had been detected on facts as per various contracts/SOW, work orders and invoices that a large body of work related to software development activity

conducted onshore abroad had no link whatsoever with the STP units in India. The said revenue receipt from onshore activity was treated as not related to the undertaking eligible for deduction u/s 10A of the I.T.Act. Such onshore receipts were treated as companywide software receipts not related to the STP Undertakings in India. This had been computed and the deduction claimed u/s 10A of the I.T.Act had been drastically reduced.

b. During the course of said fact finding it had also been detected that the assessee company is in the business of deputing technical manpower (DTM) of providing short duration technical manpower abroad. Such business activity commonly known as Body Shopping was eligible for deduction u/s 80HHE of the I.T. Act and was not included as an eligible activity u/s 10A of the I.T. Act. It had been noticed from the contracts and invoices that the assessee company had substantial revenue from such DTM activity and it claimed the revenue receipt from the same as software development

activity. It had been detected that assessee had made similar claims for earlier Assessment Years also.

6. None of these facts of DTM activity conducted, onshore revenues earned without any link to the STP Undertakings in India have been disclosed by the assessee in the returns of income and the Annual Reports submitted. It is also seen that failure on the part of assessee to disclose fully and truly all materials with regard to deduction u/s 10A has resulted in allowing excess deduction u/s 10A for AY 2005-06."

35. It is the contention of Sri Percy Pardiwalla, learned Senior Counsel appearing on behalf of Ms.Tanmayee Rajkumar for the petitioner/assessee, that the reasons for re-opening would indicate the stand of the Revenue that the deputation of technical man-power relating to software development activity conducted abroad had no link with the STP units in India. Further, that such activity was known as body shopping

and eligible for deduction under Section 80HHE of the I.T. Act and was not an activity that was eligible for deduction as regards expenses under Section 10A of the I.T. Act.

36. It is submitted that this very aspect has been a subject matter of consideration by the Assessing Officer while passing a fresh Assessment Order on 24.12.2010 consequent to the directions made in the order under Section 263 of the I.T. Act dated 22.12.2009 vide F.No.17/263/CIT-1/2009-10 (Annexure-'C'). It is submitted that in the Assessment Order passed, while computing deduction under Section 10A there was exclusion of expenditure relating to the visits of the Company's employees as well as expenses incurred relating to software development services to the clients amounting to Rs.263,01,80,361/-. Accordingly, it is contended that the very aspect of profits from rendering technical services in context of export of computer

software having been examined and a decision based on legal appreciation having been arrived at, cannot be reconsidered subsequently in reassessment proceedings, as it is impermissible to reopen assessment on the basis of "mere change of opinion".

37. The Apex Court in **Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd**[5] ***[Kelvinator]*** has reiterated the settled position that mere change of opinion cannot be a ground for re-opening concluded assessments. The observations made at paras-5, 6, 7 and 8 are extracted as herein below:

> *"**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*

[5] (2010) 2 SCC 703

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 precondition 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.

8. We quote herein below the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:

"7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that

the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

38. It must be noticed that, in the present case, as against the Assessment Order passed for the Assessment Year 2005-06, under Section 143(3) of I.T. Act 1961, the Department took up proceedings under Section 263 of the I.T. Act observing that the order was erroneous and prejudicial to the interest of the Revenue. The observation at paras-4 and 16 of the order dated 22.12.2009 which touches on the aspect of allowable

claims under Sections 10A and 80HHE of the I.T. Act, which are as follows:

> *"4. It was also seen from the records that the assessee company had incurred substantial expenses in foreign currency for rendering technical services outside India which indicates that apart from the export of computer software, the assessee was also engaged in the activity of providing technical services outside India. The profits from such activity, though eligible for deduction u/s 80HHE, was not eligible for deduction u/s 10A in respect of the entire profits without examining whether the activity of rendering technical services outside India in connection with the development or production of computer constitutes a business distinct from the business of export out of India of computer software.*
>
> *16. As mentioned in the show-cause notice, the profits derived from the export of computer software is eligible for deduction u/s 10A of the I.T. Act, 1961, whereas, u/s 80HHE, the profits derived from the export of computer software as well as the business of rendering technical services outside India are eligible for deduction.*

