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THE 2ND KIIT UNIVERSITY NATIONAL MOOT COURT COMPETITION, 2014

5TH – 7TH SEPTEMBER 2014

BEFORE THE HON'BLE HIGH COURT OF BOMBAY

CHEETAH AND CHETAK PVT. LTD. (PETITIONER)

V.

INCOME TAX AUTHORITY (RESPONDENT)

ON SUBMISSION TO THE REGISTRY OF THE COURT

OF THE HON'BLE HIGH COURT OF BOMBAY

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STATEMENT OF JURISDICTION

The Petitioner humbly submits this memorandum for the petition filed before this Honourable Court. The petition invokes its writ jurisdiction under Article 226 of the Constitution of India. It sets forth the facts and the laws on which the claims are based.

STATEMENT OF FACTS

I. Zeon is a private IT & ITES company incorporated in the Cayman Islands, carrying on its software business primarily through Singapore. Zeon has been unable to obtain a Tax Residency Certificate from Singapore in order to claim Singapore Tax Residency for Indian tax purposes. They have a presence in India through a liaison office. Zeon are credited with designing a software called Neo, which was revolutionary in the human resource industry and could predict how well a new recruit would work in an organization that was going to hire him/her and adapt to the organization's culture and values. Cheetah & Chetak Private Limited, an Indian manufacturing private limited company having its registered office in Mumbai, decided to buy this software.

II. Consequently, an agreement ("**Agreement**") was entered into between them and Zeon for the purchase of software for a price of INR 35,00,000 on a year on year basis. No TDS was deducted by the manufacturing company at the time of making payments. The Agreement stated that the Licensee is granted a '*non-exclusive, non-transferable license*', and that '*all copies of the Software shall be the exclusive property of Zeon*', according to 2(a) and 2(d) of the Agreement. Further, 2(f)(i) and 2(f)(ii) of the Agreement stipulated that the software cannot be '*loaned, rented, sold, sublicensed or transferred to any third party*', or '*used by any parent, subsidiary or affiliated entity of Licensee*' without prior written consent of Zeon. Additionally, the Agreement placed restrictions on the Licensee to not '*copy, decompile, disassemble or reverse-engineer the Software*' without Zeon's written consent, stipulated by 2(h).

III. The manufacturing company filed income tax return without delays, and for AY 03-04 and 04-05, assessment order was passed under S. 143(3) of the Income Tax Act, 1961 ("**ITA**" or "**Act**") . For AY 2005-06, the assessment was completed under S. 143(1) and for AYs 2006-07, 07-08, 08-09, it was completed under S. 143(3) of the ITA. The assessing officer had accepted the returns and the transaction with Zeon in the above AYs. On July 4, 2014, the assessing officer sent a notice to Cheetah & Chetak Private Limited under S. 148 and disallowed the deduction claimed for payments made for these AYs and sort to recover INR 50 lacs from the assesse. The reason cited was that payments made by the manufacturer constituted 'royalty' under S. 9 of the Act, and tax should have been withheld at rate of 25% for all these years while making payment to Zeon for the software. Manufacturing company was charged under ITA as an

'assesse-in-default'. Assessee decided to file a writ petition in the High Court of Bombay for all the AYs for which they had received a 148 notice, contending that the re-opening was bad in law.

STATEMENT OF ISSUES

ISSUE I: Whether the writ filed by the petitioner is maintainable?

ISSUE II: Whether the consideration paid under the license agreement amounts to royalty?

ISSUE III: Whether the reopening and the reassessment are bad in law?

ISSUE IV: Whether the petitioner is an assessee in default?

SUMMARY OF ARGUMENTS

I. THE WRIT FILED BEFORE THE HIGH COURT IS MAINTAINABLE

The writ petition filed by the petitioner is maintainable. *Firstly*, the existence of an efficacious alternative remedy in the Income Tax Act, 1961 would not oust the petitioner from filing the writ petition as fundamental rights have been infringed. *Secondly*, fundamental rights were infringed by the amendment introduced in S. 9(1)(vi) of the Income Tax Act, 1961 and therefore the writ will maintainable on this regard. *Thirdly*, the constitutionality of an act cannot be challenged in a tribunal established by the same act.

II. THE CONSIDERATION UNDER THE LICENSE AGREEMENT DOES NOT AMOUNT TO ROYALTY

The DTAA between Singapore and India cover the concerned parties as Zeon is a resident of Singapore. Zeon is a resident under S. 2 of the Singapore Income Tax Act, 1948 as its place of management and control is situated in Singapore. Therefore, S. 9 is not applicable.

In any case, Explanation 4 of S. 9(1)(vi) of the Income Tax Act is unconstitutional as it does not meet the criteria laid down by Article 14 of the Constitution of India. The legislature has arbitrarily and unreasonably added the explanation which alters the ambit of the original section. The explanation has broadened the ambit of royalty and given it a new meaning which is inconsistent with the existing judicial understanding. It also imposes royalty in transactions such as sale which was unheard of and is therefore invalid.

III. THE REOPENING AND REASSESSMENT IS BAD IN LAW

The reopening and reassessment are bad in law. *Firstly*, with regard to the reassessment, the assessing officer did not have any reason to believe that the income escaped assessment as the assessee had disclosed all material facts truly and fully. *Secondly,* the notice sent was in violation of S. 147 of the I-T Act. *Thirdly,* the reopening was in contravention of the CBDT Circular dated 29/05/2012. *Fourthly,* the deductions disallowed under S. 40(a)(ia) and the tax rate levied under S. 115(1)(b)(AA) are bad in law.

