Team Code- P118

2nd KIIT University National Moot Court Competition, 2014

In the High Court of Judicature at Bombay

Civil Writ Petition No.__OF 2014

Case Concerning
Income Tax Act, 1961

In The Matter Of:

CHEETAH & CHETAK PVT. LTD

(Petitioner)

Versus

INCOME TAX AUTHORITY

(Respondent)

Memorandum on behalf of Petitioner

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LIST OF ABBREVIATIONS

&	And
S.	Section
AAR	Authority for advance rulings
Act	Income Tax Act, 1961
ACIT	Additional Commissioner of Income Tax
AIR	All India Reporter
All	Allahabad
AO	Assessing officer
Asst.	Assistant
Bom	Bombay
Cal	Calcutta
CBDT	Central Board of Direct Taxes
CIT	Commissioner of Income Tax
CTR	Current Tax Reporter
Co.	Company
DCIT	Deputy Commissioner of Income Tax
Del	Delhi
DIT	Department of Income Tax
DTR	Direct Tax Reports
Dy.	Deputy
ed.	Edition
Fed.	Federal

Guj	Gujarat
Id.	Ibidem
IT	Income Tax
ITA	Income Tax Appeal
ITAT	Income Tax Appellant Tribunal
ITD	Income- Tax Tribunal Decision
ITO	Income Tax Officer
ITR	Income Tax Reporter
KAR	Karnataka
Ltd.	Limited
Mad	Madras
Mum	Mumbai
Nag	Nagpur
Ors.	Others
SC	Supreme Court
SCC	Supreme Court Cases
SOT	Some Other Orders of Tribunal
TTJ	Tax Tribunal Judgment
UOI	Union of India
u/s	Under Section
v.	versus

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- PALKHIVALA AND VYAS, THE LAWS AND PRACTICE OF INCOME TAX (9th ED.2012).
- SAMPATH IYENGAR , LAW OF INCOME TAX (10thED, 2009).
- V. C. RAMACHANDRAN, LAW OF WRITS (6th ED., EASTERN BOOK COMPANY VOL. 1) 2006.

OTHER DOCUMENTS

- CBDT Instruction No. F.No. 500/111 12009-FTD-1 (Pt)
- IRAS-e Tax Guide: Rights-Based Approach for Characterizing Software Payments and Payments for the Use of or the Right to Use Information and Digitized Goods http://www.iras.gov.sg/irashome/uploadedfiles/e-Tax_Guide/etaxguides_CIT_rights-based%20approach_2013-02-08.pdf
- India Singapore DTAA.
- OECD Commentaries on Model Tax Convention.

STATEMENT OF JURISDICTION

The Petitioner approaches the Hon'ble Bombay High Court under Article 226 of the Constitution of India.

STATEMENT OF FACTS

1. **Zeon** is a private company incorporated in the Cayman Islands but carries on its software business primarily through Singapore. Zeon is an IT & ITES company, having several employees across the world, including India. Zeon 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. Zeon has not been able to obtain a Tax Residency Certificate from Singapore, in order to claim Singapore tax residency for Indian tax purposes.

2. After many years of perseverance, hard work and dedication, Zeon has designed shrink-wrapped software which could predict how well a new recruit would perform in an organization that was going to hire him/her. Incidental to this, the software also predicted how well the employee would blend in the organization with respect to the culture, values etc. of the organization.

3. **Cheetah & Chetak Private Limited**, an Indian manufacturing private limited company, having its registered office in Mumbai decided to buy this software in AY 2003-04, as it was facing some issues with the employees that it was hiring.

4. An agreement was entered into between the manufacturing company and Zeon for purchase of software **("Agreement")** .The payment for the software was on a year on year basis and thus every year the manufacturing company paid Zeon the agreed sum of INR 35,00,000. No TDS was deducted by the manufacturing company at the time of making payments.

5. The manufacturing company filed its income tax return regularly without delays. For AY 03-04 and 04-05 assessment order under Section 143(3) of the Income Tax Act, 1961 was passed. For AY 2005-06, assessment was completed under Section 143(1) and for the AYs 2006-07, 2007-08, 2008-09 it was completed under 143(3). The assessing officer had accepted the returns and the transaction with Zeon in all these years. At the time when the assessments were taking place, the assessee co-operated with the tax department and provided it with all documents as and when the assessing officer asked.

6. However, on July 4, 2014, the assessing officer sent a notice under Section 148 to Cheetah & Chetak Private Limited. The assessing officer disallowed the deduction claimed for payments made for these AYs and sort to recover Rs. 50 lacs from the assesse. The reason cited by the assessing officer for all these years was that payments made by the Indian manufacturer constituted 'royalty' under section 9 of the Income tax Act, 1961, and thus tax should have been withheld at the rate of 25% for all these years, while making payment to Zeon for the software. The manufacturing company was also being charged under the ITA as an 'assessee-in-default'.

7. Aggrieved by all that was happening, the assessee filed a writ petition in the High Court of Bombay for all the AYs for which it had received a 148 notice.Since the matter in hand was the same for all years, a single writ petition was filed for all the AYs.

ISSUES RAISED

1. WHETHER, ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW THE PRESENT WRIT PETITION IS MAINTAINABLE BEFORE THIS HON'BLE HIGH COURT?

2. WHETHER, ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE LEARNED AO ERRED IN DISALLOWING PAYMENT MADE TO PURCHASE SOFTWARE FROM ZEON?

3. WHETHER, ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE ASSESSEE SHOULD BE CONSIDERED AS AN 'ASSESSEE IN DEFAULT' AND SHOULD BE LIABLE TO PAY INTEREST AND PENALTY FOR NOT DEDUCTING TAX AT SOURCE?

SUMMARY OF ARGUMENTS

1. **ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW THE PRESENT WRIT PETITION IS MAINTAINABLE BEFORE THIS HON'BLE HIGH COURT.**

The assessee submits that the present writ petition is maintainable on the ground that the reassessment order passed by the AO under Section 147 is without jurisdiction and further, the reassessment notice issued in the wake of retrospective amendment is also bad in law**.** The assessee also contends that the reassessment notice issued in the instant case is without jurisdiction because the AO has not complied with the mandate as required under Section of 147 of the Income Tax Act as AO had no 'reason to believe' to reopen the assessment and also the same is time barred. Consequently, the present writ petition cannot be deemed to be non maintainable for the assessee not having exhausted 'alternative remedy'.

