Team Code: R013

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

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

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

Civil Writ Petition No. of 2014

Cheetah & Chetak Pvt. Ltd. ……...Petitioner

(A Private Company having its
Registered Office in Mumbai)

**v.**

Income Tax Authority……..Respondent

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

MEMORANDUM ON BEHALF OF RESPONDENT

DRAWN AND FILED BY THE COUNSELS FOR THE RESPONDENT

# TABLE OF CONTENTS

# LIST OF ABBREVIATIONS

| ABBREVIATIONS | EXPANSION |
|---|---|
| § | Section |
| §§ | Sections |
| ¶ | Paragraph |
| ADIT | Additional Director of Income Tax |
| AIR | All India Reporter |
| AO | Assessing Officer |
| Bom CR | Bombay Cases Reporter |
| CIT | Commissioner of Income Tax |
| CTR | Current Tax Reporter |
| DLT | Delhi Law Times |
| HC | High Court |
| Hon'ble | Honourable |
| ITD | Income Tax Tribunal Decisions |
| ITR | Income Tax Reporter |
| p. | Page No. |
| r.w.s. | Read with Section |
| SCC | Supreme Court Cases |
| SCR | Supreme Court Reporter |
| TDS | Tax Deduction at Source |
| u/s | Under Section |
| w.e.f | With Effect From |

# INDEX OF AUTHORITIES

## A. CASES

### i. SUPREME COURT

**ii. <u>JURISDICTIONAL HIGH COURT</u>**



**iii. <u>OTHER HIGH COURTS</u>**

**iv. FOREIGN COURTS**



**v. INCOME TAX APPELLATE TRIBUNAL**



**vi. AUTHORITY FOR ADVANCED RULINGS**



**vii. PRIVY COUNCIL**



## B. BOOKS & TREATISES

## C. JOURNALS AND REPORTS



## D. LAW LEXICONS



## E. STATUTES REFERRED



## F. RULES REFERRED

# G. MISCELLANEOUS

# STATEMENT OF JURISDICTION

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

THE RESPONDENTS HUMBLY SUBMITS TO JURISDICTION OF THE HON'BLE COURT WHICH HAS BEEN INVOKED BY THE PETITIONER. HOWEVER, THE RESPONDENT RESERVES THE RIGHT TO CHALLENGE THE SAME. THE PROVISION UNDER WHICH THE PETITIONER HAS APPROACHED THE HONORABLE COURT IS READ HEREIN UNDER AS:

ARTICLE 226 – POWER OF HCS TO ISSUE CERTAIN WRITS

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

# STATEMENT OF FACTS

## I.

### ZEON: A MULTINATIONAL IT SECTOR COMPANY

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

## II.

### NEO: SHRINK WRAP SOFTWARE BY ZEON

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

## III.

### AGREEMENT BETWEEN ZEON AND CHEETAH & CHETAK PRIVATE LIMITED FOR NEO

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

## IV.

## FILING OF RETURN AND ASSESSMENT OF THE ASSESSEE

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

## V.

## REOPENING OF ASSESSMENT AND DISALLOWANCE OF EXPENDITURE

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

## VI.

## WRIT PETITION BY THE ASSESSEE

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

# ISSUES RAISED

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

**II. WHETHER THERE HAS BEEN TRUE AND FULL DISCLOSURE OF MATERIAL FACTS BY THE ASSESSEE TO THE ASSESSING OFFICER AT THE TIME OF INITIAL ASSESSMENT?**

**III. WHETHER PAYMENT MADE FOR THE USE OF SHRINK WRAPPED SOFTWARE CONSTITUTES ROYALTY?**

# SUMMARY OF ARGUMENTS

## I. WHETHER THE WRIT PETITION IS MAINTAINABLE?

*Firstly*, the redressal mechanism has been provided under the statute which must be followed in case an assessee is aggrieved.

*Secondly*, the writ jurisdiction under Article 226 is an extraordinary jurisdiction and can only be exercised in exceptional circumstances which is absent in the instant case.

## II. WHETHER THERE HAS BEEN TRUE AND FULL DISCLOSURE OF MATERIAL FACTS BY THE ASSESSEE TO THE ASSESSING OFFICER AT THE TIME OF INITIAL ASSESSMENT?

*Firstly*, that the onus to disclose all the material facts is on the assessee.

*Secondly*, that furnishing of documents does not amount to true and full disclosure of all the material facts.

*Thirdly*, that there has been concealment of material facts by the assessee as there was no disclosure of the agreement & also there was concealment of primary facts.

## III. WHETHER PAYMENT MADE FOR THE USE OF SHRINK WRAPPED SOFTWARE CONSTITUTES ROYALTY?

*Firstly*, that payment made by the petitioner to Zeon is for the grant of license to use the software.

*Secondly*, the grant of license to use the software amounts to transfer of right to use or right in respect of copyright.

*Thirdly*, the payment made for the grant of license for transfer of right in respect of copyright constitutes royalty.

