Team Code: P013

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Case filed seeking writ of Certiorari under Article 226 of the Constitution of India, 1950

MEMORIAL ON BEHALF OF THE PETITIONER IN W.P. NO. _____ OF 2014

Civil Writ Petition No. of 2014

Cheetah & Chetak Pvt. Ltd….……Petitioner
(A Private Company having its
Registered Office in Mumbai)

v.

Income Tax Authority……..Respondent

Most Respectfully Submitted before the Hon'ble Chief Justice and Other Judges of High Court of Judicature at Bombay

MEMORANDUM ON BEHALF OF PETITIONER

DRAWN AND FILED BY THE COUNSELS FOR THE PETITIONER

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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPANSION
§	Section
§§	Sections
¶	Paragraph
A.D.I.T.	Additional Director of Income Tax
A.I.R.	All India Reporter
Bom. C.R.	Bombay Case Reporter
Bom. L.R.	Bombay Law Reporter
C.I.T.	Commissioner of Income Tax
C.T.R.	Current Tax Reporter
D.L.T.	Delhi Law Times
D.T.R.	Direct Taxes Reporter
Hon'ble	Honourable
I.T.	Information Technology
I.T.O.	Income Tax Officer
I.T.R.	Income Tax Reporter
ITAT	Income Tax Appellate Tribunal
MH.L.J.	Maharashtra Law Journal
p.	Page No.
S.C.C.	Supreme Court Cases
S.C.R.	Supreme Court Reporter
u/s	Under Section
w.e.f.	With Effect From

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STATEMENT OF JURISDICTION

THE HON'BLE HIGH COURT OF JUDICATURE AT BOMBAY EXERCISES JURISDICTION TO HEAR AND ADJUDICATE OVER THE MATTER UNDER ARTICLE 226 (1) OF THE CONSTITUTION OF INDIA, 1950.

THE HON'BLE COURT HAS THE AUTHORITY TO QUASH THE NOTICE ISSUED BY THE ASSESSING OFFICER U/S 148 OF THE INCOME TAX ACT, 1961. SINCE THE MATTER IS SAME FOR ALL THE ASSESSMENT YEARS, THE PETITIONER HAS FILED A SINGLE WRIT PETITION BEFORE THE HON'BLE COURT. THE PROVISION UNDER WHICH THE PEITIONER HAS APPROACHED THE HONORABLE COURT IS READ HEREIN UNDER AS:

ARTICLE 226 – POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

NOTWITHSTANDING ANYTHING IN ARTICLE 32 EVERY HC SHALL HAVE POWERS, THROUGHOUT THE TERRITORIES IN RELATION TO WHICH IT EXERCISE JURISDICTION, TO ISSUE TO ANY PERSON OR AUTHORITY, INCLUDING IN APPROPRIATE CASES, ANY GOVERNMENT, WITHIN THOSE TERRITORIES DIRECTIONS, ORDERS OR WRITS, INCLUDING WRITS IN THE NATURE OF HABEAS CORPUS, MANDAMUS, PROHIBITIONS, QUO WARRANTO AND CERTIORARI, OR ANY OF THEM, FOR THE ENFORCEMENT OF ANY OF THE RIGHTS CONFERRED BY PART III AND FOR ANY OTHER PURPOSE

STATEMENT OF FACTS

I.

ZEON: A MULTINATIONAL IT SECTOR COMPANY

Zeon is a private company incorporated in the Cayman Islands but carries on its software business primarily through Singapore. It is an I.T. and I.T.E.S. company. Zeon is a multi – national company having several employees across the world including India. It had presence in India through a liaison office. The Indian liaison office is primarily engaged in liaising with potential clients, and provided them with presentations that discussed the various software products that Zeon has to offer. Irrespective of the above, Zeon has not been able to obtain Singapore Tax Residency Certificate to claim Singapore tax residency for Indian tax purposes.

II.

NEO: A SHRINK WRAP SOFTWARE BY ZEON

Zeon, after number of years of hard work and dedication, developed software named Neo. The software was in nature of shrink wrapped software. The software could predict how well a new recruit would perform in an organization that was going to hire him/her. Moreover, the software also predicted how well the employee would blend in the organization with respect to culture, values etc. of the organization.

III.

AGREEMENT BETWEEN ZEON AND CHEETAH & CHETAK PRIVATE LIMITED FOR NEO

In A.Y. 2003 – 04 Cheetah & Chetak Private Limited, an Indian private manufacturing company, having its registered office in Mumbai decided to buy this software as it was facing some issues with the employees that it was hiring. Cheetah & Chetak Private Limited entered into an agreement with Zeon for purchase of software. The price of software after negotiations was fixed at INR 35,00,000 (Indian Rupees Thirty Five Lakhs Only.) The payment for the software was on year to year basis.

IV.

FILING OF RETURN AND ASSESSMENT OF THE ASSESSEE

Cheetah & Chetak Private Limited made every payment for agreed sum of INR 35,00,000 (Indian Rupees Thirty Five Lakh Only.) However, no TDS was deducted by the manufacturing company at the time of making payments. The company filed its income tax returns regularly without any delays. Assessing Officer completed the assessment for A.Y. 2003 – 04, 2004 – 05, 2006 – 07, 2007 – 08 and 2008 – 09 u/s 143 (3) of the Income Tax Act, 1961. Assessment for A.Y. 2005 – 06 was completed u/s 143 (1) of the Income Tax Act, 1961. At the time of assessment Assessing Officer had accepted the return furnished by the assessee and its transaction with Zeon for the aforesaid A.Y. Moreover, while assessment was conducted by the Assessing Officer for aforesaid A.Y., the assessee fully cooperated with the Income Tax Department and provided it with all the documents as and when demanded.

V.

