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THE 2ND KIIT UNIVERSITY NATIONAL MOOT COURT COMPETITION, 2014

5TH – 7TH SEPTEMBER 2014

BEFORE THE HON'BLE HIGH COURT OF BOMBAY

CHEETAH AND CHETAK PVT. LTD. (PETITIONER)

V.

INCOME TAX AUTHORITY (RESPONDENT)

ON SUBMISSION TO THE REGISTRY OF THE COURT

OF THE HON'BLE HIGH COURT OF BOMBAY

MEMORIAL FOR THE RESPONDENT- INCOME TAX AUTHORITY

TABLE OF CONTENTS

[TABLE OF CONTENTS]

INDEX OF AUTHORITIES

BOOKS

FOREIGN CASES

STATUTE

INDIAN CASES

CBDT CIRCULAR

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

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

II. Consequently, an agreement ("**Agreement**") was entered into between them and Zeon for the purchase of software for a price of INR 35,00,000 on a year on year basis. No TDS was deducted by the manufacturing company at the time of making payments. The Agreement granted the Licensee a '*non-exclusive, non-transferable license*' and stated that '*the license is perpetual in nature*', according to S. 2(a). Further, the Agreement stipulated that all license fees are '*exclusive of and net of any taxes, duties or other such additional sums*', according to S. 4.

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

making payment to Zeon for the software. Manufacturing company was charged under ITA as an 'assesse-in-default'. Assessee decided to file a writ petition in the High Court of Bombay for all the AYs for which they had received a 148 notice, contending that the re-opening was bad in law.

STATEMENT OF ISSUES

ISSUE I. Whether the writ filed by the petitioner is maintainable before the High Court of Bombay?

ISSUE II. Whether the consideration under License Agreement is royalty?

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

ISSUE IV. Whether the petitioner has been correctly charged as an assessee-in-default?

SUMMARY OF ARGUMENTS

I. THE WRIT FILED BEFORE THE HIGH COURT IS NOT MAINTAINABLE

The writ petition filed by the petitioner is not maintainable. *Firstly*, the existence of an efficacious alternative remedy in the Income Tax Act would oust the petitioner from filing the writ petition. *Secondly,* no fundamental right was infringed by the amendment introduced in S.9 (1)(vi) of the Income Tax Act, 1961 and therefore the writ will not be maintainable on this regard.

II. THE CONSIDERATION UNDER THE LICENSE AGREEMENT AMOUNTS TO ROYALTY

The DTAA between Singapore and India does not cover the concerned transaction as Zeon is not a resident of Singapore. *Firstly,* Zeon is not a resident under S. 2 of the Singapore Income Tax Act, 1948. *Secondly,* it is incorporated in Cayman Islands.

The consideration under the license agreement is royalty under S.9(1)(vi). The consideration comes under the ambit of royalty as the use of software includes in it the use of copyright in the software as there is no distinction between a copyright and a copyrighted article. *Further,* Explanation 4 to Section 9(1)(vi) of the Income Tax act, 1961 is constitutionally valid. The parliament has the complete power to make retrospective statutes. Moreover, the explanation does not in any manner violate any fundamental right.

III. THE REOPENING AND REASSESSMENT IS NOT BAD IN LAW

The reopening and reassessment are not bad in law and cannot be held to invalid. *Firstly*, with regard to the reassessment, the assessing officer had reason to believe that the income escaped assessment as the assessee had not disclosed all material facts truly and fully. *Secondly,* the reopening was not in contravention of the CBDT Circular dated 29/05/2012. *Thirdly,* the mistake made in the reassessment, if any, had to be addressed by way of prescribed statutory provision and the writ instituted on this regard would not be maintainable before the High Court.

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

Firstly, the assessee was under an obligation to deduct sums under S. 194J. *Secondly,* the TDS on royalty was not an impossible task. *Thirdly,* there is lack of bona fide reason to believe that tax was not deductable under S. 194J.

ARGUMENT ADVANCED

I. THE WRIT PETITION FILED BEFORE THE HIGH COURT IS NOT MAINTAINABLE

(¶1.) It is submitted that the writ filed in the High Court is not maintainable as there existed an efficacious alternative remedy **[A]**. Further, the writ is not maintainable on account of non contravention of any fundamental right. **[B]**

A. Existence of an efficacious alternative remedy would bar the institution of the writ

(¶2.) A writ is an extraordinary relief[1], granted only upon the exhaustion of an existing alternative remedy[2] in a statute. Further, the writ remedy cannot be used as an alternative remedy[3] or as means to adjudge any factual inconsistencies[4] as done in appellate courts[5]. In the case of *Madhya Pradesh v. ITO*[6] the Supreme Court has held that, when there existed an adequate alternative remedy, then the writ petition would be dismissed by the court *in limine*. The petitioners, in the case at hand, had did not exercise the proper course of action **[i]** provided by the alternative remedies **[ii]** before filing the writ petition.

i. The petitioner did not exercise the prescribed course of action

(¶3.) In the case of *GKN Driveshafts (India) Ltd*.[7], the Supreme Court laid down the proper course of action to be taken by the assessee upon being served a notice under S.148 of the Income Tax Act, 1961 (hereinafter I-T Act). The Supreme Court laid down that the assessee is