IV. THE PETITIONER HAS BEEN WRONGLY CHARGED AS AN ASSESSEE-IN-DEFAULT

Firstly, the assessee was not under an obligation to deduct sums under S. 194J. *Secondly,* the TDS on royalty was an impossible task keeping in mind the prevailing law at that time. *Thirdly,* there was bona fide reason to believe that tax was not deductable under S. 194J.

ARGUMENT ADVANCED

I. THE WRIT PETITION FILED IS MAINTAINABLE BEFORE THE HIGH COURT

(¶1.) The writ petition filed by the petitioner against the notice received under section 148 of the Income Tax Act, 1961 is maintainable, as it is independent of any alternative remedy **[A]**. Further, there is infringement of fundamental rights **[B]** and therefore the constitutionality of the statute is being challenged. **[C]**

A. The writ is independent of the existing alternative remedies

(¶2.) The existence of an alternative remedy does not operate as an absolute bar on the writ court[1] as it is a process that the court chooses to opt out of convenience and discretion[2]. Under special circumstances the High Court may grant writ remedies to a petitioner even with the existence of an alternative remedy.[3]

(¶3.) Writ jurisdiction in cases of reassessment can be exercised when the assessee proves that the assessing officer has acted out of jurisdiction[4], or when there has been an invalid application of the law.[5] With respect to the issuance of notice under S. 148 of the I-T Act, 1961 it has been held that notice issued beyond the expiry of four years would be sufficient ground to file a writ when there was no default on part of the assessee.[6] In the case at hand, the petitioner was sent a notice by the assessing officer u/s 148, I-T Act after the expiry of the limitation period[7], invoking retrospective liability. Therefore it is submitted that the assessing officer acted without jurisdiction and the writ remedy can be invoked.

B. Writ petition is maintainable when there is infringement of fundamental rights

(¶4.) A writ petition can be filed with respect to reassessment when there has been a contravention of fundamental rights[8]. It is humbly submitted by the petitioners that Explanation 4

[1] Shivram Poddar v. ITO, AIR 1964 SC 1095; Also see JUSTICE B L HANSARIA'S, WRIT JURSIDICTION (3 ed. 2005).
[2] JUSTICE B L HANSARIA'S, WRIT JURSIDICTION (3 ed. 2005); Union of India v. Hidalco Industries (2003) 5 SCC 194 (198); Union of India v. Bajaj Tempo Ltd., (1998) 9 SCC 281.
[3] Whirlpool Corporation v. Registrar of Trade Marks, (1998) 8 SCC 1 (11).
[4] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ed. 2014).
[5] SAMPATH IYENGAR, LAW OF INCOME TAX 441 (11th Ed. 2011).
[6] Claridges Hotel Pvt Ltd v ITO (1980) 123 ITR 844 (Del); Nagrath Chemicals Works (Pvt) Ltd v CIT (2004) 265 ITR 401 (All); Also see SAMPATH IYENGAR, LAW OF INCOME TAX 431 (11th Ed. 2011).
[7] Page 3, Moot Problem.
[8] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX 246 (10 ed. 2014).

to S. 9(i)(vi) introduced by way of an amendment[9] is infringing the rights of equality and free trade as enshrined by the Constitution under Articles 14 and 19(1)(g) respectively. The notice sent to the petitioner[10] imposed retrospective liability, which resulted in the infringement of fundamental rights. Therefore, it is submitted that the writ filed by the petitioners is maintainable.

C. Alternative remedy is not adequate for challenging constitutionality

(¶5.) It is a settled legal principle that a Tribunal cannot test the vires of the Act which establishes it.[11] Even though it acts as the court of first instance, it cannot declare any part of the act unconstitutional, if it is established by the same act.[12] Deriving from this principle, the alternative remedy open to the petitioner in this case, would be to conform to the remedies provided by the Tribunal under the I-T Act, 1961[13] which would not be an adequate remedy in this case as the petitioner by way of the writ petition is also questioning the constitutionality of Explanation 4 of S. 9(1)(vi) added by way of an amendment[14]. Therefore, it is submitted that the writ petition filed would be maintainable, as the alternate remedy is not adequate to address the claims of the petitioner.

(¶6.) Therefore, it is humbly submitted by the petitioner, that the writ petition filed would be maintainable.

II. THE CONSIDERATION UNDER THE LICENSE AGREEMENT DOES NOT CONSTITUTE ROYALTY.

(¶7.) It is humbly submitted that the consideration under the license agreement does not constitute royalty under S. 9(1)(vi) because the DTAA between Singapore and India (hereinafter 'DTAA S-I') pre-empts the application of I-T Act, 1948 **[A]**. *In any case,* it does not constitute royalty under S. 9(1)(vi) of the I-T Act **[B]**. *Further*, the Liaison Office (hereinafter 'LO') is not a business connection under S. 9(1), therefore the petitioner was not liable to deduct Tax deducted at source (hereinafter 'TDS') under the head of business profits **[C].**

[9] Explanation 4, Section 9(1)(vi), Finance Act, 2012.
[10] Page 3, Moot Problem.
[11] L. Chandra Kumar v. Union of India & others AIR1997SC1125.
[12] L. Chandra Kumar v. Union of India & others AIR1997SC1125.
[13] S. 246, Income Tax Act, 1961; s.154 Income Tax Act, 1961.
[14] Finance Act 2012.