REOPENING OF ASSESSMENT AND DISALLOWANCE OF EXPENDITURE

On July 4, 2014, the Assessing Officer sent a notice u/s 148 of the Income Tax Act, 1961 to Cheetah & Chetak Private Limited. The reason cited by the Assessing Officer for all the A.Y. was that payments made by the Indian manufacturing company constituted 'royalty' u/s 9 of the Income Tax Act, 1961, and thus, tax should have been withheld at the rate of 25% for aforesaid years while making payment to Zeon. The assessing Officer disallowed deduction claimed for payments made to Zeon for aforementioned A.Y. and sought to recover INR 50,00,000 (Indian Rupees Fifty Lakh Only) from the assessee. Not only this, the manufacturing company was also being charged under the Income Tax Act, 1961 as an 'assessee – in – default' u/s 201 of the Income Tax Act, 1961.

VI.

WRIT PETITION BY THE ASSESSEE

Aggrieved by all that was happening, the assessee decided to file a writ petition in the HC of Bombay for all the A.Y. for which it had received a notice u/s 148 of the Income Tax Act, 1961. Since the matter in hand was the same for all years, a single writ petitioner was filed for all the A.Y.

ISSUES RAISED

I. **WHETHER THE WRIT PETITION IS MAINTAINABLE?**

II. **WHETHER THE REOPENING OF ASSESSMENT BY ASSESSING OFFICER BY ISSUE OF NOTICE DATED JULY 4, 2014 IS BAD IN LAW?**

III. **WHETHER THE ASSESSING OFFICER HAS 'REASON TO BELIEVE' THAT THERE WAS ESCAPEMENT OF INCOME?**

IV. **WHETER PAYMENT MADE FOR THE PURCHASE OF SHRINK WRAPPED SOFTWARE FOR THE PURPOSE OF USE OF SOFTWARE AMOUNTS TO ROYALTY?**

SUMMARY OF ARGUMENTS

I. WHETHER THE WRIT PETITION IS MAINTAINABLE?

Firstly, that the AO has assumed jurisdiction erroneously**.**

Secondly, that existence of alternative remedy is no bar to file petition.

II. WHETHER THE REOPENING OF ASSESSMENT BY ASSESSING OFFICER BY ISSUE OF NOTICE DATED JULY 4, 2014 IS BAD IN LAW?

Firstly, the notice seeking re-opening of assessment is barred by time.

Secondly, the jurisdictional condition for reopening an assessment beyond a period of four years has not been fulfilled because there is true and full disclosure of material facts on behalf of the Petitioner and reopening beyond four years in the absence of failure of the Petitioner to disclose material facts truly and fully is bad in law.

III. WHETHER THE ASSESSING OFFICER HAS 'REASON TO BELIEVE' THAT THERE WAS ESCAPEMENT OF INCOME?

Firstly, there was no tangible material with the AO to reopen assessment.

Secondly, there was true and full disclosure of material on the part of the assessee.

Thirdly, the reopening of assessment u/s 147 of the Act, 1961 is a mere change of opinion.

IV. WHETER PAYMENT MADE FOR THE PURCHASE OF SHRINK WRAPPED SOFTWARE FOR THE PURPOSE OF USE OF SOFTWARE AMOUNTS TO ROYALTY?

Firstly, payment made to use shrink wrapped software does not amount to royalty.

Secondly, the AO will not be justified in importing the definition of royalty from a retrospectively amended provision in the present case.

ARGUMENTS ADVANCED

I. WHETHER THE WRIT PETITION IS MAINTAINABLE?

1. The instant writ petition has been filed by the assessee, i.e. M/s Cheetah and Chetak Pvt. Ltd. [hereinafter referred as **"the Petitioner"**] challenging the impugned notice dated July 4, 2014 issued by the Assessing Officer [hereinafter referred as **"AO"**] u/s 148 of the Income Tax Act, 1961 [hereinafter referred as **"the Act"**] seeking to reopen the assessments for the Assessment Years [hereinafter referred as **"AYs"**] 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09.[1]

2. It is contended by the petitioner that the AO has acted without jurisdiction in issuing such notice which is erroneous, volatile of the fundamental rights, and thus is liable to be quashed and set aside. Further, it is contended that the present writ petition before the hon'ble Court is maintainable as the impugned notice issued by the AO is without jurisdiction.

A. THAT AO HAS ASSUMED JURISDICTION ERRONEOUSLY

3. § 149 of the Act stipulate that where the income escaped is more than INR 1,00,000 (Indian Rupees One Lakh Only), notice for reopening of assessment shall not be issued after the expiry of six years. It is submitted before the hon'ble Court that the impugned notice was issued by AO on July 4, 2014. Thus, it is *prima facie* evident that the period of six years has expired for the five AYs, i.e. 2003-04 to 2007-08. Hence, it is contended that AO cannot issue notice u/s 148 for the aforesaid AYs.

4. Further, it is submitted that in order to reopen assessment AO must have 'reason to believe.' Such reason to believe is to be based on 'tangible material' which comes to the knowledge of AO after assessment. Moreover, when the initial assessment has been concluded u/s 143 (3), as per proviso to § 147 no reopening is allowed unless there non disclosure of facts fully and truly by the assessee.

[1] Moot Proposition, p. 3 ¶ 5.

5. In the case of *Avadh Tranformers Ltd.* v. *UOI*[2] the Court held that the aforesaid conditions are in nature of jurisdictional conditions. Non-existence of these conditions affects the jurisdiction of AO to reopen assessment. Jurisdiction is also affected when the reasons for forming belief has not been disclosed or are not specific.[3]

6. In the instant case, the AO has neither stipulated the 'tangible material'[4] nor pointed out the facts which have not been disclosed by the Petitioner at the time of initial assessment. On the contrary the Petitioner has fully cooperated with the Respondent and provided it with all the documents as and when demanded.[5] Thus, it is submitted before the hon'ble Court that AO has assumed the jurisdiction erroneously.

B. THAT EXISTENCE OF ALTERNATIVE REMEDY IS NO BAR TO FILE PETITION

7. It is humbly submitted before the hon'ble Court that the remedy under Article 226 of the Constitution is discretionary remedy.[6] The Court is vested with power to entertain the petition where there occurs gross miscarriage of justice and effective remedy is not available.

8. Reliance is placed upon the decision in the case of *Whirlpool's Corp.* v. *Registrar of Trade Marks,*[7] in which it was held by the Apex Court that the jurisdiction of the HC in entertaining a writ petition under article 226 of the Constitution would not be affected although there exist alternative statutory remedies particularly in cases where the authority against whom the writ has been filed is shown to have had no jurisdiction or has purported to usurp jurisdiction without any legal foundation.