Section 10A itself recognizes that there can be certain technical services rendered outside India in connection with the business of export of computer software and accordingly, provides by way of clause (iv) of Explanation 2 that the expenses incurred in foreign currency for rendering technical services outside India are required to be reduced from the export turn over, while computing the deduction u/s 10A. The issue involved in the assessee's case which is one of the subject matters of the proposed action u/s 263 is whether the activity of rendering technical services outside India, was a business carried on by the assessee company distinct from the business of export of computer software and if so, the receipts on account of rendering technical services outside India are eligible for deduction u/s 80HHE and not Section 10A. The information as available in the records does not indicate that the Assessing Officer had examined the nature of receipts in detail having regard to the nature and extent of technical services rendered outside India during the relevant previous year ended 31.03.2005 irrespective of the nomenclature used for describing such services. In view of the failure

> *of the Assessing Officer to examine this aspect of the matter, the assessment order is held to be erroneous and pre-judicial to the interest of the revenue. With reference to the submissions made by the assessee based on the assessments made for the earlier assessment year, it is necessary to mention that each year's assessment is a separate proceeding and deduction allowable u/s 10A/80HHE depends on the facts of the case for the relevant assessment year."*

39. Finally, the order dated 22.12.2009 concludes with a direction as follows:-

> "*17.…to allow the deduction/deductions allowable u/s 10A/ 80HHE in accordance with law after making the necessary verification in the light of my observation above after giving the assessee a reasonable opportunity of being heard"*.

40. Consequent to such direction, the Assessing Officer has taken up the proceedings afresh and has

passed an assessment order on 24.12.2010 while considering the aspect of deduction under section 10A of the I.T. Act. The observations made at para-7 of the order would indicate application of mind to be an aspect of excluding, "*7. …b) expenses, if any, incurred in foreign exchange in providing the technical services outside India"*.

41. Further, the observations at para-10 in nature of finding reads as follows:

> *"10. In light of the above submissions, on verification of the details collected in respect of expenditure incurred in foreign exchange, it is clear that the company's employees visit the clients' location and provides software development services to the clients which are group companies. Therefore, all these services rendered by the company are of the nature of technical services and therefore expenditure incurred in providing these services amounting to Rs.263,01,80,361/- are required to be reduced from the export turn over as*

per the deduction to export turn over contained in the provisions of Section 10A of the I.T.Act."

42. The conclusion at para-14 is extracted hereinbelow:-

"14. In view of the above discussion, exclusion of the abovementioned expenses namely expenses incurred in foreign exchange in providing technical services outside India to the extent of Rs.263,01,80,361/-, has been restricted to export turn over only and accordingly deduction u/s 10 A of the IT Act has been computed."

43. It is clear that the Assessing Officer excluding the expenditure incurred by the assessee in connection with the provision of technical services outside India and specifically expenditure involved relating to Company's employees visit to client's location to provide software development services to the clients have been excluded [see para 10]. If that were to be so, revisiting the decision arrived at once again to further reduce the

eligible deduction under Section 10A of the I.T. Act would amount to a review on the ground of change of opinion which is impermissible.

44. Though in ***Kelvinator (supra),*** the observation is that where there is tangible material to come to the conclusion that there is escapement of income from assessment, in the present case, the tangible material as asserted by the Revenue is itself not complete.

45. A perusal of Section 148 of I.T. Act, the notice along with the reasons for reopening make it clear that the tangible material relied upon are the MSA's, Works contracts/SCW's, Invoices and other details relating to the deduction claimed under Section 10A of the I.T. Act. All of which is stated to have come to the notice of the Department relating to the Assessment Year 2008-2009. However, even on a perusal of para-2.10 of the

Assessment Order relating to the Assessment Year 2008-2009, *"… the assessee as has been asked on innumerable occasions to submit MSAs and SOWs that it had with its clients the assessee has only been able to provide some of the sample MSAs and SOWs…".* Similar observation is made at para-2.12, which reads as follows, *"… the assessee has not been able to submit all the SOWs and MSAs entered for software contract services…".* The finding by the Assessing Authority is by placing the burden on the assessee regarding correlation between the MSA, SOW/ work order *vis-a-vis* work carried out by STP/SCZ unit.

46. In light of the above, the tangible material sought to be relied upon itself not being complete, it cannot be held that the MSAs and SCWs would demonstrate that the declaration made by the assessee leads to a conclusion that there has been escapement of income. It is also a settled position that reassessment

proceedings cannot be in the nature of review and accordingly, the material as has come to light in the assessment proceedings for the Assessment Year 2008-2009 cannot be a sufficient ground to resort to reassessment proceedings.

(iii) Whether the re-assessment notice under Section 147 r/w Section 148 amounts to borrowed satisfaction as it places reliance on findings recorded in the assessment proceedings recorded in the Assessment Year 2008-2009?