A. The concerned transaction comes under the purview of the Singapore-India DTAA.

(¶8.) It is well settled that where India has entered into a treaty for avoidance of double taxation as also in respect of purposes referred to in S. 90 of the I-T Act, the contracting parties are governed by provisions of treaty.[15] The treaty overrides provisions of the Act.[16] It is submitted that Zeon is a resident under S. 2 of the Singapore Income Tax Act, 1948 **[i]** and the lack of a Tax Residency Certificate (hereinafter TRC) does not have any bearing on its residence **[ii]**. Further, Zeon's LO is not a permanent establishment (hereinafter 'PE') under Art. 5 of the DTAA I-S and therefore not taxable in India **[iii]**.

i. Zeon is a resident according to the definition of Resident under S. 2 of the I-T Act.

(¶9.) Tax conventions do not set rules as to how States have to design their domestic rules on tax residency. The expression 'in accordance with taxation laws of that state'[17] in Article 4 of the DTAA means that the person falls within the tax jurisdiction of the relevant country due to its domestic criteria of nexus.[18]

(¶10.) *Firstly*, under S. 2 of the Singapore Income Tax Act, 1948, a company is a resident as when '*the control and management of whose business is exercised in Singapore*'[19]. Domicile of a company doesn't have a part to play as a connecting factor in Income Tax Act, 1948.[20] The place of a company's incorporation or registration do not determine its residence under Singapore law.[21] Therefore, it is submitted that Zeon's place of incorporation i.e. Cayman Islands, does not have a bearing in the determination of its residence.

(¶11.) *Secondly*, ITBR[22] in the case of *NB v Comptroller of Income Tax*[23] held that the statutory "control and management" test is no different from that of common law[24].The taxable residence

[15] Union of India v. Azadi Bachao Andolan, (2003) 263 ITR 706 (SC).
[16] U.A.E. Exchange Centre Ltd. v. Union of India, (20090 313 ITR 94 (Delhi).
[17] Article 4(1), Agreement Between The Government Of The Republic Of Singapore And The Government Of The Republic Of India For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income, 1994.
[18] 26 MATHUR, GORL & SONNTAG, PRINCIPLES OF MODEL TAX CONVENTIONS AND INTERNATIONAL TAXATION, Vol. 1, Ed. 1.
[19] Income Tax Act (Singapore), Section 2 (1948).
[20] Singh Gurbachan & Henny Liow, *Treaties and Domestic Law Interact*, 6 Int'l Tax Rev. 41 (1995).
[21] Id.
[22] Singapore Income Tax Board of Review.
[23] NB v. Comptroller of Income Tax, (2006) SGITBR 2 (Singapore).
[24] De Beers Consolidated Mines Ltd v. Howe (1906) 5 TC 198 (HL); Cesena Co. Ltd. v. Nicholson (1876) 1 TC 83; Calcutta Jute Mills Co. Ltd. v. Nicholson (1876) 1 TC 83; Imperial Continental Gas Association v. Henry Nicholson (1876) 1 TC 138.

is to be determined by the place where the central management and control resides and not by the place of its incorporation.[25] Zeon's 'place of effective management' is located in Singapore as it carries on its software business primarily through Singapore[26]. It is humbly submitted that Zeon is a resident of Singapore under S. 2(resident) of Income Tax Act, 1948 (Singapore).

ii. *The lack of a TRC does not have any bearing on its resident status.*

(¶12.) *Firstly*, TRC was not a statutory requirement under S. 90 before the Finance Act 2013 was enacted. It became a *necessary but not sufficient* condition under Sec. 90(4) through a prospective amendment w.e.f 01/04/2012. Therefore, Zeon was under no statutory obligation to procure a TRC for the AYs for availing the benefits of the DTAA S-I.

(¶13.) *Moreover,* even in cases[27] before 2012, it has been held that the duty of the AO is to find whether or not the party is a resident by looking at all the surrounding circumstances and not just the TRC. Also, the apex court in *Vodafone*[28] held that TRC is not non-rebuttable proof. It can be deduced that even the presence of a TRC is not sufficient proof of residence. Therefore, it is humbly submitted that the residency of Zeon cannot be decided singularly on the basis of a lack of a TRC.

iii. *Zeon's LO is not a permanent establishment and therefore not taxable in India*

(¶14.) An entity is considered a PE under Art. 5 of the DTAA S-I when the 'fixed place of business through which business of the enterprise is partly or wholly carried out' through it. Business, wholly or partly, is said to be carried out from a place when the financial and management decisions are taken from that place. In an identical case[29], Authority for Advanced Rulings held that the LO cannot be considered to be a PE. Zeon's LO also undertook auxiliary activities like liaising with clients and giving presentations which do not come under the purview of carrying out of business. *Moreover*, the activities of Zeon's LO which consisted of liaising with clients and providing presentations[30] fall under the exclusionary clause found in Art. 5(7)(e)

[25] British Columbia Electric Railway Co. Ltd. v. King (1947) 15 ITR Supp 1 (PC); London Bank of Mexico v. Apthorpe (1891) 3 TC 143; Sao Paulo Railway Co. Ltd. v. Carter (1896) 3 TC 198; Noble Ltd (BW) v. Mitchell (1926) 11 TC 372.
[26] Page 1, Moot Problem.
[27] ADIT, CIR. 1(1) (International Taxation) v. Vinod Arora, (2012) 139 ITD 205 (Del); Hindustan Petroleum Corporation Ltd. v. Assistant Director of Income Tax, International Taxation, (2010) 36 SOT 120 (Mum).
[28] Vodafone International Holdings B.V. v. Union of India and Anr., (2012) 341 ITR 1 (SC).
[29] K.T. Corporation, (2009) 181 Taxman 94 (AAR-New Delhi).
[30] Page 1, Moot Problem.

which is: 'the maintenance of a fixed place solely for the purpose of advertising, for the supply of information'.[31] It is humbly submitted that Zeon's LO is not a PE and hence not taxable in India.