9. It is humbly submitted that the hon'ble jurisdictional Bombay HC has interfered in such matters having similar facts as in the present case.[8] While maintaining the writ petition in the

[2] Avadh Transformers Pvt Ltd v. UOI [2013] 215 Taxman 432; Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191; Voltas Ltd. v. ACIT & Anr. [2012] 349 ITR 656 [Hereinafter referred as "VOLTAS"]; Pravin Kumar v. ITO (2012) 66 DTR 236 (Guj).
[3] Coca-Cola Export Corp. v. I.T.O. (1998) 4 SCC 166; Sri Krishna (P.) Ltd. v. I.T.O., Calcutta (1996) 9 SCC 534 [Hereinafter referred as "SRI KRISHNA"] .
[4] Indivest PTE Ltd v. ADIT (2012) 250 CTR 15; Aventis Pharma Ltd. v. ACIT (2010) 323 ITR 570 (Bom).
[5] Moot Proposition, p. 4 ¶ 6.
[6] Techspan India (P.) Ltd. v. ITO [2006] 283 ITR 212 (Del); D.D BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 448 (21st Ed. 2013).
[7] Whirlpool's Corp. v. Registrar Of Trade Marks [1998] 8 SCC 1; U.O.I. v. Vicco Laboratories (2007) 13 SCC 270; U.O.I. v. Hindalco Industries (2003) 5 SCC 194; U.O.I. v. Bajaj Tempo Ltd. (1998) 9 SCC 281.
[8] OHM Stock Brokers Pvt. Ltd. v. CIT-4 & Anr. [2013] 215 Taxman 53; IPCA Laboratories Ltd. v. Gajanand Meena, DCIT & Ors. [2001] 251 ITR 416; Sesa Goa Ltd. v. JCIT [2007] 294 ITR 101; Sound Casting (P) Ltd. v. DCIT 2013 (7) Bom.C.R. 709; *Supra* VOLTAS at 2.

case of *Grindwell Norton Ltd.* v. *Jagdish Prasad Jangid, ACIT & Ors.,*[9]the hon'ble Court relied upon its own decision in the case of *Ajanta Pharma Ltd* v. *ACIT*[10] and held that:

> "Decision of the Apex Court in GKN's case (supra) does not lay down any proposition of law that in no circumstances the writ petition against the issuance of notices under s. 148 of the said Act can be entertained."

Relying on the aforesaid cases, it is submitted before the hon'ble Court that the instant writ petition is maintainable.

II. WHETHER THE REOPENING OF ASSESSMENT BY ASSESSING OFFICER BY ISSUE OF NOTICE DATED JULY 4, 2014 IS BAD IN LAW?

10. The AO has sought to reopen the assessment of the Petitioner u/s 147 of the Act for the six consecutive AYs 2003-04 to 2008-09 vide its impugned notice dated July 4, 2014. The petitioner challenges the impugned notice on it being time barred and devoid of the jurisdictional condition for reopening an assessment beyond the period of four years. It is thereby contended that the impugned notice u/s 148 seeking to reopen the assessments for all the aforementioned AYs is without jurisdiction and is liable to be quashed and set aside.

A. THAT THE NOTICE SEEKING RE-OPENING OF ASSESSMENT IS BARRED BY TIME

11. § 149 (1) (b) of the Act provides that notice of reassessment u/s 148 where the income escaped is more than INR 1,00,000 (Indian Rupees One Lakh Only) has to be issued within six years after the end of relevant AY.[11]

12. In the instant case, the AO has sent the notice for reassessment u/s 148 of the Act on July 4, 2014.[12] It is contended by the Petitioner that the period of six has lapsed for AYs 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08. Therefore, it is submitted before the hon'ble Court that the assessment of the Petitioner cannot be reopened as the same is barred by time.

[9] Grindwell Norton Ltd. v. Jagdish Prasad Jangid, ACIT & Ors. [2004] 267 ITR 673.
[10] Ajanta Pharma Ltd. v. ACIT 2004 (186) CTR 521; M.P. JAIN, INDIAN CONSTITUTIONAL LAW 670 (6th Ed. 2010).
[11] Lotus Investment Limited v. G.Y. Wagh, ACIT & Ors. [2007] 288 ITR 459; B.B LAL & N. VASHISHTH, DIRECT TAX, WEALTH TAX AND TAX PLANNING 550 (29th Ed. 2010).
[12] Moot Proposition, p. 3 ¶ 5.

B. THAT THE JURISDICTIONAL CONDITION FOR REOPENING AN ASSESSMENT BEYOND A PERIOD OF FOUR YEARS HAS NOT BEEN FULFILLED

13. It is humbly submitted that the assessment for all the AYs, i.e. from 2003-04 to 2008-09 has been sought to be reopened beyond a period of four years vide impugned notice dated July 4, 2014.[13] Further, it is submitted that assessment for AYs 2003-04, 2004-05, 2006-07, 2007-08 and 2008-09 [hereinafter referred as **"143(3) AYs"**] has been completed u/s 143(3).[14]

14. It is contended that the aforementioned 143(3) AYs attract the proviso to § 147. As per the proviso to § 147, where an assessment has been completed u/s. 143(3), the validity of reopening beyond four years of the end of the relevant year is pre-conditioned by the requirement that there is a failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment for that AY.[15] Thus, there must be a failure on the part of the assessee to fully and truly disclose material facts during initial assessment for the jurisdiction of to reassess AO to be invoked. The petitioner contends that the impugned notice, for 143(3) AYs, is invalid as the jurisdictional condition for reopening of assessment beyond a period of four years has not been fulfilled by the AO.

i. That, there is true and full disclosure of material facts on behalf of the Petitioner

15. It is humbly submitted before the hon'ble Court that the Apex Court in the case of *Calcutta Discount Co. Ltd.* v. *ITO, Calcutta & Anr.*[16] had observed that it is the duty of the assessee to disclose all the 'primary facts' before the AO. Such disclosure shall be full and true. However, the duty of the assessee is restricted to true and full disclosure of material facts only. The assessee is not under obligation to draw either legal or factual inferences.[17]