[1] SAMPATH IYENGAR, LAW OF INCOME TAX 10174 (12 ed. 2012).
[2] Income Tax Act, S.154 1961; S. 263 I-T Act, 1961.
[3] Institute of Chartered Financial Analysts of India v ACIT, (2002) 256 ITR 115 (AP); Nedunchezhian v. DCIT, 279 ITR 342; Reach Cable Networks Ltd. v. DDIT, 299 ITR 316; GVK Power Ltd v. ACIT (OSD), 336 ITR 451; Farhat Hasan v CIT , 284 ITR 111; Dewas Soya Ltd. v. ACIT, 349 ITR 676.
[4] Sahib Ram Giri v. ITO, 301 ITR 249; Precot Mills Ltd. v. CIT, 273 ITR 347; Dinesh Chand Jain v. Dy CIT, 280 ITR 567; ITO v. Shree Bajrang Commercial Co. P. Ltd., 269 ITR 338; Sterlite Industries Ltd. v. ACIT, 305 ITR 339; Mangilal v. ITO, 325 ITR 507.
[5] ABHE SINGH YADAV, LAW OF WRITS 27 (2009 ED.); V.G. RAMACHANDRAN'S, LAW OF WRITS 678 (6 ED. 2006); JUSTICE B L HANSARIA'S, WRIT JURISDICTION 132 (3 ed. 2005).
[6] Madhya Pradesh v. ITO , (1965) 67 ITR 637 (SC); *Also* see, Bhagwant Kishore Sud v. ITAT, (1999) 240 ITR 688; Sable Waghire Trust v. Achyuta Rao, (1999) 240 ITR 688 (Bom).
[7] GKN Driveshafts (India) Ltd. v. Income Tax Officer and Ors., 259 ITR 19 (SC); *Also* see SAK Industries Pvt Ltd v. Deputy Commissioner of Income Tax New Delhi, (2012) 210TAXMAN85(Delhi).

entitled to file objections to the issuance of notice[8], post which the assessing officer has to intimate the assessee with a speaking order. In the present case, the assessee has filed the writ petition upon the receipt of the notice, in contravention of the prescribed procedure. At such a stage, it is humbly submitted that the writ petition was pre-mature and not maintainable.

ii. *Appeal under s.246, I-T Act is the adequate remedy*

(¶4.) A writ petition for reassessment proceedings is not maintainable, as it can be challenged in appeal and revision as provided in the I-T Act[9]With respect to notice issued under S. 148, the Court will not address the question of limitation, as it can be raised only before the necessary tax authorities.[10] Further, the High Court cannot adjudge the sufficiency of the reasons at the stage of the notice[11] and any writ to this regard is dismissed. The petitioners filed the writ on receipt of the notice under S. 148, without exercising the remedy available in the governing statute. Therefore, it is submitted that on the existing of an alternate remedy[12] the validity of a notice under S.148 cannot be challenged by way of a writ petition and it should be dismissed.

B. There is no infringement of fundamental rights

(¶5.) It is submitted that Explanation 4 of S. 9(1)(vi), is not in contravention of any fundamental right and therefore it is submitted that the writ petition to this regard cannot be maintainable.

(¶6.) It is humbly submitted by the Respondents that the writ filed by the petitioner is not maintainable due to the existence of an adequate alternative remedy and there is no violation of any fundamental right in the enactment of the legislation introduced by way of amendment.

[8] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX 1125 (10 ed. 2014).
[9] Income Tax Act, 1961 S. 246; Harbhajan Singh v. Bansal, ITO (1999) 235 ITR 431; Jagneswar Day and Bibah Ranjan Day v. ITO ,(1998) 233 ITR 416 (Gau); Kapur Sons Steels Pvt Ltd v. ACIT, (2004) 266 ITR 478 (P&H).
[10] Chandra Lakshmi Tempered Glass Co Pvt Ltd v. ACIT (1997) 225 ITR 199 (HP); Chandi Ram v. ITO (1997) 225 ITR 611 (Raj).
[11] Trivandrum Club v. ADIT (Exemption), (2002) 256 ITR 61 (Ker); Hindustan Aluminum Corporation Ltd v. ITO, (2002) 254 ITR 370 (Cal).
[12] Fisher Xomox Sanmar Ltd v. ACIT, (2007) 294 ITR 620 (Mad); Ajanta Pharma Ltd v. ACIT, (2007) 295 ITR 218 (Bom); Baywest Power and Energy P Ltd v. ACIT, (2009) 296 ITR 532 (Mad).

II. THE CONSIDERATION UNDER THE LICENSE AGREEMENT CONSTITUTES ROYALTY.

(¶7.) It is humbly submitted that the consideration for the license agreement constitutes royalty under Sec. 9(1)(vi) because the parties to the agreement are not governed by the DTAA between Singapore and India (hereinafter 'DTAA S-I') **[A]**. Additionally, the consideration is royalty under Sec. 9(1)(vi) of the I-T Act **[B]**.

A. The parties do not come under the purview of the Singapore-India DTAA

(¶8.) It is settled law that where India has entered into a treaty for avoidance of double taxation as also in respect of purposes referred to in Section 90 of the I-T Act, the contracting parties are governed by the provisions of the treaty.[13] The DTAA S-I applies only to the residents of the contracting state.[14] It is submitted that the transaction does not come under the purview of the DTAA S-I as Zeon is not a resident of Singapore under Sec. 2 of the Singapore Income Tax Act, 1948 **[i].** *Moreover,* the lack of a Tax Residency Certificate (hereinafter TRC) has necessary significance on the determination of its residence **[ii].**

i. Zeon is not a resident of Singapore under Sec. 2 of the Singapore Income Tax Act, 1948.