47. The jurisdictional requirement under Section 147 of the I.T. Act for re-assessment requires "the assessing officer to entertain reasons to believe that income chargeable to tax has escaped assessment". It is clear that the reason to believe has to be entertained by the Assessing Officer by forming an opinion himself.

48. In W.P.No.15061/2013, pursuant to the notice under Section 148 of I.T. Act, upon request, the reasons for reopening the assessment were communicated vide communication dated 04.04.2012 (Annexure-'H') and the reasons assigned are as follows:-

> *"3. During the course of scrutiny proceedings conducted for A.Y.2008-09 various information including a large number of Master Service Agreements, Work Contracts/Scope of works, Invoices and other details related to the deduction claimed u/s 10A of the Income-tax Act were called for. On account of detailed fact finding during the course of this scrutiny proceedings for A.Y.2008-09, the following additions/disallowances to the returned income for A.Y. 2008-09, were made*
>
> > *a. It is noticed that the assessee company is rendering a large body of work onshore abroad related to software developmental activities. However, it was detected that none of the said software development activities onshore abroad had any link whatsoever with the STP*

Undertakings in India. It had been noticed that the assessee had claimed all revenue from Software developmental activities under STPs based in India only. No part of the income had ever been admitted as generated out of the company's activities abroad. During the course of investigation conducted, it had been detected on facts as per various contracts/SOW, work orders and invoices that a large body of work related to software development activity conducted onshore abroad had no link whatsoever with the STP units in India. The said revenue receipt from onshore activity was treated as not related to the undertaking eligible for deduction u/s 10A of the I.T.Act. Such onshore receipts were treated as companywide software receipts not related to the STP Undertakings in India. This had been computed and the deduction claimed u/s 10A of the I.T.Act had been drastically reduced.

b. During the course of said fact finding it had also been detected that the assessee company is in the business of deputing technical manpower (DTM) of

providing short duration technical manpower abroad. Such business activity commonly known as Body Shopping was eligible for deduction u/s 80HHE of the I.T.Act and was not included as an eligible activity u/s 10A of the I.T.Act. It had been noticed from the contracts and invoices that the assessee company had substantial revenue from such DTM activity and it claimed the revenue receipt from the same as software development activity. It had been detected that assessee had made similar claims for earlier Assessment Years also.

4. During the course of assessment for A.Y. 2008-09, it had been clearly detected that similar issues of additions/disallowances were there for previous Assessment Years also. In fact the assessee company is in the same business for the last few years and the business agreements and business practices of A.Y. 2008-09 had actually continued from the last several years. This had been noticed with respect to the MSAs, Work orders, SOWs and Invoices called for and seen

during the course of assessment proceeding for A.Y. 2008-09.

5. As per A.Y. 2008-09, 12.5% of the total onsite revenues by the assessee have been held to be out of deputation of technical manpower receipts. Similarly 12.5% of the total onsite receipts of the assessee have been held to be on account of onshore revenues not related to the STP Undertakings in India. As per this preliminary estimation and considering similar percentages of DTM activity and onshore revenue activities for the year, more than Rs.33.70 Crores of software services revenue claimed by the assessee for the year is not eligible for deduction u/s 10A of the I.T. Act."

6. None of these facts of DTM activity conducted, onshore revenues earned without any link to the STP Undertakings in India have been disclosed by the assessee in the returns of income and the Annual Reports submitted. It is also seen that failure on the part of assessee to disclose fully and truly all materials with regard to deduction u/s 10A has resulted in allowing excess deduction u/s 10A for AY 2005-06."

49. Clearly, reasons for reopening rests on the satisfaction of the Assessing Officer who has passed an Assessment Order for the Assessment Year 2008-09 which would amount to substitution of the assessment orders of reasons to believe by borrowed satisfaction of the Assessing Officer who has passed an order for the year 2008-09 which is impermissible in law.

(iv) Whether the bar under third Proviso to Section 147 of the I.T. Act is a legal impediment insofar as the present re-assessment notice is concerned?

50. The third proviso to Section 147 of I.T. Act as it existed prior to amendment of Finance Act 2021 reads as follows:

> *"Provided also 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."