2. **ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE LEARNED AO ERRED IN DISALLOWING PAYMENT MADE TO PURCHASE SOFTWARE FROM ZEON.**

The Assessee herein submits that such a disallowance pursuant to s. 40(a)(i) of the Income Tax Act is invalid in law as a 'shrink wrap software' being a 'good', is a 'copyrighted article' and thus the instant transaction is in the nature of sale not amounting to 'royalty' and further the use of the said software also does not lead to the use of patent, invention or a process. Moreover, to determine the ambit of the term 'royalty' for the purpose of s. 40(a)(i), reference should only be made to Explanation 2 of s.9(1)(vi) and not Explanation 4 of the same. Additionally, the aforementioned disallowance is bad in law also on the ground that retrospective amendments are considered to be non-applicable to alter the TDS liability. ***Without prejudice to the above,*** the assessee in the instant case can also seek relief under the India-Singapore DTAA. It is most humbly submitted that the assessee in the instant case is entitled to seek relief under the DTAA.

3. **ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE ASSESSEE SHOULD NOT BE CONSIDERED AS AN 'ASSESSEE IN DEFAULT' AND SHOULD BE LIABLE TO PAY INTEREST AND PENALTY FOR NOT DEDUCTING TAX AT SOURCE.**

The assessee submits that initiation of proceedings under Section 201 are liable to be set aside as the same are time barred and the same cannot be invoked on the basis of a retrospective amendment.

ARGUMENTS ADVANCED

[I] THE PRESENT WRIT PETITION IS MAINTAINABLE BEFORE THIS HON'BLE HIGH COURT.

The remedy of writ is an extraordinary remedy which is granted by the courts in appropriate cases to prevent violation of justice[1] or in cases where any executive authority has acted without or in excess of its jurisdiction.[2]The assessee submits that the present writ petition is maintainable on the ground that the reassessment order passed by the AO under Section 147 is without jurisdiction **[A]** and further, the reassessment notice issued in the wake of retrospective amendment is also bad in law **[B].**

[I.A] THE REASSESSMENT NOTICE IN THE PRESENT CASE HAS BEEN ISSUED WITHOUT JURISDICTION AND HENCE, THE ASSESSEE IS NOT BOUND TO TAKE RECOURSE TO 'ALTERNATIVE REMEDY'.

The assessee submits that the reassessment notice issued in the instant case is without jurisdiction because the AO has not complied with the mandate as required under Section of 147 of the Income Tax Act as AO had no 'reason to believe' to reopen the assessment **[A.1]** and the same is time barred **[A.2].** Consequently, the present writ petition cannot be deemed to be non maintainable for the assessee not having exhausted 'alternative remedy'.

[A.1] '*Reason to believe*' is different from a mere '*change in opinion*.'

It is an established legal proposition that under Section 147 of the Income Tax Act, the AO must have cogent reasons to believe that income chargeable to tax has escaped assessment in order to reopen the assessment. The material which constitutes 'reason to believe' is dependent upon facts and circumstances of every case, yet reliance can be drawn to the case of *CIT v Kelvinator*[3]wherein the Apex Court determined the sphere of the application of the same and differentiated it from a mere 'change in opinion'. It inter alia observed that "*one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, Section 147 would give arbitrary powers to the AO to reopen assessments on the basis of 'mere change of opinion', which cannot be per se a reason to reopen. AO has power to reopen provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment*."

[1]Thansingh Nathumal v Superintendent of Taxes, AIR 1964 SC 1419, Union of India v T R Varma, AIR 1957 SC 882, Minor Irrigation & Rural Engg Services v Saghoo Ram, (2002) 2 SCC 221.
[2]VC Ramachandran, Law of Writs 207 (6th ed., 2006).
[3](2010) 320 ITR 561 (SC).

Following this decision, the Hon'ble Bombay High Court in *NYK Line India Ltd v Dy.CIT*[4] held that "*in order to establish that the reopening of the assessment is not a mere change of opinion, the Revenue must demonstrate before the court that during the course of the assessment proceedings for the subsequent year, some new information or material had been brought on record which was not available when the assessment order was passed."*A division bench of the Bombay High Court in *Hindustan Lever Ltd v CIT*[5] held that the AO cannot reopen the assessment based only on previous materials as that would amount to a 'change of opinion'. The same has been rendered in the cases of *CIT v Amitabh Bachhan*[6]and *Purity Textile Ltd v ACIT &Anr*[7] .Further, it is well settled that the reopening merely on the basis of a retrospective amendment is not valid as the same is merely a 'change in opinion'.[8] Further, reopening is bad in law if there is no failure on the part of the assessee to disclose fully and truly all material facts.[9] It is submitted that in the present case, since the assessee in the assessment proceedings had disclosed all the documents that AO had asked for and there has been no new tangible material which the AO has come across, the action of the AO hence, is ultra vires the jurisdiction accorded to him.

[A.2] Reopening of Assessment Proceedings is time-barred.

Proviso to section 147 of the Income Tax Act provides where an assessment under Section 143(3) has been made for the relevant assessment year, then the same cannot be reopened after the expiry of 4 years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Further, reassessment proceedings for the AYs for which assessment has been done pursuant to s. 143(1), the time limit for the same is six years as provided under s. 149(1)(b). Thus, the reassessment notice issued for all the relevant AYs is time barred.

The Allahabad High Court in the case of *Former v CIT*[10] affirmed that "*if a notice under Section 148 of the Income-tax Act is issued, the Petitioner should not be relegated to the alternative remedy and writ petition is maintainable. Where assessment was made under section 143(3) and the assessee had disclosed fully and truly all material facts, notice issued beyond four years would be barred by limitation.*"

[4][2012] 346 ITR 361(Bom).
[5](2004) 268 ITR 332 (Bom).
[6]ITA 4046 of 2010.
[7](2010) 325 ITR 459 (Bom).
[8] Parixit Industries Pvt Ltd v ACIT, [2012] 20 Taxmann.com 750 (Guj), Sadbhav Engineering Ltd v DCIT, (2014) 223 Taxman 229 (Guj).
[9] DIL Ltd v ACIT, [2012] 343 ITR 296 (Bom), CIT v K.Mohan & Co, 349 ITR 653 (Bom).
[10](2001) 22 DTC 670 (All).