(¶9.) Under Sec. 2 of the Singapore Income Tax Act, 1948 of Singapore, a company is a resident as when '*the control and management of whose business is exercised in Singapore*'[15]. 'Control and management' is not the same as carrying out business operations of a company.[16] 'Control and management' does not refer to the control and management of the day to day affairs of the business conducted through agents, employees or servants.[17] It refers to the *head and brain* which directs all the financial, management and general affairs of the company.[18] The

[13] Union of India v. Azadi Bachao Andolan, (2003) 263 ITR 706 (SC).
[14] Article 1, DTAA S-I.
[15] Section 2(Resident)(b), Income Tax Act, (1948). (Singapore).
[16] LAW OF INCOME TAX, SAMPATH IYER, 1384 (11th Ed. 2011); K.R. SAMPATH, ARTICLEWISE ANALYSIS OF INDIA'S DOUBLE TAXATION AVOIDANCE AGREEMENTS 245 (1D ed. 2013).
[17] Narottam and Pereira Ltd v. CIT, (1953) 23 ITR 454 (Bom).
[18] De Beers Consolidated Mines Ltd v. Howe, (1906) 5 TC 198 (HL).

place from where the directors manage the affairs, conduct the meetings and take decisions of the company constitutes the *de jure* and the *de facto* control management.[19]

(¶10.) In the case at hand, Zeon just 'carries out its software business primarily through Singapore'[20]. This doesn't indicate that the directors managed the affairs, conducted meetings and took decisions for the company through Singapore. 'Carrying out software business' could also indicate mere superintendence, supervision and direction over the day to day affairs by employees, servants or managers. Therefore, it is humbly submitted that mere carrying out of business by Zeon does not constitute control and management.

ii. *The lack of a Tax Residency Certificate has necessary significance on the determination of the resident status.*

(¶11.) *Firstly*, TRC has been held to be conclusive proof of residence and primary evidence[21] by the apex court[22] and other courts[23]. The fact that Zeon wasn't able to obtain a TRC shows that it was denied TRC by the Singapore Government. It is submitted that non-issuance of TRC Singapore Government shows that it did not consider Zeon to be a resident of Singapore.

(¶12.) *Moreover*, Zeon is incorporated in Cayman Islands and is therefore not a domicile of Singapore. Therefore, it is submitted that Zeon is not a resident of Singapore as it is not incorporated in Singapore, and lacks management & control in Singapore and hence was not issued a TRC by the Singapore authorities.

(¶13.) Therefore, it is humbly submitted in front of the Hon'ble Court that the transaction does not come under the purview of the DTAA S-I.

B. The consideration paid by the petitioner under the license agreement amounts to royalty under S.9(1)(vi) of the I-T Act, 1961.

[19] Narottam and Pereira Ltd v. CIT, (1953) 23 ITR 454 (Bom).; Cesena Co. Ltd. v. Nicholson, (1876) 1 TC 83; Calcutta Jute Mills Co. Ltd. v. Nicholson, (1876) 1 TC 83; Imperial Continental Gas Association v. Henry Nicholson, (1876) 1 TC 138; London Bank of Mexico v. Apthorpe, (1891) 3 TC 143; Sao Paulo Railway Co. Ltd. v. Carter, (1896) 3 TC 198; Noble Ltd (BW) v. Mitchell, (1926) 11 TC 372.

[20] Page 1, Moot Problem.

[21] Hindustan Petroleum Corporation Ltd. v. Assistant Director of Income Tax, (2010) 36 SOT 120 (Mum).

[22] Union of India v. Azadi Bachao Andolan, (2003) 263 ITR 706 (SC).

[23] Additional Director of Income Tax v. R. Liners Ltd., (2014) 61 SOT 3 (Mum); Radha Rani Holdings (P) Ltd. v. Additional Director of Income Tax, (2007) 16 SOT 495 (Delhi); UAE Exchange Centre v. Union of India, (2009) 223 CTR (Del) 250.

(¶14.) The consideration paid under the license agreement amounts to royalty as it is royalty under the meaning of S. 9(1)(vi) **[i]**. Further, Explanation 4 to S. 9(1)(vi) of I-T Act is constitutionally valid **[ii]**. *In any case,* Zeon's LO amounts to a business connection under S. 9(1) of the I-T Act and is therefore taxable under the head of business income **[iii]**.

a. The end user reserves the right to make a copy of the software, to store it and to take a back-up of the same

(¶15.) The Respondent humbly submits that the right to make a copy of a software and the right to store it amounts to it being a copyrighted work within the meaning of S. 14(1) of the Copyright Act, 1957 (hereinafter Copyright Act). And accordingly, if payment is made for the grant of a license for the said purpose, it would constitute royalty.[24] In the facts of the case at hand, the license agreement in consideration of payment, provided for the right to storage and the right to take a back-up copy[25] of the software.[26] The petitioner was also granted conditional rights to copy[27], rent, sublicense and transfer[28] under the license agreement which are also exclusive rights under the S. 14 of the Copyright Act. It is therefore submitted that the software is a copyrighted work and the royalty payment made consequently is taxable under S. 9(1)(vi) of the IT Act.

b. The software in question is in the nature of shrink wrap software

(¶16.) It is further submitted that the distribution of shrink wrapped software is construed as a use of copyright[29]. As per the facts of the case, the software in question is in the nature of shrink wrapped software[30], therefore the distribution of the same amounts to use of copyright. Accordingly, it is submitted that the payment for the same is in the nature of royalty and is liable to be taxed under S. 9(1)(vi) of the I-T Act.

c. The payment was made by the end user for the grant of license in respect of a copyright.