16. *Ex-facie* the reasons which have been disclosed to the assessee do not even purport to state that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. On the contrary, perusal of the record would indicate that there

[13] *Id.* at 12.
[14] Moot Proposition, p. 3 ¶ 5.
[15] Archi Agnihotri and Medha Srivastava, *Interpretation of Section 147 of the Income Tax Act, 1961: Judicial Trends*, 1 MANU 1 – 6 (2008); *Supra* OHM at 3.
[16] Calcutta Discount Co. Ltd. v. ITO, Calcutta & Anr. [1961] 2 SCR 241; Centurion Bank of Punjab Ltd. v. Income Tax Settlement Commission & Ors. [2007] 290 ITR 555; DIT v. Income Tax Settlement Commission 2014 Indlaw MUM 357; Oriental Carpet Manufacturers v. ITO [1987] 168 ITR 296; G.B. Bros. & Konda Rajgopala v. ITO 2002 (176) CTR 572; ACIT v. Sarvamangala Properties [2002] 257 ITR 722; CIT v. A.R. Enterprises Pvt. Ltd. [2002] 255 ITR 121; Ranbaxy Laboratories Ltd. v. DCIT [2001] 247 ITR 34.
[17] Amrit Banaspati Company Ltd. v. ACIT 2014 Indlaw ALL 1934; DR. GIRISH AHUJA & DR. RAVI GUPTA, PROFESSIONAL APPROACH TO DIRECT TAXES: LAW AND PRACTICE 494 (29th Ed. 2011).

was a full disclosure of the *factum* of payments as well as of the agreement under which the payments were being made to Zeon.

17. It is further submitted that the Petitioner has been regularly filing its income tax returns for all the AYs without any delays.[18] It is a matter of record that the AO had accepted the returns of the petitioner and its transaction with Zeon for all these years. However, in pursuance of a mere change in opinion, the AO, vide its impugned notice has sought to reopen the assessment for the 143(3) AYs. The reason cited by the AO for all these years was that payments made by the petitioner constituted 'royalty' u/s 9 of the Act, and thus tax should have been withheld at the rate of 25% for all these years, while making payment to Zeon for the software.[19]

18. From mere perusal of the impugned notice, it is clear that the reason provided is not postulated on there being any suppression on the part of the assessee or a failure on the part of the assessee to state fully and truly all material facts necessary for the assessment. Thus, it can be deduced from the aforesaid factual matrix that there was true and full disclosure by the Petitioner of all material facts.

ii. Reopening beyond four years in the absence of failure of the petitioner to disclose material facts truly and fully is bad in law

19. It is contended that the impugned notice for reopening of the assessments for the concerned AYs does not fulfill the requirement set out under the proviso to § 147 and hence, the notices of reopening would accordingly have to be quashed and set aside.

20. The Petitioner strongly relies upon the Apex Court decision in the case of *Sri Krishna (P) Ltd.* v. *ITO*[20] and recent judgment of the jurisdictional Bombay HC in the case of *OHM Stock Brokers Pvt. Ltd* v. *CIT-4 & Anr.*[21] in which the court quashed the impugned notice issued u/s 148 and held that "*before the AO proceeds to reopen an assessment after the expiry of four years of the end of the relevant AY, he must nonetheless apply his mind to the fundamental question as to whether there has been a failure to disclose on the part of the assessee."*[22]

[18] Moot Proposition, p. 3 ¶ 5.
[19] Moot Proposition, p. 3 ¶ 5.
[20] CA Yogender Kumar Sud, *Discussion on Section 147 & 148 of the Income Tax Act, 1961,* DISTRICT BAR ASSCOIATION 2 – 19 (2013); Sri Krishna (P.) Ltd v. ITO (1996) 9 SCC 534; *Supra* SRI KRISHNA at 2.
[21] *Supra* OHM at 3.
[22] DR. VINOD K. SINGHANIA & DR. KAPIL SINGHANIA, DIRECT TAXES: LAW & PRACTICE 396 (24th Ed. 2011).

21. The decision of the Bombay HC has made the law absolute by maintaining the judicial discipline and following its own decisions in the cases of *Sesa Goa Ltd.* v. *JCIT*[23] and numerous other decisions[24] in which the Court held that "*mere reason to believe that income has escaped assessment in itself was not sufficient for reopening an assessment beyond a period of four years unless there was a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment."*[25] It was further held that Explanation 2 to § 147 cannot be read without reading the proviso to § 147 of the said Act.[26]

Thus, it is humbly submitted before the hon'ble Court that since there was true and full disclosure of facts on the part of the Petitioner, the assessment cannot be reopened as the jurisdictional condition under proviso § 147 has not been fulfilled by AO.

III. WHETHER THE ASSESSING OFFICER HAS 'REASON TO BELIEVE' THAT THERE WAS ESCAPEMENT OF INCOME?

22. It is contended before the hon'ble Court that the AO has erred in reopening the assessment by furnishing notice u/s 148 and thereafter disallowing expenditures claimed as deductions u/s 40 (1) (i) of the Act and charging the Petitioner as assessee-in-default u/s 201 of the Act.[27]

23. It is also contended that the AO neither had any 'tangible material' on record for reopening of assessment nor any failure has been shown on the part of the Petitioner as to the true and full disclosure of material facts. Accordingly, the notice issued by the AO u/s 148 to the Petitioner is in pursuance of a mere 'change of opinion'.