# ARGUMENTS ADVANCED

## I. WHETHER THE WRIT PETITION IS MAINTAINABLE?

1. It is humbly contended before the Hon'ble Court that the instant writ petition filed by the Cheetah & Chetak Pvt. Limited [Hereinafter referred to as **"the Petitioner"**] is not maintainable. It is submitted that redressal mechanism has been provided under the statute which must be followed in case an assessee is aggrieved. The Petitioner has not followed the statutory redressal mechanism and has directly challenged the notice of the AO vide this petition at an immature stage before the Hon'ble Court. The Petitioner has wrongly invoked the jurisdiction of the Court under Article 226 of the Constitution of India, 1950 [Hereinafter referred as **"the Constitution"**]

2. It is humbly submitted that the reopening in the instant case for the AYs 2003-04 to 2008-09 was made by exercising the powers that is available to AO under the Income Tax Act, 1961 [Hereinafter referred to as **"the Act"**] u/s 147 r.w.s. 148. The AO followed due procedure by issuing a notice to the Petitioner communicating the reasons to believe that its income has escaped assessment. It is contended that a proper statutory redressal mechanism is available to the Petitioner which is to ask for reasons, file objections and then receive an order of the AO disposing off his objections.

3. The Respondent relies upon the decision of the Apex Court in the case of *G.K.N. Driveshafts (India) Ltd.* v. *ITO*,[1] as per which the only option open to the assessee is to exhaust the statutory remedy under the Act. In the aforementioned case also, a notice issued u/s 148 was challenged on which the court adjudicated as:

> "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice u/s 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed,

[1] G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 1 SCC 72; ACIT v. Banswara Syntex Ltd. [2005] 272 ITR 642 (Raj).

> by passing a speaking order, before proceeding with the assessment in respect of the above said five AYs."

4. It is contended that a writ in exercise of the power under Article 226 of the Constitution is discretionary and extraordinary, that too, when a complete mechanism for efficacious remedy is provided under the statute, more so, a fiscal one.[2] In a writ of *certiorari*, the Court is concerned with the decision making process adopted by an authority, rather than the decision itself. Such a writ cannot be issued to cure all the defects even assuming they are available on record. Till the assessment order is passed, the proceedings are under adjudication before AO. The power of the AO u/s 147 of the Act is not in dispute. A notice issued by the AO is only at the stage of process of determination and not a determination by itself. The process of assessment is not required to be challenged before Court of law, as it is a still born child. Therefore, the Petitioner cannot have a legal right as there is no legal injury suffered by it at that stage.

5. The Apex Court has adjudicated over the issue that whether the HC is justified in interfering with the order passed by the AO u/s 148 in exercise of its jurisdiction under Article 226 when an equally alternate efficacious remedy was available to the assessee under the Act in negative.[3] The Apex Court in the case of *CIT* v. *Chhabil Das Agarwal*[4] relied upon its earlier decisions and held that:

> "Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal* v. *Supdt. of Taxes*,[5] *Titagarh Paper Mills* v. *State of Orissa*[6] and other similar judgments that the HC will not entertain a petition

[2] JCIT & Ors. v. Kalanithi Maran & Anr. Writ Appeal No. 347 of 2014.
[3] D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 1032 (8th Ed., 1989); H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1112 (4th Ed. 1991).
[4] CIT v. Chhabil Das Agarwal (2014) 1 SCC 603 CIT v. Vijay Bhai N. Chandrani [2013] 357 ITR 13 (SC).
[5] Thansingh Nathmal v. Superintendent of Taxes AIR 1964 SC 1419: [1964] 6 SCR 654 [HEREINAFTER REFERRED AS "THANSINGH"]; K.S. Rashid & Sons v. Income Tax Investigation Commission (1954) 25 ITR 167: AIR 1954 SC 207; Sangram Singh v. Election Tribunal, Kotah [1955] 2 SCR 1: AIR 1955 SC 425; U.O.I. v. T.R. Varma AIR 1957 SC 882: (1958) 2 LLJ 259; State of U.P. v. Mohd. Nooh AIR 1958 SC 86.
[6] K.S. Venkataraman and Co. (P) Ltd. v. State of Madras (1966) 60 ITR 112: AIR 1966 SC 1089; Titagarh Paper Mills v. State of Orissa (1983) 2 SCC 433; N.T. Veluswami Thevar v. G. Raja Nainar AIR 1959 SC 422;

> under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

6. In the instant case, no such condition has arisen which would invoke the exceptions as the case is at a premature stage, where the rights and liabilities are still to be crystallised. The AO based on his reason to believe and his finding that there has been concealment of primary facts by the Petitioner, has issued the notice u/s 148 which is as per procedure and well within his jurisdiction. In *Nivedita Sharma* v. *Cellular Operators Assn. of India*,[7] Hon'ble Apex Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief. In *Thansingh Nathmal* v. *Supdt. of Taxes*,[8] the Apex Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

> "The HC does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

7. In *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa*,[9] Apex Court observed that "*It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of*." The

---

Municipal Council, Khurai v. Kamal Kumar AIR 1965 SC 1321: (1965) 2 SCR 653; Siliguri Municipality v. Amalendu Das (1984) 2 SCC 436.