In *Rakesh Aggarwal v. Asst. CIT*[11], the Delhi High Court held that in view of the proviso to Section 147, notice for reassessment under Section 148 should only be issued in accordance with the provisions and where the original assessment had been made under Section 143(3), then in view of the proviso to Section 147, the notice under section 148 would be illegal if issued more than four years after the end of the relevant assessment year. The same view was affirmed and reiterated in the case of *Sri Sakthi Textiles Ltd v JCIT*[12] and *Talathy and Pantakhy Associated Pvt Ltd v Dy. CIT*[13].

It is well settled that in cases where the assessments are completed under Section 143(3) of the Income-tax Act, reopening of the said assessment under Section 148 of the Income-tax Act beyond the period of four years from the end of the relevant assessment year can be sustained only if it is established that there was failure on the part of the assessee to disclose fully and truly all material facts.[14] Further if Revenue seeks to reopen the assessment after the expiry of four years[15] on the ground that the assessee did not disclose material facts, then it becomes incumbent upon the Revenue to put in additional evidence and materials to justify the reopening.[16]The same view was upheld by the Bombay High Court in *IPCA Laboratories v DCIT*[17] and *ICICI Bank v K J Rao*[18].

Reliance can be placed upon the recent judgment of the Hon'ble Supreme Court in the cases of *CIT vs. Chhabil Das Agarwal*[19], *UOI v Hindustan Zinc Ltd*[20] wherein the court considered the point of alternate remedy as a bar to approach the High Court under Article 226, but carved out the exception of: "*where the statutory authority has not acted in accordance with the provisions of the enactment in question and has usurped its jurisdiction*", then the petition should be made maintainable. Further, when a reassessment notice is issued with pre-meditation, a writ petition is maintainable to challenge the same as the statutory authority has already framed his mind and formed an opinion as regards the liability of the assessee; then in such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose.[21]Thus, in this regard, it is submitted that the present writ petition challenging the reassessment notice has not been filed at a premature stage and hence the same should not be

[11] [1997] 225 ITR 496 (Delhi).
[12][2012] 340 ITR 144 (Mad), Shree Talad Jain Yuvak Mandal v ITO, [2000] 200 ITR 612 (Guj).
[13](2014) 102 DTR 259 ITR 362.
[14]Jashan Textiles Mills Ltd v DCIT, (2006) 284 ITR 542 (Bom).
[15]Sound Casting Ltd v Dy. CIT, (2013) 7 Bom CR 709, Western Outdoor Interactive v ITO, (2006) 286 ITR 620 (Bom).
[16]WeltradePvt Ltd v ITO, ITO (2009) 308 ITR 2.
[17](2001) 251 ITR 416 (Bom).
[18](2004) 268 ITR 203 (Bom).
[19](2014) 1 SCC 603.
[20](2014) 303 ELT 321 (SC), Vasu P Shetty v Hotal Vandana Palace &Ors, (2014) 5 SCALE 344.
[21] M/S Siemems Ltd v State of Maharashtra, (2008) 16 SCC 215, Arun Kumar Goyal v CIT, (2013) 81 DTR 123.

dismissed. Thus, following the aforementioned authorities, the assessee submits that the reassessment order is bad in law as the AO has usurped his jurisdiction and therefore, the present writ should be deemed maintainable and the same should not be dismissed on the ground that 'alternative remedy' was not sought.

[I.B] THE REASSESSMENT ORDER ISSUED MERELY ON THE BASIS OF RETROSPECTIVE AMENDMENT IS BAD IN LAW PURSUANT TO CBDT INSTRUCTION NUMBER F. NO. 500/111 12009-FTD-L (PT.).

It is submitted that the instant reassessment notice dated July 4, 2014 is bad in law as it is established that reassessments beyond the period of four years just on the basis of a retrospective amendment is not permissible. Further, the CBDT Instruction dated 29.05.2012 specifically provides that assessments which have been completed prior to April 1, 2012 and which have attained finality should not be reopened just on the basis of a retrospective amendment. [22]

The tax authorities are bound to abide by the aforementioned circular pursuant to Section 119 of the Income Tax Act which attaches a legal sanctity to the circulars or instructions issued under this Section. In this regard, reference is made to the judgment delivered by the Constitution Bench of the Hon'ble Supreme Court in the case of *Navnit Lal Jhaveri v K.K.Sen*[23], which upheld the binding value of a similar circular. In the said case, a circular issued under similar provisions of Indian Income Tax Act 1922 (Act of 1922) was the subject matter of consideration. It is brought forth that the circumstances for issuing circular dated 29.5.12 are similar to the circumstances for issuing the circular in the aforementioned case before the apex court. In both the situations, (i) the Parliament amended the law which created a fresh liability upon various assessees on account of deemed provisions,(ii) the concerned Minister had made assurance in the Parliament to the effect that a circular shall be issued in order to avoid genuine hardship to various assessees caused to them on account of proposed legislation and (iii) a circular has/had been issued in accordance with the assurance. Thus, the same rationale of upholding the binding nature of such a circular should be applied in the instant case as well. The same rationale has been followed and reaffirmed by the Apex court in the cases of *Ellerman Lines Ltd v CIT*[24], *K.P.Varghese v ITO*[25] and *C.B.Gautam v UOI*[26].

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[22] The said CBDT Instruction reads as under, "*the Board, after due consideration, hereby directs that in case where assessment proceedings have been completed under section 143(3) of the Act, before the first day of April, 2012, and no notice for reassessment has been issued prior to that date; then such cases shall not be reopened under section 147/148 of the Act on account of the abovementioned clarificatory amendments introduced by the Finance Act, 2012. However, assessment or any other order which stand validated due to the said clarificatory amendments in the Finance Act, 2012 would of course be enforced*."

[23] 56 ITR 198 (SC).

[24] 82 ITR 913 (SC).

[25] 131 ITR 597 (SC).

[26] 199 ITR 530 (SC).