51. The details of the issuance of Section 148 notice as well as subsisting appeals as on the relevant dates is as follows:-

W.P. No. & Year of Assessment	**Date of issuance of Section 148 Notice**	**Pendency of Appeal/Revision/ Reference**	**Date of institution of column(3) proceedings**	**Remarks**
1	**2**	**3**	**4**	**5**
15061/2013 A.Y.2005-06	29.03.2012	Appeal No. IT(TP)A No.162(Bang)2012 (A.Y.2005-06) Appeal filed against the order of CIT-(Appeals)-I dt. 18.10.2011. The CIT(Appeals)-I had rejected the appeal challenging the order passed giving effect to Order under Section 263 by the Assessing Officer.	30.01.2012	Appeal pending as on date of 148 notice.
43236/2013 A.Y.2006-07	13.09.2012	Appeal No.IT(TP)A No.1455(Bang)(2010) (A.Y.2006-07) Appeal filed against the Assessment Order	14.12.2010	Appeal pending as on date of 148 notice.

		dated 11.10.2010.		
43237/2013 A.Y.2007-08	08.10.2012	Appeal No.IT(TPA) No.1031/Bang/2011 (A.Y.2007-08) Appeal filed against the Assessment Order dated 30.08.2011.	04.11.2011	Appeal pending as on date of 148 notice.

52. In the above context and looking into the bar under the third proviso to Section 147, the object being to prohibit proceedings under Section 148, when appeal/revision/reference is pending, in the present case, taking note of the details in the Table above, more particularly, noticing pendency of appeals in Column No.(4) as on the date of Section 148 notice, clearly, notice under Section 148 was hit by the bar under third proviso to Section 147 of I.T. Act.

Analysis in W.P.No.43236/2013 and 43237/2013:-

53. In respect of re-assessment notice for the Assessment Year 2006-2007 in W.P.No.43236/2013 and for the Assessment Year 2007-2008 in

W.P.No.43237/2013 in light of the detailed discussion made hereinabove, though it relates to the Assessment Year 2005-2006, the points raised for consideration supra at para-20 are also applicable as regards the Assessment Year 2006-2007 and 2007-2008 and are answered as hereinbelow:-

In W.P.43236/2013:-

54. Insofar as Assessment Order relating to the Assessment Year 2006-2007 has dealt with the computation of deduction under Section 10A of the I.T. Act and the relevant paragraphs which deal with the said aspect are as follows:

> *"12. Even though assessee has incurred expenditure to the extent of Rs.294,66,48,857/- which is of the nature of expenses incurred in providing technical services outside India the same has not been excluded from the export turn over as per the above provisions of the I.T. Act. In*

respect of expenditure incurred to the extent of Rs.17,28,91,032/- towards telecommunication charges attributable to the delivery of software outside India, the same has been deducted both from export turn over and total turn over contrary to the provisions of Section 10A of the I.T. Act.

13. When the above issues are raised before the AR of the assessee, AR of the assessee made detailed submissions vide letter dated : 10/12/09. The gist of the submission made by the assessee are that the activities regarding which the expenditure incurred in foreign exchange do not amount to providing of technical services outside India and regarding exclusion of communication expenses from both export turn over and total turn over, the same was claimed to be done on the basis of parity between export turn over and total turn over and also on the basis of definition of total turn over elsewhere in the provisions of the I.T. Act.

14. In the light of the above submissions, on verification of the details collected in

respect of expenditure incurred in foreign exchange, it is clear that the Company's employees visit the clients' location and provide software development services to the clients which are group companies. Therefore all these services rendered by the Company are of the nature of technical services and therefore expenditure incurred in providing these services amounting to Rs.294,66,48,857/- are required to be reduced from the export turn over as per the definition of export turn over contained in the provisions of Section 10A of the I.T. Act.

15. The AR of the assessee further argued that the Company does not recover any amounts from its clients towards any expenses related to provision of technical services outside India. The stand taken by the Assessee is not acceptable. The argument of the AR of the assessee that there was no recovery by the assessee from its customers towards provision of technical services outside India is not acceptable for the reason that assessee need not have to

recover from the clients separately for each and every item of the expenditure incurred by the assessee in any contract for services it had entered into with the client. The assessee while pricing a product or service normally arise at the cost of providing the product or service and then adds a margin of profit. In such a case the expenses, incurred in foreign currency in connection with provision of technical service outside India, not forming part of turn over does not arise at all. Therefore the amount of expenditure incurred by the assessee in foreign currency in connection with provision of technical services outside India are deemed to have been recovered and deemed to have been included in the receipts received from the client. Therefore the said expenditure is to be reduced from the export turn over as the same has been specifically provided by the Act.

20. In view of the above discussion, exclusion of the above mentioned expenses namely expenses incurred in foreign exchange in providing technical services

outside India to the extent of Rs.294,66,48,857/- and expenses incurred on communication expenses attributable to the delivery of software outside India to the extent of Rs.17,28,91,032/-, has been restricted to export turn over and accordingly deduction u/s 10A of the IT Act has been computed.