A. THAT THERE WAS NO TANGIBLE MATERIAL WITH THE AO TO REOPEN ASSESSMENT

24. It is humbly submitted before the hon'ble Court that § 147 of the Act stipulates that, subject to §§ 148 to 153, the AO may reopen the assessment if he has 'reason to believe' that income

[23] Sesa Goa Ltd. v. JCIT [2007] 294 ITR 101; CIT v. M/S. K. Mohan & Co. [2011] 7 ITR (Trib.) 507; DIL Ltd. v. ACIT W.P. (Lodg.) No. 2786 of 2011; *Supra* SESA at 3.
[24] Sound Casting (P) Ltd v. DCIT (2012) 250 CTR 119; Ketan. B. Mehta v. ACIT [2012] 346 ITR 254; Tanna Builders Pvt. Ltd. v. Smt. Neela Krishnan & Anr. 2005 (198) CTR 541; M/s Ajay Oxycholoride Floorings v. Iyer, ACIT & Ors. [2006] 283 ITR 169; Purity Techtextile (P) Ltd v. ACIT & Anr. [2010] 325 ITR 459; *Supra* GRINDWELL at 3.
[25] Pravin Kumar Bhogilal Shah v. ITO (2012) 66 DTR 236 (Guj); Vinayak Construction v. ITO (2012) 66 DTR 233 (Guj); Sadbhav Engineering v. DCIT [2011] 333 ITR 483; DCIT & Ors. v. Simplex Concrete Piles (India) Ltd (2013) 11 SCC 373.
[26] Bhor Industries Ltd. v. ACIT & Ors. 2003 (183) CTR 248; IPCA Laboratories Ltd. V. Gajanand Meena, DCIT & Ors.[2001] 251 ITR 416.
[27] Moot Proposition, p. 3 ¶ 5.

chargeable to tax has escaped assessment.[28] In the case of *C.I.T.* v. *Kelvinator of India Ltd.*[29] the Supreme Court has held that the AO has power to reopen the assessment provided there is 'tangible material' to come to the conclusion that income has escaped assessment. Moreover, in *Aventis Pharma Ltd.* v. *ACIT*[30] the Bombay HC differentiated between the power to reassess and review and observed that: *"existence of tangible material is necessary to ensure against an arbitrary exercise of power."*

i. That there should be new and fresh material to constitute 'tangible material'

25. In order to constitute a material as 'tangible material', a fact should be such that it is new and was not in knowledge of the AO at the time of original assessment.[31] The Apex Court has held that the discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment would constitute a 'reason to believe' that income had escaped assessment within the meaning of § 147.[32]

26. It is contended by the Petitioner that there was no fresh material, in the present case, with the AO which would constitute 'tangible material' to reopen the assessment. The AO in the reasons furnished to the assessee for reopening assessment has merely stated that payment made by the Petitioner amounted to 'royalty' and hence, tax should have been withheld on the same.[33] The same transaction was approved by the AO at the time of initial assessment.[34] There is no additional material mentioned in the reasons which has come to the knowledge of AO on the basis of which he seeks to reopen the concerned assessments.

27. It is submitted that in the case of *CIT-3* v. *ICICI Bank Ltd., Mumbai*[35] the jurisdictional Bombay HC observed that reopening of assessment can be done when fresh material has come to notice of the AO. Similar view was taken by the same court in the case of *Siemens*

[28] DR. VINOD SINGHANIA AND DR. MONICA SINGHANIA, STUDENTS' GUIDE TO INCOME TAX 720 – 746 (48th Ed. 2012).
[29] CIT v. Kelvinator of India Ltd. (2010) 2 SCC 723: [2010] 320 ITR 561; CA Vidhan Surana & CA Sunil Maloo, *Section 147: A Treatise on the Reopening of Assessment* 1 ITATONLINE.ORG 1 – 9 (2013).
[30] Aventis Pharma Ltd. v. ACIT [2010] 323 ITR 570; DR. VINOD K SINGHANIA & DR KAPIL SINGHANIA, DIRECT TAXES: LAW & PRACTICE 454 (45th Ed. 2010).
[31] Kishor Karia and Atul Jasani, *Whether Reassessment u/s 147 is Permissible on Mere Change of Opinion*, 25 BOMBAY CHARTERED ACCOUNTANTS JOURNAL 56 (2010).
[32] Phool Chand Bajrang Lal v. ITO (1993) 4 SCC 77: AIR 1993 SC 2390; ALA Firm v. CIT (1991) 2 SCC 558; Indian & Eastern Newspaper Society v. CIT (1979) 4 SCC 248.
[33] Moot Proposition, p. 3 ¶ 5.
[34] Moot Proposition, p. 3 ¶ 5.
[35] CIT-3 v. ICICI Bank ltd., Mumbai [2012] 349 ITR 482; TAXMANN'S DIRECT TAX MANNUAL (39th Ed. 2009).

Information Systems Ltd. v. *ACIT.*[36] It is thus contended that the reasons only provide the conclusion and give no information regarding material on the basis of which reassessment u/s 147 is sought. Thus, there is no tangible material before AO for reopening of assessment.

ii. That same material does not constitute 'tangible material'

28. It is humbly submitted before the hon'ble Court that hon'ble Bombay HC in the case of *Bedmutha Industries Ltd., Nashik* v. *DCIT, Nashik & Anr*[37] held that reopening of assessment on the basis of material already disclosed during the assessment shall amount to review which is not permissible u/s 147 of the Act. Also, in the case of *Cartini India Ltd.* v. *ACIT, Mumbai & Ors.*[38] Court held that:

> "Once the AO on consideration of the material on record and the explanation offered, arrives at a final conclusion that the assessee is entitled to the deduction as claimed then, on the basis of the very same material, the AO cannot form a *prima facie* opinion that the deduction is not allowable and accordingly reopen the assessment on the ground that income chargeable to tax has escaped assessment."