Reliance is also placed on the cases of *CIT v Bear Shoes India Pvt Ltd*[27], *CIT v Vipin Vadilal*[28] and *Simplex Concrete Piles v DCIT*[29] wherein the courts did not permit reopening beyond four years merely on the basis that a new law had been enacted retrospectively. Furthermore it is an established legal principle that law does not contemplate or require the performance of an impossible act.[30]

Hence, in the instant case, the Petitioner submits that he could not have contemplated that he was liable to deduct TDS on the said payments and reopening of the assessment merely on the ground of retrospective amendment vide Finance Act, 2012 is prima facie bad in law and without jurisdiction and thereby, the instant petition should be held maintainable.

[II.] ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE LEARNED AO ERRED IN DISALLOWING PAYMENT MADE TO ZEON.

The Learned AO, pursuant to the reassessment order passed under s.147 of the Act disallowed the payments made by the assessee for the purchase of software in AYs 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 to Zeon. The Assessee herein submits that such a disallowance pursuant to s. 40(a)(i) of the Income Tax Act is invalid in law as a 'shrink wrap software' being a 'good', is a 'copyrighted article' and thus the instant transaction is in the nature of sale not amounting to 'royalty'; **[A.]**, and the use of the said software also does not lead to the use of patent, invention or a process; **[B.]** Further, to determine the ambit of the term 'royalty' for the purpose of s. 40(a)(i) reference should only be made to Explanation 2 of s.9(1)(vi) and not Explanation 4 of the same; **[C]**. ***Additionally***, the aforementioned disallowance is bad in law also on the ground that retrospective amendments are considered to be non-applicable to alter the TDS liability **[D].*Without prejudice to the above,*** the assessee in the instant case can also seek relief under the India-Singapore DTAA.

[II.A] A 'SHRINK WRAP SOFTWARE' BEING A 'GOOD', IS A 'COPYRIGHTED ARTICLE', AND THE INSTANT TRANSACTION, THUS, IS IN THE NATURE OF A 'SALE' AND CONSEQUENTIALLY, THE PAYMENTS MADE WOULD NOT AMOUNT TO 'ROYALTY'.

The assessee most humbly submits that the software is in the nature of a 'shrink wrapped software' and thus, the payments made to purchase the same would not amount to 'royalty' as the same can be considered as 'goods' and the transaction to be in the nature of

[27](2011) 331 ITR 435 (Mad).
[28](1999) 238 ITR 1022 (Guj).
[29](2003) 262 ITR 605 (Cal).
[30]LIC v CIT, (1996) 219 ITR 410 (SC), CIT v Hindustan Electro Graphite Ltd, (2000) 243 ITR 48 (SC).

'sale'**[A.1]**. Consequently, the software becomes a 'copyrighted article' and therefore, the mere use of it does not amount to the transfer of any 'copyright'**,[A.2].**

[A.1] Instant transaction is in the nature of a 'sale' as its subject-matter is a 'good'.

The assessee most humbly submits that the subject matter of the transaction is a 'good' and the same thus, is in the nature of a 'sale'. The Apex Court in *Associated Cement Companies Ltd.*v *Commissioner of Customs*[31], opined that *any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as goods.* The court while rendering the said decision relied upon the judgments delivered by UK and USA courts in *St Albans City and District Council v International Computers Ltd.*[32] *and Advent Systems Ltd v Unisys Corporation*[33]respectively.

Further, in *Tata Consultancy Services v State of Andhra Pradesh*[34], the Apex court while analysing the Sales Tax Act and Article 366(12) of the Constitution of India held that software which is incorporated in media would be good and therefore liable to sales tax.

The said interpretation of envisaging a software as 'goods' was relied upon by the Delhi High Court in *DIT v Ericsson AB*[35] to hold that when a software is supplied which is incorporated on a CD, it is 'tangible property' which is supplied and the payment made for acquiring such property cannot be regarded as a payment by way of 'royalty'[36]. The same has been held in the cases of *DCIT v ABAQUS Engineering Pvt Ltd*[37], *ADIT v TII Telecom International Pvt Ltd*[38]and *BSNL v UOI.*[39]

Furthermore, the established legal principle across all the countries is that the title of a 'License Agreement' is not necessarily conclusive, if the interpretation of the contract reveals that the intended transaction is a sale of goods and use of software till perpetuity constitutes sale.[40]OECD commentary[41] and US Regulations on Classification of Transactions involving Computer Programmes[42] provide that 'granting of shrink wrap license would be

[31]AIR 2001 SC 862.
[32]St Albans City and District Council v International Computers Ltd. (1996) 4 AER 481.
[33]1925 F 2d 670.
[34]Tata Consultancy Services v State of Andhra Pradesh, AIR 2005 SC 371.
[35](2012) 343 ITR 470 (Del).
[36]Motorola Inc v DCIT, (2005) 147 Taxman 149
[37] (2011)-TII-14- ITAT-Mad-Intl.
[38][2011] 47 SOT 76 (Mum).
[39]145 STC 91 (SC).
[40]Germany, LGMünchen, 8th February 1995 Austria 21 June 2005 Supreme Court (Software case) http://cisgw3.law.pace.edu/cases/050621a3.html, Germany, OLG Koblenz, 17 September 1993, CISG-online 91, http://cisgw3.law.pace.edu/cases/930917g1.html.
[41]D.P. Mittal, Indian Double Taxation Agreements and Tax Laws, 263, (6th ed., 2012).
[42] US Regulations on Classification of Transactions involving Computer Programmes Reg. § 1.861-18, 61 Fed.Reg. 58, 153 (1996).

considered as a sale of a copyrighted article if it is perpetual.' Perpetuity of a 'license' lends itself to the characterization as 'sales'.[43]

Royalty is a consideration for use or right to use of intellectual property[44] and not goods.[45]Since, in the instant transaction shrink wrap software is in the nature of goods, the assessee submits that the 'Agreement' is in the nature of a 'sale' and payments made pursuant to the same cannot be attributed to be as 'royalty'.