[7] Nivedita Sharma v. Cellular Operators Assn. of India (2011) 14 SCC 337; S.T. Muthusami v. K. Natarajan (1988) 1 SCC 572; Rajasthan SRTC v. Krishna Kant (1995) 5 SCC 75; Kerala SEB v. Kurien E. Kalathil (2000) 6 SCC 293; A. Venkatasubbiah Naidu v. S. Chellappan (2000) 7 SCC 695.

[8] Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra (2001) 8 SCC 509; Pratap Singh v. State of Haryana (2002) 7 SCC 484; L.L. Sudhakar Reddy v. State of A.P. (2001) 6 SCC 634; *Supra* THANSINGH at 5.

[9] Titagarh Paper Mills v. State of Orissa (1983) 2 SCC 433.

aforementioned proposition was aptly laid down Willes, J. In *Wolverhampton New Waterworks Co.* v. *Hawkesford*[10] as:

> "There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

8. Relying upon the assertions and adjudications of the Hon'ble Apex Court in the aforementioned cases, it is contended that it is settled that the extraordinary jurisdiction of the High Court under Article 226 of the Constitution cannot be invoked when an efficacious alternative remedy is available with the assessee.

*Therefore, it is humbly submitted before the Hon'ble Court that the instant writ petition is not maintainable as statutory redressal mechanism is available to the Petitioner and the AO has followed the due procedure laid down by the statute. Moreover, there has been no violation of the principles of natural justice; hence, the petition be dismissed.*

[10] Wolverhampton New Waterworks Co. v. Hawkesford (1859) 141 ER 486; Neville v. London Express Newspapers Ltd. 1919 AC 368; Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. 1935 AC 532 (PC); Secy. of State v. Mask and Co. AIR 1940 PC 105.

## II. WHETHER THERE HAS BEEN TRUE AND FULL DISCLOSURE OF MATERIAL FACTS BY THE ASSESSEE TO THE ASSESSING OFFICER AT THE TIME OF INITIAL ASSESSMENT?

9. §147 of the Act provide power to the AO to reopen assessment completed under the Act in case there is 'reason to believe' that any income of the assessee taxable under the provisions of the Act has escaped assessment. However, as per proviso to § 147, assessment can reopened after four years only when there occurs failure on the part of the assessee to disclose material facts fully and truly.

10. It is contended by the Respondent that there has been gross failure on the part of the Petitioner to disclose facts at the time assessment. It is due to these non-disclosures on the part of the assessee that the payment made to Zeon by the Petitioner without withholding of tax was allowed.[11] Thus, the income has escaped assessment due to failure on the part of assessee to truly and fully disclose all material facts.

### A. THAT THE ONUS TO DISCLOSE ALL THE MATERIAL FACTS IS ON THE ASSESSEE

11. It is humbly submitted before the Hon'ble Court that the assessment of assessee's income is done by the AO on the basis of the material disclosed by the assessee. In the case of *CIT* v. *Burlop Dealers Limited*[12] the Apex Court held that in every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, required to know all the facts which help him in coming to the correct conclusion. Thus, it is duty of the assessee to disclose all the material facts to the AO at the time of assessment.[13]

12. Reliance is placed on the case of *Ketan B. Mehta* v. *ACIT*[14] wherein the Gujarat HC observed that it is the duty of the assessee to disclose all the primary facts to the AO. The Supreme Court has also observed in the case of *Associated Stone Industries (Kotah) Limited* v. *CIT, Rajasthan*[15] that:

[11] Moot Proposition, p. 3 ¶ 5.
[12] CIT v. Burlop Dealers Limited (1971) 1 SCC 462: AIR 1971 SC 1635: [1971] 79 ITR 609.
[13] B.B. LAL & N. VASHISHTH, DIRECT TAXES: INCOME TAX, WEALTH TAX AND TAX PLANNING 27 – 29 (29th Ed. 2008).
[14] Ketan B Mehta v. ACIT [2012] 346 ITR 254G. Venkatesh Murthy v. CIT [1966] 62 ITR 244 (Kar).
[15] Associated Stone Industries (Kotah) Limited v. CIT, Rajasthan (1997) 3 SCC 323 [HEREINAFTER REFERRED AS "STONE"]; Parashuram Pottery Works Company Limited v. ITO (1977) 1 SCC 408: AIR 1977 SC 429.

> "It is now well settled by the decisions of this Court that the duty of the assessee is only to fully and truly disclose all material facts. The expression "material facts" contained in § 34(1)(a) of the Act refers only to Primary facts, and it is the duty of the assesses to disclose such primary facts."

13. Thus, relying on the aforesaid judgments of the hon'ble Apex Court and the HC, it is most respectfully submitted before the Hon'ble Court that the onus was upon the Petitioner to disclose all the primary facts to the AO at the time of the initial assessment pertaining to its transaction with Zeon.[16] The Petitioner had duty to provide all material information relating to the purchase of shrink wrapped software, Neo, from Zeon[17] which would allow the AO to form correct opinion regarding the taxability of the payment made by the Petitioner to Zeon.