B. The consideration paid by the petitioner does not amount to royalty under S. 9 of the I-T Act.

i. *The true nature of the consideration given under the agreement is not royalty.*

(¶15.) The main element to be ascertained in a transaction is the true nature of the transaction irrespective of whatever term it is commonly referred to.[32] In the case at hand, the petitioner only has the right to use[33] under the agreement and consideration under an identical agreement[34] has been held to not constitute royalty. Further, the agreement is for a sale of goods as it is a perpetual license. Explanation 4 to S. 9(1)(vi) of the I-T Act therefore imposes the implications of royalty even in cases where it is not in the nature of royalty such as sale of goods.

ii. *The explanation has removed the distinction of transfer of Copyright and the transfer of "copyrighted goods"*

(¶16.) It is submitted that limiting or restricting the scope of a definition in a statute by way of an explanation is an act of exercise of the unguided discretion of the legislature.[35] The Apex Court in the case of *Tata Consultancy Services v. State of AP*[36], has held that '*the buyer only acquires ownership of that particular copy but not the intellectual property in the copyright*' and the software was held to be a sale within the meaning of Art. 366(12) of the Constitution of India. This view of the court has been reiterated in a number of judicial pronouncements.[37] It is hence submitted that as a consequence of the amendment, royalty has to be paid even for a transfer or sale of copyrighted goods instead of only a transfer of the right of copyright.

[31] U.A.E. Exchange Centre Ltd. v. Union of India, (20090 313 ITR 94 (Delhi).
[32] CBDT v. Oberoi Hotels (1998) 231 ITR 148 (SC); Nicholas Applegate South East Asia Fund Ltd. v. ADI (International Taxation) (2009) 117 ITD 299 (Mum).
[33] Page 2, Moot Problem. Clause 2(a) of the license agreement.
[34] DDIT v. Reliance Communications Infra v. Lucent Technologies, (2014) 159 TTJ (Mum).
[35] Rai Saheb Rekchand Mohota Spg and Wvg Mills v. Labour Court (1968) AIR 151; Chotabhai Jetubhai Patel & Co v. State of Madhya Pradesh (1968) AIR 127 (MP).
[36] Tata Consultancy Services v. State of A.P., 271 ITR 401 (SC).
[37] Novell Inc, Mumbai v. Assessee on 28 November, 2011 Mumbai ITAT; DIT v. Ericsson AB (343 ITR 470)(Del), DIT v. Nokia Networks (ITA 512/2007).

iii. *The explanation has altered the meaning of Royalty and broadened its ambit and the same is inconsistent with the pre-amendment provision*

(¶17.) It is respectfully submitted that an explanation does not enlarge the scope of the original section that it is supposed to explain.[38] Judicial pronouncements have clarified[39] that royalty was to be paid when there was a transfer of right over goods and not when there was a sale. The explanation subsequent to the amendment imposes royalty even in transactions of sale, which is an unprecedented position, inconsistent with the meaning laid down in the Copyright Act, 1957 (hereinafter 'Copyright Act') and additionally, is also inconsistent with judicial opinion. Additionally, it has been held in the case of *Dassault Systems Simulia P Ltd. v. Department Of Income Tax*[40] that payment towards the purchase of a copyrighted article does not fit within the meaning of royalty under S. 14 of the Copyright Act and hence cannot be treated as royalty under S. 9 (1)(vi) of the I-T Act. It is therefore submitted that the explanation introduced by way of the amendment has led to glaring inconsistencies with the existing law and judicial opinion.

iv *Explanation 4 to S. 9(1)(vi) of the I-T Act is discriminatory and unconstitutional under Art. 14 as it treats unequal equally*

(¶18.) It is submitted that a tax statute must fulfill the test of reasonableness and equality before law, which is guaranteed under Art. 14 of the Constitution of India, 1950 (hereinafter 'Constitution').[41] The doctrine of equal protection applies to taxation law like any other law,[42] and is likely to be struck down if it contravenes the constitutional provisions or does not perpetuate a reasonable classification.[43] Moreover, any classification made by the State must have an intelligible differentia and this differentia must have a rational relation to the object

[38]Kishen Singh v Prem Singh (1939) AIR 587 (Lah); AMID DHANDHA, NS BINDRA'S INTERPRETATION OF STATUTES 250 (11th Ed. 2010).
[39]M/s VelankaniMauritus Ltd v. DCIT (IT), 4th October 2010 (Bang.); MotoralaInc v. DCIT 95 ITD 269 (Del); Airports Authority of India, 28th December 2010 (Del).
[40] Dassaults System v. Department of Income Tax, (2014) ITA No. 1027(Mds)/2013.
[41]Khyerbari Tea Co. v. State of Assam, (1964) AIR 925 (SC).
[42]Khandinge v. Agricultural ITO, (1963) AIR 291 (SC); Kunnathat v. State of Kerela, (1961) 3 SCR 77.
[43] N.M.C.S. Mills v. Ahmedabad Municipality, (1967) AIR 180 (SC).

which is sought to be achieved by the statute.[44] The corollary to the rule under Art. 14 is that unequals should not be treated equally.[45]