[A.2] <u>The payments advanced by the assessee in lieu of purchase of the software do not amount to transfer of any copyright.</u>

The term 'copyright' has not been defined in the Income Tax Act and therefore, reliance can be placed on its definition as per section 14 of the Copyright Act, 1957. The term 'copyright', in case of computer software, means the exclusive right to do or authorized to reproduce the software or issue copies or to make any adaptation or to sell the software.[46]

A person can be said to have acquired a copyright or the right to use the copyright in a product, only when he is authorized to do all or any of the above acts[47]. Accordingly, where a payer does not acquire any of the above rights, including the right to further sell or give the software on hire, but is merely permitted to use the subject-matter of the copyright (software in the instant case), it cannot be said that the payer has acquired the copyright or the right to use the copyright of the software supplied[48].

It is accordingly submitted that by mere perusal of the relevant clauses of the 'Agreement' it is clear that the assessee in the instant case possesses no right to exploit the underlying copyright but is merely permitted to use the subject-matter of the copyright.[49]

Furthermore, the right accorded to the assessee "*to make one copy of the software and associated support information for backup purposes"* shall not amount to possession of any copyright by the assessee, as all copies of the Software[50], pursuant to the Agreement are the '*exclusive property of Zeon, and such copies include Zeon's copyright and other proprietary notices.*'[51] The same rationale was affirmed by the Delhi High Court in <u>*Director of Income Tax v Infrasoft Ltd*</u>[52] wherein it was held that the right to make any back-up copies is permitted under Section 52 of the Copyright Act and the same thus, does not amount to transfer of any copyright.

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[43]D.P. Mittal, Indian Double Taxation Agreements and Tax Laws, 265, (6th ed., 2012).
[44]M.V Philips v CIT (1987) 34 Taxman 274;ABB Ltd, In re (2010) 189 Taxman 422 (AAR).
[45]D.P. Mittal, Indian Double Taxation Agreements and Tax Laws, 265, (6th ed., 2012).
[46]Geoquest Systems B.V. v. DIT (International Taxation-i) [(2010)234CTR (AAR)73.
[47] Allianz SE, TS-204-ITAT-2012(Pun).
[48]DIT v. Metapath Software International, 204 Taxman 192 (Delhi)(HC).
[49] Clause 2 of the License Agreement.
[50]Clause 2(d) of the License Agreement.
[51]*Id*
[52][2009] 28 SOT 179 (Del).

Further, the word '*use*' in Explanation 2 of s.9(1)(vi) pertains to the 'commercial use'[53] of such a software which the assessee in the instant case is completely deprived of, thus the said transaction pursuant to the same, also on this ground cannot be considered to be transfer of 'copyright'.[54] It is brought forth that the assessee in the instant case was granted a '*non-exclusive, non transferable license to use the software in accordance with the Agreement'*, which further bolsters the assessees' assertion that the payments advanced towards the purchase of the software do not in any way lead to transfer of any copyright associated with the software.

Reference in this regard is drawn to the judgment rendered by the Special Bench of the Delhi Tribunal in the case of *Motorola Inc v Deputy CIT*[55]and *Deputy CIT v Nokia*[56]wherein the Tribunal held as under*, "If the payment is really for a copyrighted article, then it only represents the purchase price of the article and, therefore, cannot be considered as royalty either under the Act or under the DTAA."*

The High Court of Delhi in *DIT v. M/S Nokia Networks*[57]approved the findings of the Special Bench of the Tribunal in the Motorola case that Copyright is distinct from the material object, copyrighted and held that, just because one has the copyrighted article, it does not follow that one has also the copyright in it. Furthermore, the OECD Tax Model Treaty also maintains that mere right to use a copyrighted material does amount to royalty.[58]

In *Dassault Systems K. K., In Re*[59] it was ruled that a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any of the rights ingrained in a copyright. Where the purpose of the licence or the transaction is only to establish access to the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself has been transferred to any extent. It does not make any difference even if the computer programme passed on to the user is a highly specialized one. The same opinion was affirmed in, *Sonic Biochem Extractions P. Ltd. v. ITO*[60],and in *DDIT v. Solid Works Corporation.*[61]Thus, the assessee submits that a shrink wrapped software by the virtue of it being a 'good' which is a 'copyrighted article', the payments advanced to purchase the same are in the nature of business income and hence, the same cannot be attributed to be 'royalty'.

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[53]D.P.Mittal, Indian Double Taxation Agreements and Tax Laws,441 (6th Ed. 2012).
[54]Modern Threads India Ltd v DCIT, (2000) 243 ITR 60 (Raj).
[55](2005) 96 TTJ (Del) 1.
[56](2005) 147 Taxman 39 (Delhi).
[57]OY(2012) 253 CTR (DEL) 417.
[58]Article 12, OECD Commentaries on Articles of Model Tax Convention.
[59](2010) 322 ITR 125 (AAR).
[60]2013(23)ITR(Trib)447(Mumbai).
[61][2012] 17 ITR (Trib) 510 (Mumbai), ACIT v Sonata Information Tech. Ltd , 2012(17)ITR(Trib)533(Mumbai).

[II.B] THE PAYMENTS ADVANCED BY THE ASSESSEE IN LIEU OF PURCHASE OF THE SOFTWARE DO NOT AMOUNT TO USE OF ANY PATENT, INVENTION, MODEL, DESIGN, SECRET FORMULA OR PROCESS.

The assessee most humbly submits that the payments advanced for the purchase of the software also do not amount to use of any patent, invention, model, design, secret formula or process. In this regard, the assessee initially emphasises on the word 'use' wherein it has been held that the said word essentially and exclusively pertains to 'commercial use' of such a patent, invention or secret process[62] which the assessee in the instant case is completely deprived of.

Furthermore, it is submitted that since 'invention', and 'patents' are not defined under the Income Tax Act it shall be necessary to rely on the respective special Acts governing the law on this subject. Section 3(k) of the Patents Act, 1970 (*hereinafter* referred as 'the 1970 Act') which defines 'invention' specifically excludes computer program from being regarded as invention.

Further, section 2(m) of the 1970 Act defines 'patent' as an invention, thereby indirectly excluding computer program from its purview. Reference is made upon the judgment rendered by the Mumbai Tribunal in *DDIT v Reliance Industries Ltd*[63]. wherein it was held that, "*It is now established law that Computer software after being put on to a media and then sold, becomes goods and it is wrong in treating this computer software as a 'Patent' or as 'Invention*".