[24] CIT v. Samsung Electronics Co. Ltd., (2011) 345 ITR 494 (Kar); ROBERT BOND, SOFTWARE CONTRACTS 65 (4th ed. 2010).
[25] Page 2, Moot Problem. Clause 2(d) of the License Agreement.
[26] RICHARD MORGAN, MORGAN & BURDEN ON COMPUTER CONTRACTS 79 (8th ed. 2009); SIR KIM LEWISON, THE INTERPRETATION OF CONTRACTS 309 (5th ed. 2011).
[27] Page 2, Moot Problem. Clause 2(h) of the License Agreement.
[28] Page 2, Moot Problem, Clause 2(f)(i) of the Licese Agreement.
[29] Samsung Electronics v. CIT, ITA 131/2010 (Del).
[30] Page 1, Moot Problem.

(¶17.) It is further submitted that if the end user has made a payment for obtaining a license with respect to a copyright in case of computer software, such a payment would fall within the ambit of royalty[31]. As per the facts of this case, the payment made by the petitioner was for obtaining a license over the software, therefore the same is in the nature of royalty and hence taxable under S. 9(1)(vi) of the I-T Act.

d. Transfer of exclusive right in the computer programme is not essential

(¶18.) The Respondents most humbly submit that a transfer of an exclusive right in copyright is not essential[32] and for a user of information embedded in the software[33], the payment would be construed as royalty, thereby liable to be taxed[34]. Additionally, this payment for the software falls within the ambit of royalty[35]. Therefore, it is submitted that the payment being in the nature of royalty is taxable under S. 9(1)(vi) of the I-T Act.

e. No distinction between copyright and a 'copyrighted article'

(¶19.) Neither the I-T Act, nor the Copyright Act, 1957 distinguish between a 'copyright' and a 'copyrighted article'[36]. Usage of software includes within it the use of copyright of the software and the copyright cannot be separated from the software[37]. It is therefore submitted, that as per the existing statutes, a use of a copyrighted good includes the use of copyright within it and hence the payment made for supply of computer software is assessable to taxation under royalty.

ii. *Explanation 4 to S. 9(1)(vi)of the I-T Act, 1961 is constitutionally valid.*

a. Parliament has the power to make retrospective statutes.

[31]Gracemac Corporation v. Assessee, I.T. App. No. 1331/2010 (Del).
[32]CIT v. Synopsis International Old Ltd., (2013) 212 Taxmann 454 (Karn).
[33]Motorola Inc. v. DCIT (2005) 95 ITD 269 (Delhi)(SB).
[34]Samsung Electronics Co. Ltd. v. ITO, (2005) 94 ITD 91 (Bang).
[35] Lucent Technologies Hindustan Ltd. v. The Income Tax Officer, (2005) 92 ITD 366 (Bang); Millennium IT Software Ltd., In re, 338 ITR 391 (AAR); CIT v. Samsung Electronics Co. Ltd., (2011) 345 ITR 494 (Kar).
[36] *Id*.
[37]Microsoft Corporation v. ADIT (ITAT Delhi) 42 SOT 550 (Del).

(¶20.) It is respectfully submitted that the sovereign power of a legislature includes within it, the power to make laws prospectively and retrospectively.[38]Consequently, when the legislature enacts a provision of law for the imposition of taxes with retrospective effect, the tax incurred is considered to be levied under the authority of law. An act of the legislature would not be rendered unconstitutional merely by virtue of it being retrospective in nature.[39] Therefore it is submitted that explanation 4 to S. 9(1)(vi) of the I-T Act which clarifies the ambiguity in the calculation of royalty, is constitutionally valid and not ultra vires the law.

b. Explanation 4 of S. 9(1)(vi) does not violate the fundamental rights.

(¶21.) It is further submitted that explanation 4 to S. 9(1)(vi) of the I-T Act is not in contravention of the fundamental rights enshrined in Part III of the Constitution of India, 1950 (hereinafter 'Constitution').

c. Explanation 4 of S. 9(1)(vi) does not violate Art. 14 of the Constitution

(¶22.) It is submitted that unless a rate of tax is found to be unreasonable, the courts should not interfere with the legislature's discretion with respect to enactment of taxing statutes.[40]Accordingly, if the general operation of the statute discharges the burden of taxation with a reasonable degree of equality, the constitutional mandate is satisfied.[41] It is therefore submitted that explanation 4 of S. 9(1)(vi) of the I-T Act sufficiently establishes the conditions for validity as per the constitutional principles.

d. Explanation 4 does not violate article 19(1)(g) of the Constitution of India

(¶23.) It is further submitted that the mere fact that the imposition of a tax leads to diminution of profits of individuals does not amount to a violation of rights under Article 19(1)(g) of the Constitution[42].Additionally, a challenge of the validity of a tax statute on grounds of violation of fundamental rights entail an extremely high burden of proof. In the facts of the case at hand, no unreasonableness or arbitrariness in any manner whatsoever has been meted out as a