24. As discussed above, the deduction u/s 10A of the IT Act has been computed after excluding the expenses incurred in foreign exchange in respect of providing technical services outside India and expenses on telecommunications attributable to the delivery of software outside India and the computation has been done for all the eligible units under Section 10A disregarding whether the unit is profit making or loss making."

55. A perusal of the above would make it clear that the Assessing Officer has specifically bestowed attention on the extent of Section 10A deduction with specific reference to expenses incurred in foreign

exchange in respect of providing technical services outside India.

56. The notice under Section 148 of the I.T. Act dated 13.9.2012 which seeks to reassess income for the Assessment Year 2006-2007 leads subsequently to enumerating reasons for re-opening assessment. The relevant reasons detailed in "reasons for reopening assessment" are reproduced below:-

> *"3. …*
>
> *a. It is notified that the assessee company is rendering a large body of work on shore related to software developmental activities. However, it was detected that none of the said software development activities onshore abroad had any link whatsoever with the STP undertakings in India. It had been noticed that the assessee had claimed all revenue from software development activities under STPs based in India Only. No part of the income had ever been admitted as generated out of the Company's activities abroad. During*

the course of investigation conducted, it had been detected on facts as per various contracts/SOW, work orders and invoices that a large body of work related to software development activity conducted onshore abroad had no link whatsoever activity was treated as no related to the undertaking eligible for deduction u/s. 10A of the I.T. Act. Such onshore receipts were treated as Company wide software receipts not related to the STP undertakings in India. This had been concluded and the deduction claimed u/s.10A of the I.T. Act had been drastically reduced.

b. During the course of said fact finding it had also been detected that the assessee company is in the business of deputing technical man power (DTM) of providing short duration technical man power abroad. Such business activity commonly known as Body Shopping was eligible for deduction u/s. 80HHE of the I.T. Act and was not included as an eligible activity u/s. 10A of the I.T. Act. It had been noticed from the contracts and invoices that the assessee

Company had substantial revenue from such DTM activity and it claimed the revenue receipt from the same as software development activity. It had been detected that assessee had made similar claims for earlier Assessment Years also.

4. During the course of assessment for A.Y. 2008-09, it had been clearly detected that similar issues of additions/disallowances were there for previous Assessment Years also. In fact, the assessee Company is in the business for the last few years and the business agreements and business practices for A.Y. 2008-09 had actually continued for the last several years. This had been noticed with respect to MSAs, Work orders, SOWs and Invoices called for and seen during the course of assessment proceedings for A.Y. 2008-09.

5. As per A.Y. 2008-09, 12.5% of the total onsite revenues by the assessee has been held to be out of deputation of technical man power receipts. Similarly, 12.5% of the total onsite receipts of the assessee have been held to be on account of onshore revenues not related to the STP undertakings in India. As this preliminary estimation and considering similar percentages of

DTM activity and onshore revenue activities for the year, more than ***Rs.26.06 crores*** *of software services revenue claimed by the assessee for the year is not eligible for deduction u/s. 10A of I.T. Act.*

6. None of these facts of DTM activity conducted onshore revenues earned without any link to the STP undertakings in India have been disclosed by the assessee in the returns of income and the Annual Reports submitted. It is also seen that failure on the part of assessee to disclose fully and truly all material facts with regard to deduction u/s.10A has resulted in allowing excess deduction u/s. 10A for A.Y. 2006-07."

57. The question as to weather the Deputation of Technical Manpower [DTM] activity leading to generation of revenue and having a nexus with the STP undertaking is a legal requirement to claim deduction under Section 10A of the I.T. Act, whereas, in the absence of such nexus, income from DTM could be claimed as a deduction only under Section 80HHE of the I.T. Act. This precise

aspect has been adverted to in the Assessment Order for the Assessment Year 2006-2007 as noticed above. The nexus between the technical services rendered and the STP which is necessary for an allowable deduction under Section 10A of the I.T. Act is a legal requirement and existence of such nexus is a conclusion to be arrived at by the Assessing Officer. Once the primary facts regarding providing of technical services outside India is made out, there would end the duty of the assessee and the question of nexus is a matter that the Assessing Officer ought to have clarified by further investigation.