Computer software cannot also be treated as process. End user of the software in the case of shrink-wrap software does not have any access to source code. He has only right to use the software for his personal or business use. Further, since the end-users do not have any access to the computer program embedded in computer software, they cannot be said to have rights in relation to a process.[64]In *ADIT vs. TII Team Telecom International Pvt Ltd*[65]it was held that, **"***when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein*."

Thus, the said payments advanced by the assessee do not amount to royalty even pursuant to sub clause (iii) of Explanation 2.

[62]D.P.Mittal, Indian Double Taxation Agreements and Tax Laws, 129 (6th ed. 2012), Modern Threads India Ltd v DCIT, (2000) 243 ITR 60 (Raj).
[63] [2011] 43 SOT 506 (Mum).
[64]DDIT. M/s. Solid Works Corporation, [2012] 51 SOT 34 (Mum).
[65][2011] 47 SOT 76 (Mum).

[II.C] THE PAYMENTS MADE BY THE ASSESSEE FOR THE PURCHASE OF THE SOFTWARE DO NOT AMOUNT TO 'ROYALTY' AS ENVISAGED UNDER SECTION 40(a)(i) OF THE ACT.

The Revenue may put forth an argument that vide Explanation 4 inserted in s.9(1)(vi) pursuant to the Finance Act, 2012, even payments made in respect of a right to use a software is also included in the ambit of 'royalty', but then it is submitted that Explanation (A) appended to s. 40(a)(i) of the Act clearly provides for the domain of the 'royalty' for the application of the said section[66] as it only refers to Explanation 2 to Section 9(1)(vi) and not Explanation 4 of the same.[67] Explanation 2 of s.9(1)(vi) of the Act clearly envisages that for a transaction to be deemed as 'royalty' the consideration has to be furthered in lieu of 'transfer of all or any rights in respect of any copyright, literary, artistic or scientific work.'[68]. The assessee herein submits that pursuant to the aforementioned sub issues furthered, the instant transaction does not amount to 'royalty' under Explanation 2.

[II.D] ADDITIONALLY, IF IN THE LIGHT OF THE RECENT RETROSPECTIVE AMENDMENT THE PAYMENTS ARE DEEMED TO BE IN THE NATURE OF 'ROYALTY', THE SAME CANNOT BE MADE TO ALTER THE TDS LIABILITY OF THE ASSESSEE.

The assessee submits that even if the Hon'ble High Court in the wake of the recent retrospective amendment[69] deems the payments to be in the nature of 'royalty', then it is asserted that the amendment shall not affect the disallowance under Section 40(a)(i). In *Sonata Information Technology Ltd v DCIT*[70], it was held that the retrospective amendment brought vide Finance Act, 2012 would not apply to the disallowance under Section 40(a)(i). The same opinion was affirmed in *Channel Guide India Ltd v ACIT*[71]wherein the decision was based on the legal maxim '*lex non cogit ad impossibilia*' meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform and relied on the decision of the Hon'ble Supreme Court in the case of *Krishnaswamy S. v UOI*[72]. Further, Hon'ble Bombay High Court in *CIT v Kotak Securities Ltd*[73] held that if due to bonafide belief, a person does not deduct TDS while making payment, then there can be no

[66]Sonic Bio Chem Extractions Pvt Ltd v ITO, (2013) 23 ITR 447 (Mum).
[67] The aforementioned Explanation clause provides that '*for the purpose of this sub-clause [i.e. s. 40(a)(i)] "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9.*'
[68]Sonata Information Technology Ltd v DCIT, (2012) 19 ITR 408 (Mum), ACIT v NGC Networks Pvt Ltd, ITA No 1832/Mum/2014.
[69]Vide Finance Act, 2012.
[70](2012) 19 ITR 408 (Mum).
[71](2012) 20 ITR 438 (Mum), Sterling Abrasives Ltd v ITO, IT Appeals 2243 and 2244 (Ahmadabad of 2008).
[72](2006) 281 ITR 305 (SC).
[73](2012) 240 ITR 333 (Bom).

disallowance under Section 40(a)(i) of the Act.[74] The same was upheld in *Infotech Enterprises Ltd v ACIT*[75] and *Skol Brewereis v ACIT*[76]. From the above judgments, it can reasonably be asserted that the TDS liability of the assessee should remain unaltered in spite of a retrospective amendment being brought into force.

[*ARGUENDO*]: *WITHOUT PREJUDICE TO THE ABOVE*, THE ASSESSEE IS ENTITLED TO SEEK BENEFITS UNDER THE INDIA-SINGAPORE DTAA AND PURSUANT TO THE SAME, THE PAYMENTS MADE CANNOT BE CONSIDERED AS ROYALTY.

It is most humbly submitted that the assessee in the instant case is entitled to seek relief under the DTAA as the mandatory prerequisite of 'furnishing a Tax Residency Certificate (*hereinafter* referred as TRC) before DTAA benefits can be sought'[77], was only brought with prospective effect[78] vide Finance Act, 2012. Thus, the aforementioned mandate shall not apply to disentitle the assessee from claiming DTAA benefits;**[A]**. Furthermore, the said prerequisite by the virtue of being a 'rule of evidence' is directory in nature;**[B]** and pursuant to the DTAA, the payments are not in the nature of royalty **[C]**.

[A.] The mandate pursuant to Section 90(4) of the Income Tax Act, 1961 is inapplicable in the instant case.

The assessee submits that Section 90(4) of the Income Tax Act, 1961 provides a prerequisite of furnishing a TRC before benefits can be sought under the DTAA. However, the said prerequisite was only brought with prospective effect from April 1, 2013. Accordingly, the said condition shall not apply to disentitle the assessee from claiming benefits under DTAA, since before the said provision was enacted; the only prerequisite to ascertain whether a DTAA benefit can be granted to a tax payer was to determine the residential status of the tax payer.

In the instant case, the assessee entered into an agreement with Zeon, a company incorporated in Cayman Islands which carries its software business primarily through Singapore. It is herein submitted that the failure to obtain a TRC by Zeon should not be considered as a bar to claim DTAA benefit, as Section 2 of Income Tax Act, 1947 of Singapore provides that a company would be considered as a tax resident of Singapore if the same carries on its business primarily from or through Singapore. Thus it is evident that Zeon is indeed a tax resident of Singapore. Consequently, the present agreement between the assessee and Zeon entitles the assessee to claim benefit under DTAA[79].