[38]J. K. Jute Mills Company Limited v. State of Uttar Pradesh and Anr., (1962) IILLJ 580 All.
[39] Mewar Textile Mills ltd v. Union of India, AIR (1955) Raj 114; AMIT DHANDHA, NS BINDRA'S INTERPRETATION OF STATUTES 245 (11th ed. 2010).
[40] Meenakshi v. State of Karnataka, (1983) AIR 1283 (SC).
[41] Hoechst Pharmaceuticals Ltd. v. State of Bihar (1983) AIR 1019 (SC); State of Kerela v. Aravind Ramakant Modawadakar, (1999) 7 SCC 400.
[42] Express Hotels (P) Ltd v. State of Gujrat, (1989) AIR 1949 (SC); Federation of Hotel and Restaurant v. Union of India, (1990) AIR 1637 (SC).

consequence of the imposition of explanation 4 of S. 9(1)(vi) of the I-T Act therefore not amounting to a violation of Article 19(1)(g) of the Constitution.

(¶24.) Therefore, it is humbly submitted before this Hon'ble Court that the consideration under the license agreement amounted to royalty under S. 9(1)(vi).

iii. *Zeon's LO is a business connection under S. 9(1) of the I-T Act.*

(¶25.) Under Sec. 9(1)(i) of the I-T Act, all income accruing or arising, whether directly or indirectly, through or from any business connection in India, shall be deemed to accrue or arise in India. A non-resident could be taxed only if there was business connection between the business carried on by a non-resident and some activity in the taxable territory which contributes directly or indirectly to the earning of those profits or gains.[43]

(¶26.) *Firstly*, an entity is considered as a business connection under when it 'habitually secures orders in India, mainly or wholly for the non resident'[44]. Zeon's liaison office is *primarily* engaged in liaising with potential clients and also provides them with product presentations.[45] Engagement with potential clients amount to negotiation and negotiation by a liaison comes within the expression 'business connection'.[46]

(¶27.) *Secondly*, it has been held[47] that where there are several persons employed by a LO, it can be safely assumed that the LO is directly contributing to the income of the enterprise. In the case at hand, there are several employees of Zeon's who are employed at the Indian LO. Therefore, it is submitted that Zeon's LO directly contributes to its income.

(¶28.) Therefore, it is humbly submitted before this Hon'ble Court that Zeon's LO is a permanent establishment under S. 9(1) of the I-T Act and hence the petitioner was required to deduct the TDS under the head of business profits.

[43] Anglo French Textile Co. Ltd., (1953) 23 ITR 101 (SC); CIT v R.D. Aggarwal & Co., (1965) AIR 1526.
[44] Explanation 2(c) to Sec. 9(1), I-T Act, 1961.
[45] Pg. 1, Moot Problem.
[46] Gutal Trading In re, 278 ITR 643 (AAR).
[47] M/s. Brown & Sharp INC v. DCIT, (2014) 160 TTJ (Delhi).

III. THE REOPENING AND REASSESSMENT ARE VALID AND IN CONSONANCE WITH LAW

(¶29.) The respondent submits that the reopening **[A]** and the reassessment **[B]** are valid and in conformity with law and should be upheld.

A. The Reassessment is consonance with law

(¶30.) The respondent submits that the reopening of the assessment for the concerned AYs is neither in violation of law **[i]** nor in contravention of the Central Board of Direct Taxes (hereinafter 'CBDT') circular dated 29/05/2012 **[ii]**.

i. Reassessment can be done for the concerned AYs

(¶31.) It is submitted that the assessing officer had reason to believe that income chargeable to tax had escaped assessment. Additionally, the petitioner did not disclose fully and truly, all material facts, regarding the assessment and thus the reassessment proceeding initiated under S.147 of the I-T Act **[a]**. It is further submitted that the notice served under section 148 was valid **[b]**.

a. <u>The assessing officer had reason to believe that income chargeable to tax had escaped assessment under S. 147.</u>

(¶32.) It is submitted that in order to initiate reassessment proceedings under S. 147 of the I-T Act, for an assessment having been completed under S. 143(1) of the I-T Act, the condition precedent is that the assessing officer should have reason to believe**[1]** that income chargeable to tax has escaped assessment **[2]**. Further, the petitioner had not disclosed all material facts **[3]** fully and truly **[4]**. Lastly, the assessment was rightly conducted beyond the period of four years **[5]**.

1. The assessing officer had sufficient reason to believe that income had escaped assessment with the material on hand.

(¶33.) It is submitted that in S. 147 of the IT Act as substituted by the Direct Tax Laws (Amendment) Act, 1987, the phrase 'reason to believe' has a very wide connotation.[48] The limitation placed by the Act is that the reopening cannot be done on wholly vague, indefinite, far-fetched or remote information.[49] Law mandates an application of mind by the assessing officer to such material,[50] and a mere change in opinion about old material does not give jurisdiction to reassess.[51] Moreover in numerous cases decided by various Courts, wherein the assessing officer had exempted income from charge due to a certain view taken by him, was subsequently allowed to reassess.[52]

(¶34.) In the case at hand, the position regarding "all or any rights"[53], with respect to royalty was very ambiguous[54] during the concerned AYs. The position was subsequently clarified by the legislature by way of an amendment[55] through the Finance Act, 2012. The memorandum to the Finance Bill, 2012 abundantly clarifies that the aforementioned amendment was brought about to settle the position regarding the use of computer software and to put the confusion created by judicial decisions to rest. It is therefore submitted that the amendment and the intent behind the same establishes sufficient reason for belief for the assessing officer.