58. Further, the reliance on documents that has come out as regards the proceedings for the Assessment Year 2008-2009 by way of MSAs, Work Contracts, SCWs and Invoices cannot be sufficient by itself to initiate proceedings for deduction under Section 10A of the I.T. Act in light of absence of nexus. If that were to be so, as the reliance on such documents for the purpose of

reducing Section 10A of I.T. Act, the deduction for Assessment Year 2008-2009, itself has not attained finality and is subject to appeal as averred by the petitioner in the pleadings which remains uncontroverted. If that were to be so, the material relied upon in assessment proceedings for the Assessment Year 2008-2009 not having been finally adjudicated so as to indicate requirement to reduce Section 10A deduction, the same cannot be made use of for reassessment proceedings. The requirement that there must be true and full disclosure cannot be stated to have been breached by taking recourse to the material produced during the Assessment Year 2008-2009 as such conclusion for the Assessment Year 2008-2009 leading to reduction in Section 10A deduction itself is a subject matter of further adjudication.

In W.P. 43237/2013:-

59. In the Assessment Order, for the Assessment Year 2006-2007, the deduction under Section 10A of the I.T. Act to the extent of Rs.96,02,15,533/- was sought for as regards 4 units in the STPI. The scope of deduction under Section 10A is specifically dealt with under the caption 'computation of deduction' under Section 10A of the I.T. Act, out of the total expenditure in foreign currency of Rs.342,32,22,291/-, an amount of Rs.336,14,67,945/- was the expenses incurred in providing technical services outside India. Insofar as the deduction claimed under Section 10A of the I.T. Act and queries were raised, the observations of the Assessing Officer is as follows:

> *"10. When the above issues were raised before the AR of the assessee, AR of the assessee made detailed submissions. The gist of the submission made by the assessee are that the activities regarding which the expenditure*

incurred in foreign exchange do no amount to providing of technical services outside India and regarding exclusion of communication expenses from both export turn over and total turn over, the same was claimed to be done on the basis of parity between export turn over and total turn over and also on the basis of definition of total turn over else where in the provisions of the I.T. Act.

11. In light of the above submissions, on verification of the details collected in respect of expenditure incurred in foreign exchange, it is clear that the Company's employees visit the clients' location and provide software development services to the clients which are group companies. Therefore, all these services rendered by the company are of the nature of technical services and therefore expenditure incurred in providing these services amounting to Rs.336,14,67,945/- are required to be reduced from the export turn over as per the definition of export turn over contained in the provisions of Section 10A of the I.T. Act.

17. In view of the above discussion, exclusion of the abovementioned expenses, namely

expenses incurred in foreign exchange in providing technical services outside India to the extent of Rs.336,14,67,945/- and expenses incurred on communication expenses attributable to the delivery of software outside India to the extent of Rs.9,77,74,451/-, has been restricted to export turn over only and accordingly deduction u/s 10A of the IT Act has been computed.

19. As discussed above, the deduction u/s 10A of the IT Act has been computed after excluding the expenses incurred in foreign exchange in respect of providing technical services outside India and expenses on telecommunications attributable to the delivery of software outside India and the competition has been done for all the eligible units under Section 10A disregarding whether the unit is profit making or loss making."

60. It is clear that the Assessing Officer has dealt with expenditure incurred in providing technical services outside India and despite the assertion by the Company that the expenditure incurred on activities in foreign

exchange do not amount to providing technical services outside India, the Assessing Officer has concluded that the said expenditure incurred in foreign exchange for visit of the Company's employees to the location of the clients' and providing software development services would not fall within the permissible deduction under Section 10A of the I.T. Act.

61. Subsequently, after notice was issued under Section 148 of the I.T. Act for reassessment and upon request, reasons for reopening assessment was communicated, it is made out in the order that during the course of scrutiny proceedings conducted for Assessment Year 2008-2009, documents in the nature of MSAs, Work contracts/SCWs, Invoices have come forth. The basis of materials that has come forth for the Assessment Year 2008-09 leading to disallowing of expenditure is reflected in paras-3(a) and 3(b) and the same is extracted hereinbelow:-

"3. …

a. It is notified that the assessee company is rendering a large body of work on shore related to software developmental activities. However, it was detected that none of the said software development activities onshore abroad had any link whatsoever with the STP undertakings in India. It had been noticed that the assessee had claimed all revenue from software development activities under STPs based in India Only. No part of the income had ever been admitted as generated out of the Company's activities abroad. During the course of investigation conducted, it had been detected on facts as per various contracts/SOW, work orders and invoices that a large body of work related to software development activity conducted onshore abroad had no link whatsoever activity was treated as no related to the undertaking eligible for deduction u/s. 10A of the I.T. Act. Such onshore receipts were treated as Company wide software receipts not related to the STP undertakings in India. This had been concluded and the deduction

claimed u/s.10A of the I.T. Act had been drastically reduced.