(¶19.) It is hence submitted that explanation 4 to S. 9(1)(vi) of the I-T Act is in contravention of article 14 as, in the case of royalty, prior to the amendment, royalty was required to be paid only for all or any rights over the copyright. However, subsequent to the amendment, the assessee is required to pay royalty for a mere right to use the copyrighted article in contrast to the owner of the copyright who receives in consideration for paying royalty, the right of usage along with the right over the copyright. Therefore it is submitted that the aforementioned explanation imposes the same duty to pay royalty over two assesses having substantially unequal status, thereby violating Art. 14 of the Constitution.

v. *The legislature has arbitrarily and unreasonably added the explanation which alters the ambit of the original section and it is therefore invalid.*

(¶20.) It is respectfully submitted that an exercise of arbitrary power would result in inequality and violation of Art. 14 of the Constitution.[46] The explanation to S. 9(1)(vi) of the I-T Act reflects arbitrariness as it has substantially altered the prior existing law and its implications, and is in complete contrast to the intent behind the section as it existed before the explanation was introduced.

(¶21.) Therefore, it is humbly submitted before this Hon'ble court that the consideration given under the agreement does not constitute royalty.

C. The LO is not a Business Connection and hence the petitioner is not liable to deduct TDS

(¶22.) The question of business connection is a mixed question of fact and law.[47] The burden of proof on the I-T Department under S. 9(1) is that *firstly,* function of liaison office was not limited to liaison work and therefore it constitutes a business connection.[48] *Secondly*, that income arose or accrued through the LO.

[44] State of West Bengal v. Anwar Ali Sarkar, (1952) AIR 75 (SC), Budhan v. State of Bihar, (1955) AIR 191 (SC); Harakchand v. Union of India, (1969) 2 SCC 166; (1970) AIR 1453 (SC); State of Bombay v. F.N. Balsara, (1951) AIR 318 (SC).
[45] M.P. JAIN, INDIANCONSTITUTIONAL LAW 1002 (2003).
[46] Avinder Singh v. State of Punjab, (1979) AIR 321 (SC).
[47] GVK Industries Ltd. v. ITO, (1997) 228 ITR 564 (AP).
[48] Ikea Trading (Hong Kong) Ltd, In re, (2009) 308 ITR 422 (AAR).

(¶23.) *Firstly*, an entity is considered a business connection under Explanation 2(c) to S. 9(1) when it 'habitually secures orders in India, mainly or wholly for the non resident'. The relation has to be a 'business connection' must be close, commonness of interest, real and intimate.[49] In the immediate case, Zeon's LO was just engaged in liaising and advertising and that does not constitute a business connection.

(¶24.) *Secondly*, income cannot be said to be an income arising or accruing under S. 9(1) if the person who purchases the goods pays the money directly to the non-resident.[50] The facts[51] say that the LO was engaged in advertising and liaising with clients and wasn't involved in financial matters. Therefore, it can be reasonable deduced that Zeon's LO did not have any revenue streams and that the activities were incidental to the main business.

(¶25.) Therefore it is humbly submitted that Zeon's LO does not constitute a business connection for the purposes of S. 9(1) and hence the petitioner was not liable to deduct TDS under the head of business profits.

III. THE REOPENING AND THE REASSESSMENT ARE BAD IN LAW

(¶26.) The petitioner submits that the reopening **[A]** and reassessment **[B]** are in violation of law and should be regarded as invalid proceedings.

A. The Reassessment proceeding is bad in law

(¶27.) It is submitted that the assessment for the concerned AYs is in violation of law **[i]** and is in contravention of the Central Board of Direct Taxes (hereinafter 'CBDT') circular dated 29/05/2012 **[ii]**.

i. The Reassessment cannot be conducted for the concerned AYs

(¶28.) It is submitted that the assessee had disclosed all material facts **[a]** truly and fully **[b]**regarding the assessment and hence the reassessment proceedings initiated under S. 147 of the I-T Act is in violation of the prescribed limitation period of four years **[c]**. It is further submitted that the notice served under S. 148 is invalid **[d]**.

[49] Commissioner of Income-Tax, Punjab v. R.D. Agarwal, (1965) ITR LVI 24; GVK Industries Ltd. v. ITO, (1997) 228 ITR 564 (AP).
[50] The Commissioner of Income Tax v Nike Inc., (2013) 217 TAXMAN 1 (Kar).
[51] Page. 1, Moot Problem.

a. The assessee has disclosed all material facts

(¶29.) It is submitted before this Hon'ble Court that the requirement of disclosing material facts under S. 147 of the I-T Act is a pre-requisite for filing of returns under S. 139 of the I-T Act or as response to a notice under S. 142(1)or S. 148[52] of the I-T Act. These facts if not taken into account would have an adverse effect on the assessee thereby resulting in a larger assessment than the one originally made[53]. Moreover, this duty of the assessee commences from the time of filing the return[54] and extends to instances of the assessing officer calling upon any substantive detail necessary for the conduction of the assessment[55]. The petitioners in the present circumstances had filed their returns for the concerned AYs without delay and had cooperated with the assessing officer in all respects when the assessment procedures were conducted under Ss. 143(1) and 143(3) of the I-T Act for the relevant AYs[56].