2. The income has escaped assessment

(¶35.) It is submitted that taxable income escaped assessment under the head "income chargeable to tax that has been under-assessed" as given in explanation 2(c)(i) to S.147 of the IT Act. The expression 'escaped assessment' has been elaborately explained by explanation 2 to S.147 of the IT Act.

(¶36.) It is submitted that S.147 of the IT Act is applicable if some income assessable for the assessment year in question has escaped assessment wholly or in part.[56] In the case at hand,

[48] Nirmalkumar Ashok Kumar v Gopi, (1991) 187 ITR 329 (Bom); Sir Bansilal and Co. v Prabhu Dayal, ITO (1990) 185 ITR 287 (Bom).
[49] ITO v Lakhmani Mewal Das (1976) 103 ITR 437 (SC); ITO v Mahadeo Lal Tulsyan (1978) 111 ITR 25 (Cal).
[50] ITO v. Ramnarain Bhojnagarwalla, (1976) 103 ITR 797 (SC).
[51] Birla VXL Ltd. v. ACIT, (1996) 217 ITR 1 (Guj).
[52] Kumar Kamal Singh (Maharaj) v. CIT, (1959) 35 ITR 1 (SC); Bikram Kishore (Maharaja) v. Province of Assam, (1949) 17 ITR 220 (Cal); Bansilal Abirchand Firm (RB) v. CIT, (1964) 53 ITR 536 (Bom); CIT v. Bansilal Abirchand Firm (RB), (1968) 70 ITR 220 (Cal).
[53] Income Tax Act, 1961, S.9(1)(vi).
[54] Para 16, Arguments Advanced.
[55] Explanation 4 to Income Tax Act, 1961, Sec. 9(1)(vi).
[56] Hari Babu v. CIT, (1974) 96 ITR 118 (All).

royalty is taxable income within the meaning of the I-T Act[57], and it had escaped assessment wholly as the petitioner failed to deduct TDS under S.194J of the I-T Act at the time of making payments.[58] It is further submitted that income can also be held to escape assessment as a result of the lack of vigilance of the IT officer, or due to inadvertence, negligence or the perfunctory performance of his duties without due care and caution.[59] Therefore in the case at hand, the assessing officer's omission, if any in the concerned AYs has no bearing on the income that has escaped assessment.

(¶37.) Therefore, it is submitted that the assessing officer had reason to believe that income chargeable to tax had escaped assessment for the AY 2005-06 which was assessed under Sec. 143(1) of the IT Act.

3. The assessee had not disclosed all material facts

(¶38.) It is submitted that the requirement of disclosing material facts under S.147 of the IT Act is a pre-requisite for filing of returns by the assessee under S.139 of the I-T Act or under a response to a notice under S.142(1) or S.148 of the I-T Act[60]. The Supreme Court has laid down that it is the duty of the assessee company to disclose all the facts which have a bearing on the ongoing assessment.[61]

(¶39.) In the present case, the petitioner had not disclosed the true nature of the agreement and the fact that it amounted to a transfer of rights in the copyright.[62] This fact was material so as to find the tax liability under the head of royalty, under S. 9(1)(vi) of the I-T Act. Therefore, it is submitted that the non-disclosure of this fact amounts to a non-disclosure of material facts by the assessee.

4. The assessee had not disclosed all facts fully and truly.

(¶40.) It is submitted that the phrase "omission or failure to disclose fully and truly all material facts" essentially means "non-disclosure".[63] Disclosure in indirect and incidental manner cannot

[57] Para 24, Arguments Advanced.
[58] Page 1, Moot Problem.
[59] Palaniswami (P) v. CIT, (1977) 106 ITR 811 (Mad); Panchugurumurthy v. CIT, (1995) 211 ITR 51 (Mad).
[60] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ed. 2014); SAMPATH IYENGAR, LAW OF INCOME TAX 441 (12 ed. 2012).
[61] Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 106 ITR 1 (SC).
[62] Para 19, Arguments Advanced.
[63] Citibank N.A. v. Ojha (S.K.),(2002) 257 ITR 663 (Bom); India Steam Co. Ltd. v. JCIT, (2005) 275 ITR (Cal).

absolve the assessee of his duty to disclose truly and fully.[64] The implication of 'disclose' as mentioned in the statute[65], is always in relation to facts which the assessee is aware of[66] and any violation of disclosure happens when the assessee withholds material information known to him at the relevant time from the assessing officer[67].

(¶41.) In the present case, the petitioner failed to deduct TDS[68] even when the consideration under the agreement amounted to royalty[69]. Thus it amounts to a misrepresentation by the petitioner regarding the nature of the consideration. Moreover, it also amounts topassive concealment of the true nature of the transaction. Additionally mere production of documents by the petitioner under S. 143(3) of the I-T Act[70] does not amount to disclosure within explanation 1 to S. 147 of the I-T Act. It is submitted that the petitioner had not disclosed fully and truly all material facts, thereby necessitating the initiation of the reassessment proceedings under S. 147 of the I-T Act with respect to the AYs 2003-04, 04-05, 06-07, 07-08, 08-09.