## B. THAT FURNISHING OF DOCUMENTS DOES NOT AMOUNT TO TRUE AND FULL DISCLOSURE OF ALL THE MATERIAL FACTS

14. It is humbly submitted before the Hon'ble Court that Explanation I to §147 stipulates that mere production of books of accounts or other evidence from which material information can be deduced with the help of due diligence does not necessarily amount to disclosure of facts.[18]

15. In the case of *CIT* v. *Foramer France,*[19] hon'ble Supreme Court has elucidated on the term 'true and full disclosure of material facts.' The Apex Court held that true and full disclosure refers to the disclosure of all the primary facts which are necessary for the completion of assessment by the AO. Omission of certain primary facts or disclosure of wrong facts does not amount to true and full disclosure. Similarly, in the case of *Kantamani Venkata Naryana and Sons* v. *1st Addl. ITO,*[20] Supreme Court observed that production of evidence from which material facts can be discovered cannot be held to be full disclosure of facts. Reliance is also placed on the case of *Calcutta Discount Co. Ltd.* v. *ITO, Calcutta & Anr.*[21]

16. It is submitted that in the instant case, the assessment of the Petitioner was completed u/s 143 (3) of the Act for the AYs 2003-04, 2004-05, 2006-07, 2007-08 and 2008-09 while

[16] Moot Proposition, p. 1 ¶ 2.
[17] *Id.* at 16.
[18] Archi Agnihotri & Medha Srivastava, *Interpretation of Section 147 of the Income Tax Act, 1961: Judicial Trends* MANU 1 – 11 (2005).
[19] CIT v. Foramer France [2003] 264 ITR 566 (SC): (2003) 185 CTR 512.
[20] Kantamani Venkata Naryana & Sons v. 1st Addl. ITO AIR 1967 SC 587, [1967] 63 ITR 638.
[21] Calcutta Discount Co. Ltd. v. ITO, Calcutta & Anr. [1961] 2 SCR 241: AIR 1961 SC 372: (1961) 41 ITR 191.

assessment for AY 2005-06 was completed u/s 143 (1) of the Act.[22] Further, reliance is being placed on the case of *Indo – Aden Salt Manufacturing and Trading Company Private Limited* v. *ITO*[23] wherein the Supreme Court held that:

> "Mere production of evidence before the Income Tax Officer was not enough, that there may be omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then, it is the duty of the assessee to bring it to the notice of the assessing authority. Assessee knows all the material and relevant facts - the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent. That was immaterial."[24]

17. It is submitted before the Hon'ble Court that the Petitioner had furnished only those documents to the Respondent which was demanded by it during the initial assessment.[25] Thus, it is vehemently negated by the Respondent that the Petitioner voluntarily made disclosure regarding information relating to its transactions with Zeon.

18. It is further contended that the Petitioner did not disclose all the material information to the Respondent. As aforementioned, it furnished only that information which was demanded from it by the Respondent. In *MMTC* v. *DCIT*,[26] ITAT observed that mere furnishing of documents without providing the information to the AO does not amount to true and full disclosure of facts.

19. The Petitioner and Zeon had entered into transaction for purchase of computer software i.e. Neo in lieu of payment of INR 35,00,000 (Indian Rupees Thirty Five Lakh Only.) [27] It had provided certain documents on demand by the Respondent purporting to the aforesaid transaction.

20. Thus, it is submitted before the Hon'ble Court that the Petitioner has furnished only the documents to the Respondent while conducting assessment u/s 143 (3) which in the light of Explanation I to § 147 and concealment of other material information does not amount to disclosure of material information.

---

[22] Moot Proposition, p. 3¶ 5.
[23] Indo-Aden Salt Manufacturing and Trading Company Pvt. Ltd. v. ITO AIR 1986 SC 1857: (1986) 2 SCC 33.
[24] ITO v. Lakhmani Mewal Das (1976) 3 SCC 757; Malegaon Electricity Co. P. Ltd. v. CIT (1970) 2 SCC 431; Hazi Amir Moh. Mir Ahmed v. CIT [1977] 110 ITR 630.
[25] Moot Proposition, p. 4 ¶ 6.
[26] MMTC v. DCIT [2009] 119 ITD 175: 2009 (309) ITR(AT) 361.
[27] Moot Proposition, p. 2 ¶ 4.

## C. THAT THERE HAS BEEN CONCEALMENT OF MATERIAL FACTS BY THE ASSESSEE

21. It is humbly submitted before the Hon'ble Court that where the assessee has failed in his duty to make true and full disclosure to the AO at the time of assessment then AO may reopen assessment after the expiry of four years.[28]

22. In the case of *Ganga Saran & Sons P. Ltd.* v. *ITO & Ors.,*[29] the Hon'ble Supreme Court has held that in order to reopen assessment beyond four years, AO should not only have 'reason to believe' that income has escaped assessment but such escapement shall be due to non-disclosure of certain material facts by the assessee to the AO.