29. In the instant case, the AO has sought to reopen the assessment for AYs 2003-04 to 2008-09 on the basis of material which was already on record. Further, except in AY 2005-06 the assessment for the aforesaid AYs was done u/s 143(3).[39] Earlier AO had accepted transaction of the Petitioner with Zeon and concluded that no TDS was to be deducted. Also, all disclosures pertaining with the transaction were made by the Petitioner at the time of initial assessment. Therefore, it is contended that the AO has already formed an opinion over the transactions of the petitioner and further has not provided any tangible material forming his changed opinion. Thus, it is the case of mere reapplication of mind to same material which cannot form tangible material.

iii. That notice u/s 148 does not mention any 'tangible material'

30. In the case of *Hindustan Lever Ltd.* v. *R.B. Wadkar*[40] it was held that that reasons are linked to evidence. Reasons should be self explanatory and should not keep assessee guessing for reasons. The reasons recorded must be based on 'tangible material' and same shall be

[36] Siemens Information Systems Ltd. v. ACIT [2007] 295 ITR 333: [2008] 168 Taxman 209.
[37] Bedmutha Industries Ltd., Nashik v. DCIT, Nashik & Anr. 2012 Indlaw MUM 1207.
[38] Cartini India Ltd. v. ACIT & Ors [2009] 314 ITR 275: 2009 (4) Mah. L.J. 102; [2009] 179 Taxman157.
[39] Moot Proposition, p. 3 ¶ 5.
[40] Hindustan Lever Ltd. v. R.B. Wadkar [2004] 268 ITR 332: 2004 (4) Bom.C.R. 691: 2004 (190) CTR 166: 2004 (3) Mah. L.J. 517; [2004] 137 Taxman 479.

disclosed in the reason. The aforesaid stand was reiterated in the case of *Bombay Stock Exchange Ltd.* v. *DIT & Ors.*[41] Reliance is also placed on the decisions of the jurisdictional HC in the cases of *Debashu Services Private Ltd.* v. *DCIT*[42] and *NYK Line (India) Ltd.* v. *DCIT*[43] where the Court held that 'tangible material' is the test for reopening of assessment u/s 147. It is a check against arbitrariness.

31. It is humbly submitted by the Petitioner that in the instant case that the AO in his reasons has failed to furnish the material on the basis of which reopening of assessment is sought. Further, it is contended that the AO has provided the Petitioner with conclusion and not material which forms the basis of his conclusion. Thus, AO has failed to furnish the 'tangible material' on the basis of which the reopening of assessment is sought. Thus, in the absence of any tangible material in the instant case, it is contended by the Petitioner that the reassessment is bad in law and hence, the notice u/s 148 be quashed.

B. THAT THERE WAS TRUE AND FULL DISCLOSURE OF MATERIAL ON THE PART OF THE ASSESSEE

i. That the Petitioner had disclosed all the primary facts at the time of initial assessment

32. It is humbly submitted before the hon'ble Court that once the full disclosure was made at the time of initial assessment then the AO cannot reopen assessment, beyond four years, unless any non-disclosure of fact has occurred because of fault on the part of the assessee.[44] In the instant case, the AO had conducted the assessment u/s 143(3) of the Act and had accepted the transaction of the Petitioner with Zeon.[45] Moreover, the Petitioner at the time of assessment had fully cooperated with the AO and furnished all the documents required at time of assessment.[46] Thus, it can be deduced from the aforesaid factual matrix that there was true and full disclosure by the Petitioner of all material facts.

ii. That AO had applied mind to the material facts disclosed by the Petitioner

[41] Bombay Stock Exchange Ltd. v. DDIT 2014 Indlaw MUM 606; Hindustan Lever Ltd. v. V.K. Pandey [2001] 251 ITR 209; Caprihans India Ltd. v. Prakash Chandra [2002] 256 ITR 721.
[42] Debashu Services Pvt. Ltd. v. DCIT 2014 Indlaw MUM 588; Indivest PTE Ltd. v. ADIT (2012) 250 CTR 15: (2012) 206 Taxman 351; Balakrishna Hiralal Wani v. ITO (2010) 321 ITR 519.
[43] NYK Line (India) Ltd. v. DCIT [2012] 346 ITR 361.
[44] ITO v. Lakhmani Mewal Das (1976) 3 SCC 757; CIT v. Bhanji Lavji (1972) 4 SCC 88; ITO v. G.K. Properties Pvt. Ltd. 2014 Indlaw ITAT 916.
[45] Moot Proposition, p.3 ¶ 5.
[46] Moot Proposition, p. 4 ¶ 6.

33. It is humbly submitted before the hon'ble Court that in the case of *CIT* v. *Goetze (India) Ltd.,*[47] hon'ble Delhi HC has observed that a presumption is raised that AO has applied mind to the facts disclosed to him when the assessment is complete u/s 143 (3) of the Act. Similar view has been taken by the hon'ble Supreme Court in the case of *CIT* v. *Kelvinator of India Ltd.*[48]

34. In the instant case, the Petitioner had disclosed truly and fully all material facts before the AO at the time of assessment. Further, the assessment was completed by the AO for all AY under consideration except AY 2005-06 u/s 143 (3) of the Act.[49] Thus, it can be concluded that AO had applied mind to the material facts disclosed by the Petitioner during the assessment.

C. THAT THE REOPENING OF ASSESSMENT U/S 147 OF THE INCOME TAX ACT, 1961 IS A MERE CHANGE OF OPINION

35. It is humbly submitted before the hon'ble Court that 'change of opinion' refers to formation of opinion by AO and subsequent change thereof.[50] The doctrine of change of opinion presupposes the formulation of an opinion by AO[51] Thus, when the AO has formed an opinion and completed the initial assessment; subsequent reopening of assessment u/s 147 on same material shall be construed as change of opinion.

i. That the assessment is reopened on the basis of same facts and in absence of additional material

36. Hon'ble jurisdictional HC in *Asteroids Trading and Investments Pvt. Ltd.* v. *DCIT*[52] observed that where the assessee has truly and fully disclosed all the primary facts and assessment was concluded u/s 143 (3) then reopening of assessment on the basis of same facts shall amount to change of opinion. Also, it is submitted before the hon'ble Court that existence of additional material information is necessary to form a reason that income has escaped assessment.

[47] CIT v. Goetze (India) Ltd. [2010] 321 ITR 431; V.P. GAUR AND D.B. NARANG, INCOME TAX: LAW AND PRACTICE (37th Ed. 2010).
[48] CIT v. Kelvinator of India Ltd. (2010) 2 SCC 723; AIR 2010 SC (Supp) 672; [2010] 320 ITR 561; [2010] 187 Taxman 312.
[49] Moot Proposition, p. 3 ¶ 5.
[50] BBC World News Ltd. v. ADIT 2014 (208) DLT 415.
[51] CIT v. H.P. Sharma (1980) 122 ITR 675; Consolidated Photo & Finvest Ltd. v. ACIT (2006) 281 ITR 394.
[52] Aesteroids Trading & Investments Pvt. Ltd. v. DCIT [2009] 308 ITR 190; CIT v. Shimbhaoli Sugar Mills Ltd. [2011] 333 ITR 470; Dalmia Brothers Pvt. Ltd. v. CIT Delhi & Anr. 2011 Indlaw Del 3057; NTPC Ltd. v. DCIT & Ors. [2013] 350 614; CIT. v. Smt. Bjnda Devi 2005 (197) CTR 447.