(¶30.) Additionally, the assessee is under a liability to disclose only primary facts[57] and not any legal or factual inference derived from it,[58]and the burden of proving any concealment on the part of the assessee, lies on the assessing officer[59]. It is hence submitted that the petitioner has extended complete cooperation to the Income Tax department, and has at all instances provided the assessing officer with necessary documents as and when required, therefore actively ensuring disclosure of all material facts.

b. The Assessee has disclosed all facts fully and truly

(¶31.) It is submitted that a duty to disclose facts truly and fully arises only when the assessee has knowledge of the facts[60]. It is abundantly clear that the implication of 'disclose' as

[52] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ed. 2014); SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012).
[53] ITO v. Selected Dalurband Coal Co P Ltd, (1996) 217 ITR 597 (SC); Bawa Abhai Singh v. DCIT, (2002) 253ITR 83 (Del); Also see SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012), pg 10027.
[54] Modi Spg & Wvg Mills v. ITO, (1975) 101 ITR 637; KCP Ltd v. ITO, (1984) 146 ITR 284 (AP); Kanchanbai v. CIT, (1979) 117 ITR 53(AP).
[55] SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012) page 10023.
[56] Page 3, Moot Problem.
[57] Calcutta Discount Co Ltd v. ITO, (1961) 41 ITR 191 (SC); CIT v. Chidambaram Chettiar , (1971) 80 ITR 467 (SC); Khan Bhadur Hormashi Maneckji Dossabhoy Hormashi Bhiwandiwalla and Co. v. IAC, (1991) 188 ITR 203 (Bom).
[58] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ed. 2014) page 2173; Also see CIT v. Hemchandra, 77 ITR 1 (SC); Grindlays v. ITO, 116 ITR 710; CIT v. Burlop, 79 ITR 609 (SC); Star Automobiles v. ITO, 17 8 ITR 613; Kibe v. CWT, 169 ITR 40; Imperial Chemicals Inds v. ITO ,111 ITR 614.
[59] CIT v. Bhanji Lavji, (1971) 79 ITR 582 (SC).
[60] SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012), page- 10027.

mentioned in the statute[61], is always in relation to facts which the assessee is aware of[62] and any violation of disclosure happens when the assessee withholds material information known to him at the relevant time from the assessing officer[63]. In the case at hand, the notice issued under S. 148 of the I-T Act recorded reasons in the manner of retrospective liability which were not known to the assessee at the time of making the assessment. The assessee had provided all other primary information, at the time of making assessment. Therefore it is submitted that the petitioner did not default in disclosing any material information fully and truly to the assessing officer.

c. The assessment was conducted beyond the period of four years

(¶32.) It is submitted that S. 147 of the I-T Act provides that reassessment cannot be conducted beyond the expiry of four years from the relevant AY, unless there is fault on part of the assessee in disclosing material information fully and truly[64]. The petitioner has abundantly clarified that the assessee has not defaulted in disclosing any material information fully and truly to the assessing officer, hence the limitation period of four years would be applicable in the present facts of the case.

(¶33.) It is further submitted that a retrospective amendment cannot be an exception to the prescribed limitation for the purpose of carrying out a reassessment under S. 147 read with S. 148 of the I-T Act.**a.** *A retrospective amendment in the law cannot be an exception to the limitation period.*

(¶34.) It is submitted that a retrospective amendment does not empower the assessing officer to reopen the assessment after the expiry of four years.[65] Moreover, this view has been consistently upheld by way of judicial review, wherein it has been stated that when there is no fault on part of the assessee in terms of disclosure then a retrospective amendment cannot be used as a tool to reopen an assessment[66].Therefore, it is submitted that explanation 4 to S. 9(1)(vi) of the I-T Act

[61] S.147, Income Tax Act, 1961.
[62] Canara Sales Corpn Ltd v. CIT, (1989) 176 ITR 340 (Kar).
[63] Mukhtiar Singh Sandhu v. ITO, (1986) 160 ITR 526 (P&H); CIT v. Balvantrai S Jain, (1969) 72 ITR 59 (Bom); ITO v. Calcutta Chromotype Pvt Ltd, (1974) 97 ITR 55; Also see SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012).
[64] Proviso 2, s. 147, Income Tax Act, 1961.
[65] CIT v. K. Mohan & Co.(Exports), 349 ITR 653(Bom).
[66] CIT v. K. Mohan & Co.(Exports), 349 ITR 653(Bom); Sadbhav Engineering Ltd. v. Dy. Commissioner Of Income Tax , 333 ITR 483 (Guj); Cadila Healthcare Ltd. v.Dy. Commissioner Of Income Tax And Another, 334 ITR 420(Guj).

introduced by way of amendment[67] would not empower the assessing officer to reopen the assessment of assessment years beginning from 2003-04. Hence, as per the facts of this case, the notice under S.148 having been served in July 2014[68] is beyond the expiry of the limitation period of four years for the relevant AYs therefore rendering the reassessment invalid.

d. The notice served under section 148 is invalid

(¶35.) The petitioner submits before this Hon'ble Court that S. 148 of the I-T Act prescribes a limitation period, within which a notice must be served to the assessee. A notice of reopening an assessment under S. 148 of the I-T Act is subject to the threshold requirement of S. 147 of the I-T Act[69]. Additionally, the validity of the notice[70] is a condition precedent to the initiation of any proceeding under S. 147 of the I-T Act[71]. It is submitted that the notice sent to the petitioners under S. 148 of the I-T Act is invalid on grounds of being vague **[1]** and on having been served on the expiry of the limitation period **[2].**