23. Moreover, the Apex Court in the case of *Associated Stone Industries (Kotah) Limited* v. *Commissioner of Income Tax, Rajasthan* [30] elucidated the meaning of the term 'material facts' and observed that by material facts it meant that assessee should disclose primary facts to the AO. However, assessee is not bound to disclose or aid the AO in drawing any legal or factual inference from such primary facts. The Court also held that what constitutes primary facts is a question of fact and shall be contingent on the facts of each case.[31]

### *i. That there were primary facts which came to the knowledge of AO subsequent to assessment*

24. It is submitted before the Hon'ble Court that term 'primary facts' refers to the set of facts which are necessary for the AO to draw inferences and form opinion about the taxability of the income. Further, the facts which affect the opinion of the AO or for the basis of opinion of AO are known as 'primary facts.'[32]

25. In the case of *Indian Oil Corporation* v. *ITO*[33] the Apex Court has observed that:

---

[28] DR. GIRISH AHUJA & DR. RAVI GUPTA, DIRECT TAXES: LAW & PRACTICE 953 – 1030 (5th Ed. 2013).
[29] Ganga Saran & Sons P. Ltd. v. ITO & Ors. (1981) 3 SCC 143: [1981] 130 ITR 1; Sheo Narain Jaiswal & Ors. v. ITO & Ors., [1989] 176 ITR 352; Fenner (India) Ltd. v. DCIT [2000] 241 ITR 672; Anil Radhakrishna Wani v. ITO & Ors. 2010 (3) Bom CR 577: (2010) 323 ITR 564; Multiscreen Media P. Ltd. v. UOI & Anr. (2010) 324 ITR 48; IPCA Laboratories Ltd. v. Gajanand Meena, DCIT & Ors. (2001) 251 ITR 416; Supreme Treves Pvt. Ltd. v. DCIT & Ors. (2010) 323 ITR 323; Arvind Mills Ltd. v. DCIT (2000) 242 ITR 173; Gujarat Fluorochemicals Ltd. v. DCIT (2009) 319 ITR 282; Inducto Ispat Alloys Ltd. v. ACIT (2010) 320 ITR 458; Vikram Kothari (HUF) v. State of U.P. (2011) 200 Taxman 152.
[30] Associated Stone Industries (Kotah) Ltd. v. CIT, Rajasthan (1997) 3 SCC 323; Calcutta Discount Co. Ltd. v. ITO, Calcutta & Anr. [1961] 2 SCR 241: AIR 1961 SC 372; Oriental Carpet Manufacturers v. ITO [1987] 168 ITR 296; G.B. Bros & Konda Rajgopala v. ITO [2004] 267 ITR 774; ACIT v. Sarvamangala Properties [2002] 257 ITR 722; CIT v. A.R. Enterprises (2002) 255 ITR 121; Ranbaxy Laboratories Ltd. v. DCIT [2001] 351 ITR 23.
[31] AGR Investment Ltd. v. ACIT [2011] 333 ITR 146.
[32] ACHARYA SHUKLENDRA, LAW OF INCOME TAX 1526 (3rd Ed. 2001).
[33] Indian Oil Corp. v. ITO (1986) 3 SCC 409: AIR 1987 SC 1897.

> "What facts are material and necessary for assessment will differ from case to case. In every assessment proceedings, for computing or determining the proper tax due from the assessee, it is necessary to know all the facts which help the assessing authority in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed or otherwise, the assessing authority has to draw inferences as to certain other facts."

26. Reliance is also being placed on the judgments of Hon'ble HCs in the cases of *CIT* v. *Sahil Knit Fab*[34] and *Acorus Unitech Wireless Private Limited* v. *ACIT*[35] wherein the Courts have reiterated the stand taken by the Hon'ble Apex Court.

27. It is contended that in order to determine that the payment of INR 35,00,000 (Indian Rupees Thirty Five Lakh Only) by the Petitioner to Zeon[36] is in nature of royalty, it is pertinent for the AO to have knowledge of the nature of payment and terms and conditions of the Agreement. Concealment or wrongful disclosure of such information would misled the AO in characterizing the payment and hence, wrong assessment of the income.

28. Therefore, it is submitted that the Agreement between the Petitioner and Zeon for the sale of the shrink wrapped software[37] along with the source and nature of payment is a primary fact. The Hon'ble Delhi HC in *CIT* v. *Highgain Finvest Private Limited*[38] held that the true source of receipt and nature of income are primary fact. Non-disclosure such information is non-disclosure of material information.