b. During the course of said fact finding it had also been detected that the assessee company is in the business of deputing technical man power (DTM) of providing short duration technical man power abroad. Such business activity commonly known as Body Shopping was eligible for deduction u/s. 80HHE of the I.T. Act and was not included as an eligible activity u/s. 10A of the I.T. Act. It had been noticed from the contracts and invoices that the assessee Company had substantial revenue from such DTM activity and it claimed the revenue receipt from the same as software development activity. It had been detected that assessee had made similar claims for earlier Assessment Years also.

62. The reasons for reopening the assessment are identical in all respects to reasons for reopening made out as regards the Assessment Year 2006-2007 and the discussion made supra at paras-57 and 58 relating to the

said Assessment Year 2006-07, is adopted to arrive at the conclusion that the assessing officer has not made out grounds for the for the purpose of reopening the assessment.

IV Implication of Circular No.1/2013[6]:-

63. It must be noted that Circular No.1/2013 has sought to clarify issues relating to export of computer software. The clarifications issued at para-2(ii) specifically deals with the requirement of separate Master Service Agreement. The observations at para-2(ii) is extracted as hereinbelow:

> *"2(ii) WHETHER IT IS NECESSARY TO HAVE SEPARATE MASTER SERVICE AGREEMENT (MSA) FOR EACH WORK CONTRACT AND TO WHAT EXTENT IT IS RELEVANT.*
>
> *As per the practice prevalent in the software development industry, generally two*

[6] F.No.178/84/2012 - ITA.I - Government of India, Ministry of Finance, Department of Revenue, CBDT dated 17.01.2013.

types of agreement are entered into between the Indian software developer and foreign client. Master Services Agreement (MSA) is an initial general agreement between a foreign client and a Indian software developer setting out the broad and general terms and conditions of business under the umbrella of which specific and individual Statement of Works (SOW) are formed. These SOWs, in fact, enumerate the specific scope and nature of the particular task or project that has to be rendered by a particular unit under the overall ambit of the MSA. Clarification has been sought whether more than one SOW can be executed under the ambit of particular MSA and whether SOW should be given precedence over MSA.

The matter has been examined. It is clarified that the tax benefits under Sections 10A, 10AA and 10B would not be denied merely on the ground that a separate and specific MSA does not exist for each SOW. The SOW would normally prevail over the MSA in determining the eligibility for tax benefits unless the Assessing Officer is able to establish that there has been splitting up or reconstruction of an

existing business or non-fulfillment of any other prescribed condition. "

64. The Circular as extracted hereinabove makes it clear that the benefit under Section 10A is not dependant on separate MSA and the Statement of Works would prevail over the MSA. If that were to be so, the discovery of tangible material in the form of MSAs does not by itself have the effect of permitting revisiting of the closed assessment proceedings. Further, the Circular also deals with the question at para-2(i)(b) as regards receipts from deputation of technical man power for such onsite "software development at the client's place". The clarification in this regard at para 2(i)(b) which is of relevance is extracted hereinbelow:-

"(b) It has also been brought to notice that it is a common practice in the software industry to depute Technical Manpower abroad (at the client's place) for software development activities (like upgradation, testing,

maintenance, modification, trouble-shooting etc.), which often require frequent interaction with the clients located outside India. Due to the peculiar nature of software development work, it has been suggested that such deputation of Technical Manpower abroad should not be considered detrimental to the benefits of the exemption under sections 10A, 10AA and 10B merely because such activities are rendered outside the eligible units/undertakings.

The matter has been examined. Explanation 3 to sections 10A and 10B and Explanation 2 to section 10AA clearly declare that profits and gains derived from 'services for development of software' outside India would also be deemed as profits derived from export. It is therefore clarified that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between the client and the eligible unit should not be denied benefits under sections 10A, 10AA and 10B provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled."

65. It clarifies that the expenditure incurred for services to develop software outside India could be allowed under section 10A of the I.T. Act if deputation is for development of software.