Reliance is placed on the case of *DCIT* v. *Central Warehousing Corp.*[53] where the ITAT has observed that reassessment based on reappraisal of same facts is invalid in law.[54]

37. In the instant case, the AO had completed assessment u/s 143 (3) of the Act in all the concerned AYs except in 2005-06 in which it was completed u/s 143(1). Also, as already contended there is true and full disclosure of material facts by the petitioner in the instant case. Thus, it is submitted before the hon'ble Court that the AO is seeking to reopen assessment u/s 147 on the basis of same facts and in absence of any additional material on record.

ii. Arguendo, That the reopening assessment on the basis of retrospective amendment is change of opinion

38. In the case of *Parixit Industries (P.) Ltd.* v. *ACIT*,[55] Gujarat HC held that when a retrospective clarificatory amendment is added to the Act, the same is considered to be in operation from the retrospective date. Thus, AO cannot reopen concluded assessment as it would amount to change of opinion.

39. In the instant case, the AO has sent the impugned notice u/s 148 on July 4, 2014 on the ground that payment to Zeon by the Petitioner amounts to royalty u/s 9 of the Act. It is contended by the Petitioner that the said notice is issued in the aftermath of amendment made to § 9 retrospectively w.e.f. July 1, 1976. However, such opening of concluded assessment would amount to change of opinion and hence, bad in law. Reliance is placed on the case of *Eicher Ltd.* in which reopening solely on the basis of retrospective amendment was held bad in law.[56]

Thus, it is humbly submitted before the hon'ble Court that AO does not have 'reason to believe' u/s 147 and notice u/s 148 is mere change of opinion. Hence, the reopening of assessment u/s 147 of the Act is bad in law; and shall be quashed.

IV. WHETER PAYMENT MADE FOR THE PURCHASE OF SHRINK WRAPPED SOFTWARE FOR THE PURPOSE OF USE OF SOFTWARE AMOUNTS TO ROYALTY?

[53] DCIT v. Central Warehousing Corp. 2014 Indlaw ITAT 726; Legato Systems (India) Pvt. Ltd. v. DCIT [2010] 187 Taxman 294; D.T. & T.D.C. Ltd. v. ACIT (2010) 324 ITR 234.
[54] CIT v. Usha International Ltd. [2012] 348 ITR 485: [2012] 210 Taxman 188.
[55] Parixit Industries (P.) Ltd. v. ACIT [2012] 20 Taxmann 750.
[56] CIT v. Eicher Ltd. [2007] 163 Taxman 259.

40. It is contended that the payment made for the purchase of shrink wrapped software for the purpose of its use does not amounts to royalty. Such payment is made for use of a copyrighted material in which the copyright exists and not for the use of a copyright which subsists in that material. AO is unjustified in holding that such payment amounts to royalty. Further, it is contended that even if the AO imports such definition from the retrospectively amended provision in § 9(1)(vi) of the Act, he is unjustified in doing so as such provision is nothing but charging a new levy by adding something which was never there in the garb of clarificatory retrospective amendment.

A. THAT PAYMENT MADE TO USE SHRINK WRAPPED SOFTWARE DOES NOT AMOUNT TO ROYALTY

41. Clause (v) of Explanation 2 to § 9(1)(vi) of the Act provides that the consideration received on transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work would be deemed to be royalty.

42. It is contended that a copyright is different from the work in respect of which copyright subsists. No doubt, if right to use the copyright had been transferred, the same would give rise to royalty. The enjoyment of some or all the rights which the copyright owner has is necessary to invoke the royalty definition. But where right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material, the same would not give rise to any royalty income and would be business income. It is humbly submitted that, in the instant case, License Agreement [Hereinafter referred as **"the Agreement"**] transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the 'right to use' the copyrighted material which is clearly distinct from the rights in a copyright. The petitioner has only got a copy of software without any part of the copyright of the software.

43. Further, it is contended that the payment made for the use of a shrink wrapped is actually a payment made for the copyrighted material and for the same a strong reliance is being placed on the decision of hon'ble Apex Court in the case of *TCS* v. *State of AP*[57] in which it was held that:

> "As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. What the

[57] Tata Consultancy Services v. State of A.P. (2005) 1 SCC 308:[2004] 271 ITR 401; DIT v. Ericsson A.B. [2012] 343 ITR 470: [2012] 204 Taxman 192.

> buyer purchases and pays for is not the disc or the CD. Thus a transaction of sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act."

44. It is further submitted that the examination of the Agreement of the Petitioner with Zeon reveals that Clause 2 of the Agreement forbids the petitioner from transferring, assigning or sublicensing the software. It even forbids the use of the software by the parent, subsidiary or affiliated companies of the Petitioner. The Agreement also forbids the Petitioner from decompiling, reverse engineering, disassembling or decoding the software. Clause 2(d) r/w Clause 4 also contemplates that the Petitioner is allowed to make only a backup copy of the software and the printed support information and the copy so made shall carry the copyright and other proprietary notices of Zeon, i.e. the copy so made is owned by and are the copyright of Zeon. The Agreement prohibits commercial use of software and permits educational use of the same.

45. Upon perusal of the Agreement, it can be deduced that under no part of the Agreement Zeon transfers copyright right as envisaged under § 14 of the Copyright Act, 1957 to the Petitioner. Therefore, sale of software by Zeon to the Petitioner cannot be said to be the transfer of the copyright to the Petitioner either in part or in whole. Thus, consideration paid by the Petitioner to Zeon for acquiring copy of the software is not for the use of copyright or transfer of right to use of copyright.