*ii. That the aforementioned primary facts has been concealed by the Petitioner at the time of assessment*

29. Proviso to § 147 provides that the assessment can be reopened by AO post four years of conclusion of relevant AY if there has been concealment of primary facts by the assessee.[39] Same was held by the Hon'ble Gujarat HC in *Aayojan Developers* v. *ITO*[40] that if there has been non-disclosure of certain facts by the assessee then the AO can assume jurisdiction to reopen assessment. Further, the Court held that it is irrelevant if such non-disclosure was

[34] CIT v. Sahil Knit Fab 2012 Indlaw HP 1958.
[35] Acorus Unitech Wireless Private Ltd. v. ACIT 2014 Indlaw DEL 770; C.H. Naniwadekar, *Reopening & Revision of Assessment* 1 – 10 (2006).
[36] Moot Proposition, p. 2, ¶ 4.
[37] Moot Proposition, p. 1 ¶ 3.
[38] CIT v. Highgain Finvest Private Limited 2007 (141) DLT 551: [2008] 304 ITR 325: [2007] 164 Taxman 142.
[39] TAXMANN'S DIRECT TAXES LAW LEXICON 395 – 407 (1st Ed. 2008).
[40] Aayojan Developers v. ITO [2011] 335 ITR 234; Ghaziabad Ispat Udyog Limited v Deputy Commissioner of Income Tax, Ghaziabad 2014 Indlaw ALL 1272.

willful or inadvertent. It is contended by the Respondent that the Petitioner had concealed certain primary facts at the time of assessment. Due to such concealment, no TDS was deducted u/s 195 of the Act on the payment made by the Petitioner to Zeon.[41]

(a) That the Petitioner did not disclose the Agreement to the AO.

30. The Petitioner had entered into a non-exclusive perpetual Licensing Agreement [Hereinafter referred as **"the Agreement"**][42] with Zeon for the purchase of shrink wrapped software i.e. Neo.[43] The Agreement contained the terms and conditions on the basis of which the software was provided to the Petitioner. The Agreement was the basis upon which the AO can ascertain the character of the payment made by the Petitioner.

31. In the case of *Director of Income Tax* v. *McDonalds Incorporation*[44] the Hon'ble Delhi HC did not allow the AO to reopen assessment to tax payment in nature of royalty since the licensing agreement was disclosed by the assessee. Similarly, the ITAT in the case of *Qualcomm Incorporation* v. *ADIT, International Taxation*[45] the licensing agreement has been relied upon by AO for the reopening of assessment u/s 147 of the Act.

32. Thus, it is submitted before the Hon'ble Court that it was duty of the Petitioner to furnish to the Respondent the Agreement for purchase of software. However, it has concealed the same by not furnishing the aforementioned Agreement.

(b) That the Petitioner also did not disclose other primary facts.

33. It is submitted before the Hon'ble Court that the taxability of the payment is dependent upon the nature of payment. The licensing agreement between the Petitioner and Zeon is not the sole determining factor for the nature of payment made. Any additional information which is necessary for the determination of character of income is also a primary fact. In the case of *Deputy Commissioner of Income Tax* v. *Gupta Overseas*[46] the Delhi bench of ITAT held that nature of payment is essential to determine the taxability of the payment.

[41] Moot Proposition, p. 2 ¶ 3.
[42] Moot Proposition, p. 2 ¶ 4.
[43] Moot Proposition, p. 1 ¶ 3.
[44] Director of Income Tax v. McDonalds Incorporation [2013] 213 Taxman 26.
[45] Qualcomm Incorporation v. ADIT, International Taxation [2013] 23 ITR (Trib) 239; HCL Limited v. ACIT 2004 Indlaw ITAT 565.
[46] DCIT v Gupta Overseas 2014 Indlaw ITAT 20; Rangesh Banka, *Core Principles of Reassessment with Important Case Laws* 1 ITATONLINE.ORG 1 – 9 (2010).

34. It is submitted that the agreement stipulates the terms and conditions to the Petitioner regarding the usage of the computer software. However, the said agreement does not provide for the quantum of payment to be made by the Petitioner to Zeon. Moreover, it also does not specify that the Petitioner shall make payment year on year basis.[47]

35. It is contended by the Respondent that the aforesaid fact is a primary fact as it is vital in determination of the true nature of the income i.e. as royalty and hence, chargeable to tax u/s 9 (1) (vi) of the Act. Thus, even if the agreement was furnished by the Petitioner to the AO yet it has concealed the primary fact as it never disclosed that the payment was to be made on year on year basis. The Petitioner has furnished only the documents to the AO.[48]

36. It is submitted before the Hon'ble Court that in the case of *Remfrey & Sagar* v. *CIT*[49] it was held that the non furnishing of the primary facts, in case of payment in lieu of agreement, the agreement, lead to non disclosure of material facts truly and fully. Same was held in the case of *CIT* v. *Highgain Finvest Private Limited*[50] wherein the Court observed that the nature and source of payment should be disclosed by the assessee.

37. Relying on the aforesaid judgments, it is contended that the Petitioner had suppressed the primary facts which were essential to determination of nature payment made by the Petitioner. This has misled the AO to accept the transaction between the Petitioner and Zeon leading to escapement of income.

*Thus, it is humbly submitted before the Hon'ble Court that there has not been true and full disclosure on the part of the Petitioner and hence, the assessment can be reopened validly u/s 147 of the Act.*

[47] Moot Proposition, p. 2 ¶ 3.
[48] Moot Proposition p. 4 ¶ 6.
[49] Remfrey & Sagar v. CIT [2013] 351 ITR 75: [2013] 213 Taxman 268.
[50] CIT v. Highgain Finvest Private Limited [2008] 304 ITR 325: [2007] 164 Taxman 142.