5. The assessment was rightly conducted beyond the period of four years

(¶42.) It is submitted that S. 147 of the I-T Act provides that reassessment cannot be conducted beyond the expiry of four years of the relevant assessment year, unless there is a fault in the part of the assessee in disclosing material information fully and truly[71]. As the Respondents have established, that the assessee defaulted in disclosing material information fully and truly to the assessing officer, the limitation period of four years therefore would not be applicable in the present facts of the case.

b. <u>The notice served under section 148 was valid</u>

[64] Calcutta Discount Co Ltd v. ITO, (1961) 41 ITR 191 (SC); Shahdara Saharanpur Light Railway Co Ltd v. CIT, (1994) 208 ITR 882 (Cal).
[65] Income Tax Act, 1961, S. 147.
[66] Canara Sales Corpn Ltd v. CIT, (1989) 176 ITR 340 (Kar).
[67] Mukhtiar Singh Sandhu v. ITO, (1986) 160 ITR 526 (P&H); CIT v. Balvantrai S Jain, (1969) 72 ITR 59 (Bom); ITO v. Calcutta Chromotype Pvt Ltd, (1974) 97 ITR 55; *Also* see SAMPATH IYENGAR, LAW OF INCOME TAX 567 (12 ed. 2012).
[68] Page 1, Moot Problem.
[69] Para 18, Arguments Advanced.
[70] Page 3, Moot Problem.
[71] Proviso 2, S. 147, Income Tax Act, 1961.

(¶43.) The validity of the notice[72] is a condition precedent to the initiation of any proceeding under S.147 of the IT Act[73]. It is submitted that the notice sent to the petitioners under S.148 of the IT Act is not invalid on grounds of being vague **[1]** and on having been served on the expiry of the limitation period **[2].**

1. The notice served was not vague

(¶44.) It is submitted that the subject matter of the reassessments of all the AYs for which the notice was sent was the same, that is, royalty. Therefore, the notice cannot be held infructuous as a single notice could sufficiently fulfil the pre-requisites of S. 148 of the I-T Act. Additionally, the requirement of sending a notice is only procedural in nature and has been held to be a machinery section.[74] The notice sent by the assessing officer fulfilled the requirement of bringing to the attention of the petitioners the grounds under which reassessment was going to be held.[75] Therefore, it is submitted that the notice served was not vague in any manner whatsoever.

2. The limitation period of a notice is not addressed by the High Court

(¶45.) It is submitted that with respect to notice issued under S. 148 of the I-T Act, the Court will not address the question of limitation, as it can be raised only before the necessary tax authorities.[76] The petitioner directly approached the High Court by filing a writ petition upon the receipt of the notice which was in violation of the prescribed statutory procedure[77]. The High Court, by way of its writ jurisdiction would not address matters related to factual inconsistencies[78] and therefore it is submitted that the matter related to limitation period of the notice should be dismissed.

ii. *The Reopening is not in contravention with the CBDT circular dated 29/05/2012.*

[72] SAMPATH IYENGAR, LAW OF INCOME TAX (12 ed. 2012), page 10203; KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ed. 2014) page 2203-04; *Also* see Narayan v. ITO, 35 ITR 388 (SC); CIT v. Pratap, 41 ITR 421 (SC); CIT v. Robert, 48 ITR 177 (SC).

[73] CIT v. Thayaballi Mulla Jeevaji Kapasi, (1967) 66 ITR 147 (SC); CIT v. Mintu Kalita, (2002) 253 ITR 334 (Gau); Sasikumar (PN) v. CIT, (1988) 170 ITR 80 (Ker).

[74] CIT v. Mahaliram Ramjidas, (1940) 8 ITR 442 (PC); Sales Tax Officer v. Uttareswari Rice Mills, (1973) 89 ITR 6 (SC).

[75] PAGE 3, Moot Problem.

[76] Chandra Lakshmi Tempered Glass Co Pvt Ltd v. ACIT, *Supra* note 10; Chandi Ram v. ITO, *Supra* note 9.

[77] Income Tax Act, 1961, S. 246; *Also* see GKN Driveshafts (India) Ltd. v. Income Tax Officer and Ors., 259 ITR 19 (SC).

[78] Sahib Ram Giri v. ITO, *Supra* note 4; Precot Mills Ltd. v. CIT 273 ITR 347; Dinesh Chand Jain v. Dy CIT, *Supra* note 4.

(¶46.) The respondent submit that the circular issued by the CBDT[79] abundantly clarifies that assessments which have been completed and have thus attained finality under S. 143(3) of the I-T Act prior to April 1, 2012 shall not be reopened under S. 147 of the I-T Act. It has been reiterated by the Courts that circulars or general directions issued by the CBDT would be binding under S. 119 of the I-T Act on all officers and persons employed, in the execution of the I-T Act.[80] It is further submitted that the principles regarding finality of an assessment state that an assessee is entitled not to be subjected to reassessment unless the statute permits reassessment to be carried out.[81]Since in the present case the reassessment proceedings under S. 147 of the I-T Act have been proved, the assessments cannot be said to have attained finality, thereby, the applicability of the CBDT circular is pre-empted. It is therefore submitted that the reassessment is not in contravention of the CBDT letter dated 29/05/2012.