1. The notice served is vague

(¶36.) It is submitted that when there is no definite or specific material mentioned in the notice served, or when the notice is vague,[72] an initiation of reassessment proceedings would be held to be invalid[73]. In absence of any irregularity as regards the persons to whom it is served, any irregularity or clerical mistake in the notice can be disregarded[74]. However in the case at hand, the petitioner was served a single notice under S. 148 of the I-T Act with reference to all the AYs beginning from 2003-04[75]. The I-T Act mandates that the notice served to the assessee must specify the AY in order to comply with the precondition of limitation and to ensure that the notice is clear in all respects. In the present circumstances of the case, since the notice served to

[67] Finance Act 2012.
[68] Page 3, Moot Problem.
[69] SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012), pg- 10197.
[70] SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012)page 10203; KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX page 2203-04; Also see Narayan v. ITO, 35 ITR 388 (SC); CIT v. Pratap, 41 ITR 421 (SC); CIT v. Robert, 48 ITR 177 (SC).
[71] CIT v. Thayaballi Mulla Jeevaji Kapasi, (1967) 66 ITR 147 (SC); CIT v. Mintu Kalita, (2002) 253 ITR 334 (Gau); Sasikumar (PN) v. CIT, (1988) 170 ITR 80 (Ker).
[72] ITO v. Chandiprasad 119 ITR 340; Madablal v. CIT, 144 ITR 745.
[73] Eveready Industries India Ltd v. JCIT (Asst), (2000) 243 ITR 540 (Gau); Siemens Information System Ltd v. ACIT, (2007) 293 ITR 548 (Bom); IIFCO Ltd v. JCIT, (2008) 296 ITR (AT) 68 (Del).
[74] CIT v. Vidarbha Housing Board, (1988) 171 ITR 481 (Bom).
[75] Page 3, Moot Problem.

the petitioner was vague, it is submitted that the notice is invalid as per the provisions of the I-T Act.

2. The notice served exceeded the limitation period

(¶37.) It is humbly submitted that a notice served under S. 148 of the I-T Act must comply with limitation period of four years; beyond which if it is served to the assessee, it is to be regarded as an invalid notice. Since the notice served to the petitioners by the assessing officer, addresses the assessment years starting from 2003-04, thereby exceeding the period of limitation, the same is invalid in law.

ii. *The Reopening is in contravention with the CBDT circular dated 29/05/2012.*

(¶38.) The petitioner most respectfully submits that the circular issued by the CBDT[76] abundantly clarifies that assessments which have been completed and have thus attained finality under S. 143(3) of the I-T Act prior to April 1, 2012 shall not be reopened under S. 147 of the I-T Act. It has been reiterated by the Courts that circulars or general directions issued by the CBDT would be binding under S. 119 of the I-T Act on all officers and persons employed, in the execution of the I-T Act.[77]

(¶39.) It is further submitted that the principles regarding finality of an assessment state that an assessee is entitled not to be subjected to reassessment unless the statute permits reassessment to be carried out.[78] Additionally, as long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act.[79]

(¶40.) Therefore the petitioner humbly submits that the reassessment proceedings initiated by the respondent was in violation of the CBDT circular and since the circular is binding on the respondent, the reassessment proceedings initiated were in violation of law.

[76] No. F. No. 500/111/12009-FTD-1(Pt.) dated 29/05/2012.
[77] ITO v. Manoharlal Kothari, 236 ITR 257; Grindlays Bank v. CIT, 201 ITR 148; CIT v. Ankitesh P. Ltd., 340 ITR 14.
[78] Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 106 ITR 1 (SC); Merchant v. CED, (1989) 177 ITR 490 (SC); Vipan Khanna v. CIT ,(2002) 255 ITR 220 (P&H); Kapoor Bros. v. Union of India ,(2001) 247 ITR 324 (Pat).
[79] Catholic Syrian Bank Ltd. v CIT, 343 ITR 270 (SC).

B. The returns have been incorrectly reassessed by the assessing officer under S. 147 of the I-T act.

(¶41.) It is submitted that the reassessment has been wrongly completed by the Assessing Officer as the deduction has been wrongly disallowed**[i]** and the interest of 25 percent has been incorrectly imposed on the petitioners **[ii]**.

i. *The deduction has been wrongly disallowed.*

(¶42.) It is submitted that for the purpose of S. 40(a)(ia), royalty shall have the same meaning as in Explanation 2 of S. 9(1)(vi) and therefore the consideration given under the license agreement will not be considered as royalty. Explanation 4 which was introduced w.e.f. 1.6.1976 by the Finance Act, 2012 has no effect as that explanation was not referred to in S. 40(a)(ia). Since the definition of royalty was specifically mentioned in S. 40(a)(ia), the examination of the issue can only be made with reference to Explanation 2 alone in accordance with the concept of legislation by incorporation. The explanation 4 cannot be considered as the same was not incorporated in definition of royalty in S. 40(a)(ia).[80] Therefore, it is submitted that the deduction cannot be disallowed.

ii. *The rate of interest has been wrongly imposed on the petitioners*

(¶43.) The Finance Act 2013 introduced an amendment to S. 115A, in order to ensure uniform tax liability for non-resident tax payers. The amendment increased the percentage of tax levied in cases of royalty from 10 percent to 25 percent[81]. The amendment would be brought into force with effect from 2013 as clearly stated in the text of legislation. The assessing officer imputed the tax liability of 25 percent on the assessees for all the Assessment Years, starting from 2003-04[82], which effectively imputed retrospective liability for a prospective legislation. Such imposition is in violation of law, as it is a settled principle that prospective legislations cannot be applied retrospectively. Therefore, it is submitted by the petitioners that, percentage of tax imposed by the assessing officer is an incorrect application of law and thus is an invalid reassessment.