# III. WHETHER PAYMENT MADE FOR THE USE OF SHRINK WRAPPED SOFTWARE CONSTITUTES ROYALTY?

38. It is contended before the Hon'ble court that payment made for the use of shrink wrapped software constitutes royalty u/s 9(1) (vi) of the Act. It is submitted that grant of a license to use a computer software amounts to a transfer of a right in respect of copyright as enumerated in the Act. A pure transfer of software as in the present case does not amount to sale of a copyrighted material but is a transfer of a right in respect of the copyright embedded in the software. Thus, it is most respectfully submitted that the AO was correct in his reasons providing that the payment made for the grant of such a license amounts to royalty.

## A. THAT PAYMENT MADE BY THE PETITIONER TO ZEON IS FOR THE GRANT OF LICENSE TO USE THE SOFTWARE

39. It is humbly submitted that a license is a grant of authority to do a particular thing.[51] A license does not, in law, confer a right. It only prevents that from being unlawful which, but for the license, would be unlawful. A license gives no more than the right to do the thing actually licensed to be done. It transfers an interest to a limited extent, whereby the licensee acquires an equitable right only in the copyrighted article.[52]

40. *Ex facie,* it is clear that the agreement between the Petitioner and Zeon is a license agreement for the use of software. Examination of the Agreement reveals that the only right granted to the petitioner is the right to use the software and also to create a backup copy. The license granted to the Petitioner is a perpetual, non-exclusive and non-transferable license that also forbids the Petitioner from transferring, assigning or sub-licensing the software.[53] As per the license agreement, the proprietary rights over the copy of the software, support information and the backup copies of the same have not been transferred and have been held by Zeon.[54]

41. It is further submitted that the transaction does not even results in the transfer of the ownership in the copy of the software which is given to the petitioner in pursuance of the agreement. Hence, it is submitted that the agreement is a license agreement which has been granted to the petitioner just to use the software and hence, cannot be exempted from the

[51] H. Ward Classen, *Fundamentals of Software Licensing* 37 IDEA 1 – 93 (1996).
[52] ADIT (International Taxation), Mumbai & Anr. v. Reliance Infocomm Ltd. & Ors. 2013 Indlaw ITAT 40.
[53] Moot Proposition, p. 2, ¶ 4.
[54] Moot Proposition, p. 2 ¶ 4.

scope of the definition of royalty as provided under the Act.

**B. THAT THE GRANT OF LICENSE TO USE THE SOFTWARE AMOUNTS TO TRANSFER OF RIGHT TO USE OR RIGHT IN RESPECT OF COPYRIGHT**

42. It is humbly submitted that the owner or licensor of a copyright has a right to grant permission to use the software or a computer programme, in respect of which they have a copyright, without transferring the right in copyright. It is one of the rights of a copyright owner or licensor. Without such right being transferred, the end-user has no right to use the software or computer programme. If end-user uses it, it amounts to infringement of copyright.[55] For transfer of such right if consideration is paid, it is not a consideration for transfer of a copyright but for use of intellectual property embedded in the copyright, and therefore it is for transfer of one of those rights of the owner of the copyright. It is not a right in copyright but it is a right in respect of a copyright as enumerated in Explanation 2 to § 9(1)(vi) of the Act.[56] Even when a copyrighted article is sold, the end-user gets the right to use the intellectual property embedded in the copyright and not a right in the copyright as such.[57]

43. Reliance is placed on the case of *Citrix Systems Asia Pacific Pte Ltd*[58], in which the Authority for Advanced Rulings on similar facts held that:

> "Whenever a software is assigned or licensed for use, there is involved an assignment of the right to use the embedded copyright in the software or a license to use the embedded copyright, the intellectual property right in the software. It is not possible to divorce the software from the intellectual property right of the creator of the software embedded therein."

44. It is further submitted that without transferring a right in the copyright it is not possible to receive consideration for the use of the intellectual property for which the owner possess a copyright. Ultimately, the consideration paid is for the usefulness of the material object in respect of which there exists a copyright. Therefore, the intention of the legislature was not to exclude the consideration paid for the use of such material object which is popularly called as

[55] A. LEMLEY, PETER S. MENELL, ROBERT P. MERGES & PAMELA SAMUELSON, SOFTWARE & INTERNET LAW 307 – 311 (3rd Ed. 2006).
[56] DOUGLAS E. PHILIPS, THE SOFTWARE LICENSE UNVEILED: HOW LEGISLATION BY LICENSE CONTROL SOFTWARE ACCESS? 6 – 15 (1st Ed. 2009).
[57] Deloitte, *Taxation of Shrink Wrapped Software: India and International Perspective* 2 – 23 (2013).
[58] Citrix Systems Asia Pacific Pte Ltd [2012] 343 ITR 1 (AAR); Raj Shroff & Daksha Baxi, *Taxation of Software Supplied by Foreign Companies* 1 – 8 (2012).

copyrighted article. Even in respect of a copyrighted article the same is transferred, no doubt the right in the copyright is not transferred, but a right in respect of a copyright contained in the copyrighted article is transferred.[59] Therefore, the legislature thought it fit to use the phrase "in respect of" as contra distinct from the word "in" copyright in Explanation 2 to § 9(1)(vi) of the Act.