[74]Metro & Metro v ACIT, (2013) 95 DTR 149 (Agra).
[75](2014) Tax Corp (Intl) 6945.
[76](2013) 42 ITD 49 (Mum).
[77]Section 90(4) of the Income Tax Act, 1961.
[78]With effect from April 1, 2013.
[79] Refer Moot Proposition, Para 1.

[B.] <u>The prerequisite of obtaining a TRC is merely a '*rule of evidence*' and the same is thus procedural and directory in nature.</u>

The intention of introducing section 90(4) is to provide treaty benefits only to residents of a particular country and prevent residents of a third state from claiming the treaty benefits[80]. However, in certain circumstances NR may not be in a position to obtain TRC despite its best efforts. Mandating TRC, in such cases, may result in undue hardship in case of bonafide residents of foreign country, which is not the intent of the law[81]. Hence if a NR is able to prove his residential status, the same should be accepted rather than making the provision of obtaining TRC a rigid requirement.

The Memorandum to Finance Bill 2012 states that filing of TRC is a necessary but not a sufficient condition to claim treaty benefits, which invariably means that the tax authority can question the TRC furnished by the NR, despite the TRC being a Rule compliant. In such cases the NR would be liable to prove his residential status through other evidences. This being the legal position when Tax Authority rejects a valid TRC, the same should even apply in a case where despite bonafide efforts made, NR is unable to obtain a TRC. As a matter of 'Principle of Natural Justice' the NR should be provided with an opportunity of proving his residential status and should not be out rightly denied treaty benefits as TRC could not be obtained or the same is defective. The condition of furnishing TRC is more of measure of evidence[82].This proposition finds its support from Chennai Tribunal's decision in *<u>MSC Agency (India) (P) Ltd v ITO</u>*[83], and Karnataka High Court's decision in *<u>ITO vs. Smt. Mandira D. Vakharia</u>*[84] where it was ruled that, non furnishing of TRC is only a technical rule which can be rectified. Reference can also be drawn to a recent decision[85] of the Swiss Federal Supreme Court (SFSC) which ruled that though the tax payer had to furnish a stamped residence confirmation on the official tax form, yet insisting solely upon such a confirmation and ruling out all other evidences would be too formalistic. In a Spanish case, the National Court of Spain[86]ruled that, furnishing of a TRC, though is mandatory to claim DTAA benefit, but then the same can be relaxed if other documents are provided by the assessee, to convincingly claim its residence.[87]

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[80] Memorandum explaining provisions of Finance Bill, 2012.

[81]Supdt of Taxes v Omkarnal Nathumal Trust, 4 CTR 172 (SC), LIC v CIT, (1996) 219 ITR 410 (SC), Mafatlal Apparels Manufacturing Co v DCIT, 61 TTJ 323 [1998] (Bom).

[82] Reliance can be placed on the ratio provided in Drapco Electric Corporation, (1978) CTR (Guj) 181 to prove that Section 90(4) Is a '*rule of evidence*.'

[83][(2011) 9 ITR 423], ADIT v Green Emirate Shipping & Travels, (2006) 100 ITD 203

[84][(2001) 167 CTR (Kar) 224].

[85]Dated 18 January 2012 (2C 818/2011).

[86]Case No. 143/2008, decision dated 4 March 2010.'

[87] Hindustan Petroleum Corporation Ltd.V ADIT I.T.A. No. 5762/Mum./2004

Hence, in a case where despite best efforts of the NR, taxpayer is not able to obtain TRC in terms of Rule 21 AB, the taxpayer may still be able to satisfy the tax authority about his tax residency and entitlement to claim Treaty benefit on the basis that TRC could be urged as evidence. In such situations, it is submitted that absence of TRC should not be fatal to the entitlement of the taxpayer to claim Treaty benefit.

[C.] Pursuant to the DTAA, payments are not in the nature of royalty.

The assessee submits that India Singapore DTAA provides a narrower definition of royalty as compared to the one provided in Section 9(1) (vi) of the Income Tax Act, 1961[88]. In *Kansai Nerolac v ADIT*[89], the Mumbai tribunal while interpreting Article 12 of India Singapore DTAA held that software when put into a media and sold akin to goods, the amount paid towards the purchase of such computer software cannot be treated as royalty. In *DIT v Ericsson*[90], the Delhi High Court while interpreting a similar DTAA held that there is a clear distinction between acquisition of 'copyright right' and a 'copyrighted article'. The former can be deemed to be included within the ambit of 'royalty' but the latter cannot[91].

In *UOI v Azadi Bachao Andolan*[92], the Apex Court has held that if an assessee is entitled to claim benefits under DTAA and if the same is more beneficial to the assessee as compared to the Income Tax Act, then the former shall prevail over the latter pursuant to Section 90(2) of the Income Tax Act.[93] Pursuant to this judgment, it is herein submitted that the retrospective amendments vide Finance Act 2012, in the definition of 'royalty' under Section 9(1)(vi) shall be inapplicable to govern the instant transaction as benefit by the assessee is being sought under the DTAA which overrides the provisions of the Income Tax Act.[94]Furthermore reference is also drawn to the recent IRAS e-Tax Guide issued by Inland Revenue Authority of Singapore wherein it has been maintained that use of software not for commercial purposes is to be characterized as use of a copyrighted article which is not subject to withholding of tax.[95] In light of the foregoing

[88]'Royalty' as provided under Article 12 of the DTAA "*covers any payment for the use of, or the right to use any copyright of a literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information or for any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8*".

[89][2010] 134 TTJ 342 (Mum).

[90]TS-769-HC (2011) (Del).

[91]ADIT v TII Team Telecom International Pvt Ltd, S-490-ITAT (2011) (Mum), Motorola Inc v DCIT, (2005) 96 TTJ (Del) 1.

[92]263 ITR 706 (SC), WNS North America Inc v ADIT, (2013) 141 ITD 117 (Mum).