66. Para 2(i)(a) deals with the clarification relating to onsite development of computer software which qualifies as export activity for tax benefit under section 10A. The clarification in that regard at para-2(i)(a) is extracted below:

> *(a) CBDT had earlier issued a Circular (Circular No. 694 dated 23.11.1994) which provided that a unit should not be denied tax-holiday under sections 10A or 10B on the ground that the computer software was prepared 'on-site', as long as it was a product of the unit, i.e., it is produced by the unit. However, certain doubts appear to have arisen following the insertion of Explanation 3 to sections 10A and 10B (vide Finance Act, 2001) and Explanation 2 to section 10AA (vide Special Economic*

Zones Act, 2005) providing that "the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India", and a clarification has been sought on the impact of the Explanation on the tax-benefits as compared to the situation that existed prior to the amendments.

The matter has been examined. In view of the position of law as it stands now, it is clarified that the software developed abroad at a client's place would be eligible for benefits under the respective provisions, because these would amount to 'deemed export' and tax benefits would not be denied merely on this ground. However, since the benefits under these provisions can be availed of only by the units or undertakings set up under specified schemes in India, it is necessary that there must exist a direct and intimate nexus or connection of development of software done abroad with the eligible units set up

> *in India and such development of software should be pursuant to a contract between the client and the eligible unit. To this extent, Circular No. 694 dated 23.11.1994 stands further clarified.*

67. It is clear that the clarification stipulates that the benefits under Section 10A deductions can be availed of, if there exists a direct and intimate nexus or connection between the development of software abroad with the eligible units setup in India. Though the clarification is issued on 17.01.2013, whereas the said circular is only clarificatory and does not confer any new benefit and hence can be made use of to interpret the scope of deduction under Section 10A of the I.T. Act as regards development of software at the client's place abroad by deputation of technical man power. The circular clarifies as follows:-

a) There has to be a nexus between development of software done abroad and the eligible units set up in India.

b) Deputation of technical man power abroad cannot be considered detrimental to benefits of exemption under Section 10A of the I.T. Act merely on the ground that such activities are rendered outside the eligible units

c) Tax benefits under Section 10A of the I.T. Act cannot be denied merely on the ground that specific MSA does not exist. Even in the presence of MSA, it is the Statement of works that would prevail.

d) Accordingly, the circular further clarifies the position in relation to services of software development activities in the clients' place abroad and widens the scope of allowability of

deduction under Section 10A of the I.T. Act itself without claiming deduction under Section 80HHE of the I.T. Act.

e) When the present facts are looked into, it is clear that the deductions sought for could fall within the scope of Section 10A of the I.T. Act, which however is a determination to be made on merits while this court is only considering as to whether the Assessing Officer has applied his mind to the issue of deduction under Section 10A of the I.T. Act, whether the assessee has made true and full disclosure of relevant primary facts. In order to come to a conclusion regarding the above two aspects, the circular would throw some light and it is in such context that the circular could be referred to.

68. Accordingly, the conclusion arrived at by the Assessing Officer for the Assessment Years 2005-2006, 2006-2007 and 2007-2008, when examined from the point of view of the Circular would strengthen the case of upholding deduction under Section 10A of the I.T. Act and would indicate that the resort to a review by recourse to Section 148 of the I.T. Act in the guise of reassessment would be a futile exercise.

69. Accordingly, the Writ Petitions are ***disposed off*** in terms of the following:-

(i) In W.P.No.15061/2013, the re-assessment notice issued under Section 147 r/w Section 148 of the I.T. Act at Annexure–'G' dated 29.03.2012 for the Assessment Year 2005-2006, is set aside and consequently, the order bearing F.No.DCIT-C-11(4)/12-13 at Annexure–'P' dated 13.03.2013 passed by respondent No.1 rejecting the petitioner's

objection as regards jurisdiction to issue Section 148 notice, is set aside.

(ii) In W.P.No.43236/2013, the re-assessment notice issued under Section 147 r/w Section 148 of the I.T. Act at Annexure–'D' dated 13.09.2012 for the Assessment Year 2006-2007, is set aside and consequently, the order bearing F.No.DCIT-C-11(4)/BGL/13-14 at Annexure–'J' dated 22.08.2013 passed by respondent No.2 rejecting the petitioner's objection as regards jurisdiction to issue Section 148 notice, is set aside.

(iii) In W.P.No.43237/2013, the re-assessment notice issued under Section 147 r/w Section 148 of the I.T. Act at Annexure–'D' dated 08.10.2012 for the Assessment Year 2007-2008, is set aside and consequently, the

order bearing F.No.DCIT-C-11(4)/BGL/13-14 at Annexure–'J' dated 26.08.2013 passed by respondent No.2 rejecting the petitioner's objection as regards jurisdiction to issue Section 148 notice, is set aside.

Sd/-
JUDGE

NP/VGR