45. It is contended that the words 'in respect of' denote the intention of the legislature to give a broader meaning. The words 'in respect of' admit of a wide connotation, than the word "in" or "on". The expression "in respect of" means "attributable to" If it is given a wider meaning "relating to or with reference to", it has been used in the sense of being 'connected with'. Whether it is a fiscal legislation or any legislation for that matter, the golden rule of interpretation equally applies to all of them. i.e., the words in a statute should be given its literal meaning.[60] The meaning is clear, intention is clear, there is no ambiguity. Therefore, there is no scope for interpretation of this expressed term in as much as in the context in which it is used in the provision.[61] Any other interpretation would lead to the aforesaid provision becoming otiose.

46. Thus, by adopting literal interpretation to the term 'royalty' as provided under the Act, it is most respectfully submitted that the grant of license to use computer software amounts to transfer of all or any rights in respect of copyright.

### C. THAT THE PAYMENT MADE FOR THE GRANT OF LICENSE FOR TRANSFER OF RIGHT IN RESPECT OF COPYRIGHT CONSTITUTES ROYALTY

47. It is humbly submitted that the as per § 9(1)(vi) of the Act, a payment made for transfer of right in respect of copyright (including granting of license) constitutes royalty.[62] It is reiterated by the Respondent that the Agreement in the present case is a license agreement under which Zeon has agreed to grant a license to the Petitioner for the use of software. Also, that such transfer of 'right to use' of the software amounts to the granting of license for transfer of right in respect of the copyright in the software.

48. The annual payment made is neither towards the transfer of right in a copyright nor towards a

[59] ADIT (International Taxation), Mumbai & Anr. v. Reliance Infocomm Ltd. & Ors. 2013 Indlaw ITAT 40.
[60] JUSTICE S. RANGANATHAN, SAMPATH IYENGAR'S LAW OF INCOME TAX 2190 (8th Ed. 1992).
[61] DR. VINOD K SINGHANIA AND DR. KAPIL SINGHANIA, DIRECT TAXES: LAWS & PRACTICE 449 (45th Ed. 2010).
[62] GURMEET BEDI AND MANPREET SINGH SACHDEVA, HALSBURY'S OF LAW INDIA: INCOME TAX – II 393 (41st Vol. 2008).

sale of a copyrighted material. A mere examination of the Agreement would show that the annual payment is made for the right to use the software which is a right in respect of a copyright. Thus, it is contended that the annual payment made by the petitioner to Zeon in lieu of the aforementioned license amounts to royalty within the meaning of § 9(1)(vi) of the Act.

49. Hon'ble Karnataka HC in the case of *Samsung Electronics Ltd.* v. *CIT*[63] while dealing with the same question and a similar license agreement where a transfer of right to use copyrighted software was effected held that license granted for making use of the copyright in respect of shrink wrapped software/off-the-shelf software under a license agreement, which authorizes the end user, i.e., the customer to make use of the copyright software contained in the said software, which is purchased off the shelf or imported as shrink wrapped software would amount to royalty. The Respondent further relies on the decision of ITAT, Bombay in the case of *ADIT (International Taxation)* v. *Reliance Infocomm Ltd.*[64] in which it held that payment made for grant of license for transfer of right to use the software amounts to royalty. It is contended that the principles laid down by the Hon'ble Karnataka High Court and ITAT are applicable to the instant case as the *factum* of supply of software without hardware is in *pari materia* with the facts of the instant case.

*Thus, relying on the aforementioned decisions, it is most respectfully submitted before the Hon'ble Court that the payment of INR 35,00,000 (Indian Rupees Thirty Five Lakh Only) made by the Petitioner to Zeon in respect of the license to use the software amounts to royalty u/s 9 (1) (vi) of the Act.*

[63] Samsung Electronics Ltd v. CIT [2012] 345 ITR 494 (Kar).
[64] Praxity, *Cross Border Taxation of Software Contracts,* 1 BKD 1 – 15 (2010); ADIT (International Taxation) v. Reliance Infocomm Ltd. 2013 Indlaw ITAT 40.

# PRAYER

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

1. That the Petition filed by the Petitioner is frivolous and immature and hence, same must be dismissed;

2. That the Assessing Officer has validly issued the notice for reassessment u/s 148;

3. That the payment made by the Petitioner to Zeon amounts to 'royalty' under the Income Tax Act, 1961 and hence, TDS at the rate of 25% should have been deducted;

4. That there has been failure on the part of the Petitioner to deduct TDS on payments made by it to Zeon and hence, the payment made shall be disallowed as expenditure u/s 40 (1) (i) of the Income Tax Act, 1961; and

5. That the Petitioner is liable to be charged as 'assessee – in – default' u/s 201 of the Income Tax Act, 1961.

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

**All of which is humbly submitted.**

Filed on: __/__/2014 Sd/-

**Counsels for the Respondent**