[93]B4U International Holdings Ltd v DCIT, [2012] 52 SOT 545 (Mum).

[94]Director of Income Tax v Infrasoft ltd., ITA1034/2009, ADIT .v. Siemens Aktiengesellschaft (2013) 142 ITD 614 (Mum.)(Trib.), WNS North America Inc. v. ADIT (2013) 141 ITD 117, B4U International Holdings Ltd v DCIT, [2012] 52 SOT 545.

[95] http://www.iras.gov.sg/irashome/uploadedfiles/e-Tax_Guide/etaxguides_CIT_rights-based%20approach_2013-02-08.pdf.

assertions and authorities cited, it is most humbly submitted that the AO erred in disallowing the payments advanced by the assessee to Zeon on the ground that TDS was not deducted on such payments as pursuant to the judgment rendered in *G.E. India Technology Centre v CIT*,[96] the assessee is liable to deduct TDS under Section 195 only if the payments made to the non-resident are chargeable under this Act.

Further, it is brought forth that the DTAAs entered into by India with Turkmenistan, Russia, Morocco, Trinidad and Tobago, Kyrgyz Republic, etc. the expression '*computer software*' finds mention in the definition of royalty. Thus, it is asserted, that both under the Income Tax Act 1961 and in the DTAA entered into with various States, whenever it was felt appropriate, the Parliament has chosen to incorporate the expression '*computer software*' specifically. When the same is conspicuous by its absence under Explanation 2 to Section 9(1)(vi) of the Income Tax Act, 1961 and under Article 12(3) of the India-Singapore DTAA, the same cannot be read into them by implication.

[III.] ON THE FACTS AND CIRCUMSTANCES OF THE CASE AND IN LAW, THE ASSESSEE SHOULD NOT BE CONSIDERED AS AN 'ASSESSEE IN DEFAULT' AND SHOULD NOT BE LIABLE TO PAY INTEREST AND PENALTY FOR NOT DEDUCTING TAX AT SOURCE.

The assessee submits that initiation of proceedings under Section 201 are liable to be set aside as the same are time barred, **[A];** and the same cannot be invoked on the basis of a retrospective amendment;**[B].**

[III.A] THE PROCEEDINGS UNDER SECTION 201 ARE TIME BARRED.

The assessee submits that Section 201(3) provides that an order for charging an assessee as an 'assessee in default' for a financial year commencing on or before April 1, 2007 has to be passed before 31st March, 2011. Thus, in the instant case, the order for charging the assessee as 'assessee in default' are time barred for all the AYs. Though Section 201 of the Act does not prescribe any limitation period for the assessee being declared as an 'assessee in default', yet the same has to be done within a reasonable time[97] as held in *DIT vs. Mahindra & Mahindra Limited*[98]. The maximum time limit for initiating and completing the proceedings u/s. 201(1) has to be at par with the time limit available for initiating and completing the assessment[99] under Section 153.

[96] (2010) 10 SCC 29.
[97] State of Punjab v Bhatinda District Co.Op Milk Producers Union Ltd, (2007) 11 SCC 363, CIT v NHK Japan Broadcasting Corporation (2008) 305 ITR 137 (Delhi).
[98] Income Tax Appeal No. 3489 of 2009.
[99] CIT v Satluj Jal Vidyut Nigam Pvt Ltd, (2012) 71 DTR 145.

Thus, the assessee submits that a notice under Section 201 and 201(1A), if issued beyond the 'reasonable period' of 4 years, would be barred by limitation.[100]

[III.B] PETITIONER CANNOT BE TREATED AS 'ASSESSEE IN DEFAULT' RETROSPECTIVELY.

The assessee submits that proviso to Section 201 of the Act states that, no penalty shall be charged if the assessee is able to provide good and sufficient reasons as to why he has failed to deduct and pay such tax[101]. It is an established legal principle that the assessee has to look at the legal position prevalent on the date when he makes the payment to decide whether such payment is liable to TDS. If he in good faith believes that such payment is not liable to tax, he is justified in not deducting tax and cannot be treated as an assessee in default under 201(1) of the Act. Reliance can be placed on *CIT v Yahoo India Pvt Ltd*[102] wherein the revenue's reliance on retrospective amendment by Finance Act 2012 to Section 9 to hold the payments as 'royalty' was rejected as it was held that the amendment clearly shows that the issue is debatable and therefore penalty cannot be attracted in the absence of any failure to disclose material facts. The same has been held by the Apex Court in *PWC v CIT*[103] and *CIT v Hindustan Electro Graphite Ltd*[104].The assessee cannot also be made liable to pay interest for not deducting TDS as in *Star India Pvt Ltd v Comm. Of Excise*,[105] it was held that "*the liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively would not entail the payment of interest with retrospective effect.*"[106]

It is thus submitted that the assessee in the instant case should not be regarded as 'assessee in default' and thus should not be made liable to pay any interest or penalty.

[100] CIT v Hutchison Essar Telecom Ltd, (2010) 323 ITR 230.
[101] Motorola Inc v DCIT, (2004) 270 ITR 62 (Del SB), Samsung Electronics v ITO, 93 TTJ 658 (Bang), P V Rajgopal v UOI, (1998) 233 ITR 678 (AP).
[102] TS-105-HC-2013 (Bom).
[103] (2012) 11 SCC 316.
[104] (2000) 243 ITR 48 (SC).
[105] 268 ITR 321.
[106] Deverson Pvt Ltd v CBDT, (2005) 273 ITR 414 (Guj).

PRAYER

Wherefore, in the light of arguments advanced, authorities cited and facts stated the Petitioner humbly prays that:

a. This Hon'ble Court may be pleased to admit the present writ petition.

b. This Hon'ble Court may be pleased to declare that the learned AO erred in disallowing the payments made to purchase software from Zeon pursuant to s. 40(a)(i) of the Income Tax Act.

c. This Hon'ble Court may be pleased to declare that the petitioner is not an 'assessee in default' and is not liable to pay any interest and penalty.

Or, Pass any other order as it deems fit in the interest of equity, justice and good conscience.

For This Act of Kindness, the Petitioner Shall Duty Bound Forever Pray.

Place- Mumbai

Date- August 7, 2014.

S/d-

(Counsel for the Petitioner)