[80] Sonata Information Technology Ltd. v D.C.I.T., 2012 (19) ITR (Trib) 408 (Mumbai).
[81] The Finance Act, 2013.
[82] Page 3, Moot Problem.

IV. THE PETITIONER HAS BEEN WRONGLY CHARGED AS AN ASSESSEE-IN-DEFAULT

(¶44.) Withholding taxes like TDS require that when a person is responsible for paying any sum, he withholds applicable taxes as an agent of the Government and is indeed recovering tax on behalf of the Government.[83] The petitioner has been wrongly charged as an assessee-in-default under S. 201 of the I-T Act as he was not required to deduct any sums **[A]**, deduction was an impossible task under the then prevailing law **[B]**, and he was under a bona fide belief that the consideration did not amount to royalty **[C]**.

A. The petitioner has been wrongly charged as an assessee-in-default under Sec. 201 of the I-T Act as he was not required to deduct any sums.

(¶45.) Under S. 201, if a payer 'does not deduct the tax', then he would be deemed to be an assessee-in-default with respect to the tax.[84] It is submitted that the petitioner was not liable to deduct TDS under S. 194J during the concerned AYs because the consideration did not constitute royalty under S. 9(1)(vi) of the I-T Act.[85] Therefore, it is submitted that the assessee was not required to deduct any taxes under S. 201 and is not an assessee-in-default.

B. Deduction was an impossible task under the then prevailing law.

(¶46.) The maxim *lex non cogit ad impossiblia* upheld by the apex court[86] is applicable here. The Mumbai Tribunal in the case of *Channel Guide*[87] laid down that previous AYs payments cannot be held to be in the nature of royalty given the retrospective clarifications.[88] This decision has found support in many subsequent cases[89]. Moreover, the taxpayer will have to practically bear the burden of tax, interest, penalty and disallowances for no mistake on his part.[90]

[83] 119 BMR ADVISORS, MANAGING TAX DISPUTES IN INDIA (1st Ed., 2013).
[84] CIT v. Ranoli Investment, 235 ITR 433; Bennett Coleman v. Damle, 157 ITR 812.
[85] Para 16, Arguments Advanced.
[86] Krishnaswamy S. Pd v. Union of India, (2006) 281 ITR 305 (SC).
[87] Channel Guide India Ltd., (2012) 20 ITR(T) 438 (Mumbai Tribunal).
[88] Additional Commissioner of Income Tax v. Metro & Metro, I.T.A., No. 287/2013 (Agra).
[89] Metro and Metro v. Additional Commissioner of Income Tax, (2014) 29 ITR (Trib) 772 (Agra); Assistant Commissioner of Income Tax v. Zee News Ltd., (2013) 27 ITR 240 (Mum); M/s. New Bombay Park Hotel Pvt. Ltd. v. Income Tax Officer (International Taxation), (2014) 61 SOT 105 (Mum); M/s. Exotic Fruits Pvt. Ltd. v. Income Tax Officer (International Taxation), (2014) 62 SOT 247 (Bang); Infotech Enterprises Ltd. v. Addl. CIT, (2014) 30 ITR (Trib) 542 (Hyderabad); Kerala Vision v. Assistant Commissioner of Income Tax, I.T.A. No. 794/2013 (Coch); Kodak Polychrome Graphics (I) (P.) Ltd. v. Additional Commissioner of Income-tax, (2014) 147 ITD 603(Mum).
[90] Sunil M. Lala, *Strong signal against retrospective amendment*, Business Line, November 4, 2012.

(¶47.) In the immediate case, the retrospective amendment[91] was brought about by the Finance Act 2012 which was nowhere in sight at the material points of time, i.e. AYs 2002-2008. Therefore, it was an impossible task for the petitioner to perform. It is therefore submitted that the law cannot cast the burden of performing the impossible task of performing tax withholding obligations with retrospective effect.

C. The petitioner was under a bona fide belief that the consideration under the agreement did not amount to royalty.

(¶48.) At the time when the payments were made, the law regarding royalty was not clear, as shown above[92]. Due to the conflicting judgments on the issue regarding rights[93] that came along with a copyrighted software, the petitioner was of the bona fide belief that TDS was not necessary on payments to the non-residents.[94] The Assessee had bona fide reason to believe that tax was not deductible under S. 194J of the I-T Act.

Therefore, it is submitted that the petitioner has been wrongly charged as an assessee-in-default.

[91] Income Tax Act, Explanations 4-6 to Section 9(1)(vi) (1961).
[92] Para 16, Arguments Advanced.
[93] Income Tax Act, Explanation 2(i) to Section 9(1)(vi) (1961).
[94] Infotech Enterprises Ltd. v. Additional Commissioner of Income Tax, (2014) 30 ITR (Trib) 542 (Hyd).

PRAYER

In light of the issues raised, arguments advanced and authorities cited, the counsel for the Petitioner humbly prays that the Hon'ble Court be pleased to adjudge, hold and declare:

1. That, the writ filed is maintainable in the court of law.
2. That, the consideration given under the agreement is not royalty.
3. That, the Amendment to Section 9(1)(vi) of I-T Act is invalid and unconstitutional.
4. That, the reopening and reassessment under S. 147 of I-T Act is bad in law.
5. That, the petitioner is not an assessee-in-default.

And pass any order that this Hon'ble court may deem fit in the interest of equity, justice and good conscience.

And for this act of kindness, the counsel for the petitioner shall duty bound forever pray.

Sd/-

(Counsel *for* Petitioner)