46. The Hon'ble Special Bench, ITAT Delhi in a similar issue in the case of *Iridium India Telecom Ltd* v. *Motorola Inc.*[58] examined the conditions in the non-exclusive restricted license of the software and found that:

> "The supplier of software had only transferred a copy of the software or copyrighted article but had not transferred any of the copyright. Under these circumstances, consideration received for the sale of Copyright article, namely, software was held not to be royalty, and it was also held that copyright is different from the copyright article."[59]

47. Reliance is Placed by the petitioner on the decision of hon'ble Delhi HC in the case of *DIT* v. *Infrasoft Ltd*[60] in which while dealing with a license agreement having same terms, it held

[58] Motorola Inc. v. DIT [2005] 95 ITD 269; Iridium India Telecom Ltd v. Motorola Inc. (2005) 2 SCC 145: 2004 (1) Mh. L.J. 532: (2005) 270 ITR 62.
[59] ADIT v. TII Team Telecom International Private Ltd. C/o Sudit Parekh and Co. [2011] 12 ITR (Trib.) 688; DIT v. M/s Nokia Networks OY (2012) 253 CTR 417; CIT v. HP India (P) Ltd. (2009) 222 CTR 378.
[60] DIT v. Infrasoft Ltd [2014] 220 Taxman 273.

that *"what has been transferred is not copyright or the right to use copyright but a limited right to use the copyrighted material and does not give rise to any royalty income."*

48. The license granted by Zeon to the Petitioner is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes.[61] The Petitioner relies upon the decision of Delhi HC in the case of *DIT* v. *M/s Nokia Networks OY*[62] in which it ruled that "*the right to make a backup copy purely as a temporary protection against loss, destruction or damage does not amount to acquisition of a copyright in the software"*.

49. The Petitioner further relies upon the AAR ruling in the case of *Dassault Systems K. K., In Re*[63] in which it negated the contention of the revenue that the right permitting the licensee to make a copy of the programme by loading the programme on the hard disk of the computer amounted to assignment of a right in the copyright in terms of § 14 of the Copyright Act, 1957 as under:

> "It seems to us that reproduction and adaptation envisaged by s. 14(a)(i) and (vi) can contextually mean only reproduction and adaptation for the purpose of commercial exploitation. What has been excluded under s. 52(aa) is not commercial exploitation, but only utilizing the copyrighted product for one's own use. The exclusion should be given due meaning and effect; otherwise, s. 52(aa) will be practically redundant. When the infringement is ruled out, it would be difficult to reach the conclusion that the buyer/licensee of product has acquired a copyright therein."

50. It is therefore apparent from aforementioned decisions that in case of sale of copyrighted article, namely, a copy of computer programme, payment received is not construed as royalty as envisaged in Explanation 2 to § 9(1)(vi) r/w § 9(1)(vi) of the Act if there is no transfer of copyright partly or wholly.

[61] Ajay R. Singh, *Guide to the law on Reopening of Assessments undr section 147 of the Income tax Act, 1961*, 1 AIFTP JOURNAL 1-22 (2012).
[62] DIT v. M/s Nokia Networks OY [2013] 358 ITR 259.
[63] Dassault Systems K. K., In Re [2010] 322 ITR 125: [2010] 188 Taxman 223.

B. THAT THE AO WILL NOT BE JUSTIFIED IN IMPORTING THE DEFINITION OF ROYALTY FROM A RETROSPECTIVELY AMENDED PROVISION IN THE PRESENT CASE

51. It is submitted that the Explanation 4 as introduced in § 9(1)(vi) by way of a retrospective amendment in 2012 vide the Finance Act, 2012 provides that any payment made for 'right to use' computer software amounts to royalty. The reason provided by the AO in the impugned notice is for all these years was that payments made by the Indian manufacturer constituted 'royalty' under § 9 of the Act, and thus tax should have been withheld at the rate of 25% for all these years, while making payment to Zeon for the software. However, the AO has failed to provide the tangible material, which led him to this changed belief. Assuming that his changed belief was based on the retrospective amendment to § 9 in the year 2012, it is contended that such amended definition cannot be imported to the petitioner's case.

52. Explanation 4 has been inserted to clarify that transfer of all or any rights in respect of any right, property or information as mentioned in Explanation 2, includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred. It is contended that the amendment is nothing less than a substantial amendment levying a new duty over the assessee under the garb of clarification.

53. In the case of *Denish Industries Ltd* v. *ITO*[64], where the AO sought to reopen the assessment on the basis of the clarificatory retrospective amendments beyond four years, hon'ble Gujarat HC quashed the impugned notice. Strong reliance is placed on the case of *CIT* v. *Hindustan Electro Graphites Ltd*[65]wherein it was held that:

> "An assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation."

In the light of the abovementioned arguments and judgments, it is humbly submitted before the hon'ble Court that the payment made by the petitioner for the purchase of shrink wrapped software does not amounts to royalty.

[64] Denish Industries Ltd v. ITO [2004] 271 ITR 340; CIT v. Bipin Vadilal [2004] 271 ITR 340.
[65] CIT v. Hindustan Electro Graphites Ltd. (2000) 3 SCC 595; Modem Fibotex India Ltd v. DCIT [1995] 212 ITR 496.

PRAYER

Wherefore in the light of arguments advanced, authorities cited and facts mentioned, the Honorable Court may be pleased to adjudicate by issuing an appropriate writ, direction or order, in nature of *Certiorari* or *Mandamus*

1. That the reopening of assessment by A.O. is barred by time and hence, is bad in law;
2. That A.O. has reopened assessment without jurisdiction; hence, notice u/s 148 of the Income Tax Act, 1961 shall be quashed;
3. That the payment made by the Petitioner is not royalty u/s 9 of the Income Tax Act, 1961; hence, no liability to deduct TDS arose;
4. That payment made by the assessee shall be allowed as expenditure; and
5. That the Petitioner shall not be charged as an 'assessee – in – default u/s 201 of the Income Tax Act, 1961.

And any other relief that the honorable Court may be pleased to grant in the interests of justice, equity and good conscience.

All of which is humbly submitted.

Filed on: __/__/2014 Sd/-

Counsels for the Petitioner