B. The reassessment is not bad in law

(¶47.) The petitioner's remedy in cases of wrong reassessment, if any is by way of appeal[82] as provided by the Act.[83] When the AO acts within his jurisdiction, the court cannot interfere by a writ of prohibition[84] or certiorari[85] merely because it is erroneous on points of fact or law[86]. In this case, the AO acted within his jurisdiction under S. 147[87]. Therefore, the petitioner cannot bring a writ with regards to a wrong reassessment.

(¶48.) *In any case,* application of a wrong provision of the I-T Act or erroneous application of same will amount to mistake apparent on the face of record.[88] The petitioner has alternative

[79] No. F. No. 500/111/12009-FTD-1(Pt.) dated 29/05/2012.
[80] ITO v. Manoharlal Kothari, 236 ITR 257; Grindlays Bank v. CIT, 201 ITR 148; CIT v. Ankitesh P. Ltd., 340 ITR 14.
[81] Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 106 ITR 1 (SC); Merchant v. CED, (1989) 177 ITR 490 (SC); Vipan Khanna v. CIT, (2002) 255 ITR 220 (P&H); Kapoor Bros. v. Union of India, (2001) 247 ITR 324 (Pat).
[82] KANGA & PALKHIVALA'S, THE LAW AND PRACTICE OF INCOME TAX (10 ED. 2014)., VOL. II, PG. 2199.
[83] Hyderabad Allwyn v. ITO, 46 ITR 988; Gyaniram v. ITO, 47 ITR 472.
[84] Raymond Woollen Mills v. CIT, 236 ITR 34 (SC); Mulchand v. ITO, 252 ITR 758; Geo Miller v. DCIT, 254 ITR 620; Jaganath Mishra v. CIT, 253 ITR 282; Pramod Kumar v. ITO, 186 ITR 637; Rekhi v. ITO, 18 ITR 618; Ashoka v. UOI, 29 ITR 507; President Talkies v. ITO, 25 ITR 447; Radhakant v. Johri, 39 ITR 182; Kunjannamma v. ITO, 42 ITR 640.
[85] ACIT v. Banswara Syntex, 272 ITR 642; Ajai Verma v. CIT, 304 ITR 30; Ramballabh Gupta v. ACIT, 288 ITR 283; Krishna Gupta v. CIT, 231 ITR 628.
[86] Ratnachudamani S. Utnal v. ITO, 269 ITR 272; Chattanatha v. ITO , 38 ITR 325; Chinnaswami v. ITO, 61 ITR 400.
[87] Para 37, Arguments Advanced.
[88] CIT v. Peirce Leslie & Co. Ltd., (1997) 227 ITR 759 (Mad).

remedies against mistake under S. 154(2)(b) by way of rectification[89] and under S. 246(1)(b) by way of an appeal to the Deputy Commissioner (Appeals). It is only when the authority does not dispose of a rectification application, wrongly rejects it[90] or is time barred that a writ may be issued compelling him to do so.[91] Therefore, it is submitted that the writ regarding erroneous reassessment should be quashed as the petitioner did not exhaust his alternative remedies under S. 154(2)(b) and S. 246(1)(b).

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

(¶49.) Withholding taxes like TDS require that when a person is responsible for paying any sum, he withholds applicable taxes as an agent of the Government and is indeed recovering tax on behalf of the Government.[92] It is submitted that the petitioner has rightly been charged as an assessee-in-default under S. 201 of the I-T Act as he was under an obligation to deduct sums under S. 194J.

(¶50.) Under S. 201, if the payer 'does not deduct the tax', then he would be deemed to be an assessee-in-default in respect of the tax.[93] In the case at hand, the consideration under the license agreement amounted to royalty even in the pre-2012 amendment scenario.[94] The maxim *lex non cogit ad impossiblia* upheld by the apex court[95] is not applicable here. Therefore, it is submitted that the assessee was required to deduct sums under S. 201.

(¶51.) *Moreover,* the defense of bona fide reason is available only when the assessee makes a fair and honest estimate of the taxable income.[96] The deduction was not impossible as the petitioner was aware of the nature of the agreement and the nature of the income arising therein. Therefore, the petitioner had no bona fide reason to believe that tax was not deductible under S. 194J of the I-T Act.

(¶52.) Therefore, it is submitted that the petitioner has been rightly charged as an assessee-in-default.

[89] CIT v. McLeod & Co. Ltd., (1982) 134 ITR 674 (Cal).
[90] Parshuram v. Trivedi 100, ITR 581; VK Const v. CIT, 215 ITR 26; Indian Herbs v. DCIT, 212 ITR 425.
[91] Rajamma v. ITO, 152 ITR 657; Burmah Oil v. ITO, 165 ITR 264.
[92] 119 BMR ADVISORS, MANAGING TAX DISPUTES IN INDIA, (1st Ed. 2013).
[93] CIT v. Ranoli Investment, 235 ITR 433; Bennett Coleman v Damle, 157 ITR 812.
[94] Para 19, Arguments Advanced.
[95] Krishnaswamy S. Pd v Union of India (2006) 281 ITR 305 (SC).
[96] Gwalior Rayon v. CIT, 140 ITR 832; CIT v. Nestle India, 243 ITR 435; ITO v. Gujarat Narmada, 247 ITR 305.

PRAYER

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

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

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

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

Sd/-

(Counsel *for* Respondent)