

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) NO. 9064/2011**

% **Reserved on: 13th November, 2013**
Date of Decision: 21st February, 2014

BBC World News LimitedPetitioner
Through Mr. C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar and Mr. Sheel Vardhan,
Advocates.

Versus

Assistant Director of Income Tax Circle 1(1) ...Respondent
Through Mr. Balbir Singh, Sr. Standing Counsel with
Mr. Rupender Singh and
Mr. Abhishek Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

BBC World News Limited (formerly known as BBC World Ltd.), a company resident of and incorporated in United Kingdom, a wholly owned subsidiary of BBC Commercial Holdings Limited which in turn is a wholly owned subsidiary of the British Broadcasting Corporation, has filed the present writ petition for setting aside reassessment proceedings initiated in respect of the assessment year 2003-04, by issue of notice dated 30th March, 2010 under Section 148 of the Income Tax Act, 1961 (Act, for short). The petitioner has also impugned order dated 13th December, 2011, dismissing objections raised by the petitioner to the initiation of reassessment proceedings.

2. The petitioner, as noticed above, is a company incorporated in United Kingdom and was/is engaged in running and operating BBC

World channel w.e.f. 1st December, 2002. Prior thereto another company incorporated in United Kingdom, BBC Worldwide Limited, was engaged in the business of running and operating BBC World channel and had entered into airtime sales and marketing agreement with BBC Worldwide (India) Pvt. Ltd. Airtime sales and marketing agreement between the BBC Worldwide and BBC Worldwide (India) Pvt. Ltd. w.e.f. 1st December, 2012 were novated by assignment of rights of BBC Worldwide Ltd. in favour of the petitioner. Consequently, BBC Worldwide (India) Pvt. Ltd. started acting as an agent for the petitioner in India for sale of airtime for advertisements on BBC world channel. In addition to soliciting advertisement, BBC World (India) Pvt. Ltd. also provide marketing support to the petitioner. BBC Worldwide (India) Pvt. Ltd. was/is a company incorporated in India and being a resident, their income was/is taxable in India.

3. During the period relevant to the assessment year 2003-04 i.e. for the period between 1st December, 2002 to 31st March, 2003, the petitioner filed its return of income on 2nd December, 2003, declaring NIL income and claimed credit of tax deducted at source and prepaid taxes amounting to Rs.46,88,196/-. Refund of the said taxes was prayed for. Subsequently, the petitioner revised its return on 31st March, 2005 by enhancing the TDS amount and prepaid taxes to Rs.55,37,518/-. The revised return was filed to rectify omission in respect of TDS credit.

4. The return was taken up for scrutiny assessment and assessment order under Section 143(3) dated 24th March, 2006 was passed by Assessing Officer, inter alia, holding that the petitioner had Permanent Establishment (PE, for short) in India as BBC Worldwide (India) Pvt. Ltd. was their dependent agent under Article 5(4) of the India U.K.

Double Taxation Avoidance Agreement. It was also held that the petitioner had business connection under Section 9(1)(i) of the Act. The Assessing Officer placed reliance on the order passed by Commissioner of Income Tax (Appeals) for the assessment year 2000-01 in relation to BBC Worldwide Ltd. On the question of computation of profits/loss attributed to Indian PE, the Assessing Officer in the assessment order dated 24th March, 2006 held that 20% of the global profit/loss earned by the petitioner could be attributed to the PE of the petitioner in India. This was done on the proportionate or ratio of the India turnover versus the global turnover. On this basis, the income of the petitioner, attributable to India was assessed at the loss of Rs.69,42,475/-. We shall be referring to the assessment proceedings and the assessment order dated 24th March, 2006 subsequently.

5. In the reasons to believe recorded on 29th March, 2010, before issue of impugned notice, the assessing officer had recorded as under:-

“The assessment order in the case was passed on 24.03.2006 wherein the Assessing Officer has held that the assessee has an agency PE in India in the form of BBC Worldwide (India) Private Limited (BWIPL). And attributed a loss of Rs.69,42,475 to Indian activities. While perusing the records of the case it is noticed that during the assessment proceedings the actual expenditure incurred on the activities related to the Indian operations were not submitted by the assessee. In the orders for A.Ys. 2004-05 to 2006-07, in the case of the assessee, it has been held that the global loss, if any, is not on account of activities of the assessee in India and such loss cannot be attributed to the PE of the assessee in India. It is therefore held that the statements furnished by the assessee showing loss from Indian activities do not represent the correct position and the same has been found not reliable.

The office believes that in the absence of such crucial information assessment of the income of the assessee for the A.Y. 2003-04 could not be completed properly....”

6. Thereafter the assessing officer referred to explanation 2 to Section 147 and emphasized excessive loss or depreciation allowance or any other allowance computed under the Act is deemed to be a case of income chargeable to tax having escaped assessment.

7. It is an admitted position that in the present case, impugned notice has been issued after four years from the end of the relevant assessment year. The contention of the petitioner in view of the said factual background is that (1) it is a case of change of opinion; (2) the petitioner had made disclosure of full and true material facts and (3) reasons to believe do not justify reopening and meet the legal requirements.

8. In support of the contentions raised by the petitioner, it is submitted that the assessing officer in the assessment proceedings, had asked the petitioner to furnish India specific revenues and expenses and these were submitted vide letter dated 22nd March, 2006. The stand taken by the Revenue and subsequently mentioned in the order dated 13th December, 2011 dismissing the objections, is that the letter dated 22nd March, 2006 was neither on records of the department nor was it mentioned in the assessment order. It is stated that the assessment proceedings commenced on 31st May, 2005 by issue of notice, yet the submission dated 22nd March, 2006, running into 407 pages were filed just before passing of the assessment order dated 24th March, 2006. Thus there was no full and true disclosure of material facts.

9. There is considerable controversy on whether the petitioner had filed letter dated 22nd March, 2006 during the course of the original assessment proceedings. In the order dated 13th December, 2011 passed by the Assessing Officer rejecting objections to reopening, it has been observed:

“Perusal of the records reveals that the submission dated 22 March 2006 stated to have been filed during the original assessment proceedings are not on record nor there is any mention of the same in the assessment order. In the assessment order dated 24^m March 2006, the AO has discussed submissions dated 22 March 2006 filed by BBC Worldwide India Private Limited and not by BBC World Ltd. The Submissions dated 26 March (sic) 2006 (sic) filed by BBC Worldwide India Private Limited are on record. However, apart from this, it is observed that the submissions are stated to have been filed on 22 March 2006 and the assessment order was passed on 24th of March 2006. Although the assessment proceedings in this case commenced in 31 May 2005 by way of issue of notice under section 143 (2), yet it is ironical that it was barely 2 days prior to the passing of the assessment order that the assessee allegedly filed the voluminous submissions running into 407 pages containing details regarding expenses. Under the circumstances, it cannot be termed as amounting to true and full disclosure of material facts.”

At another place, in the same order, it has been observed:

“On this issue, it is observed that there is no change of opinion in the instant case. Perusal of the assessment record as well as the assessment order does not reveal any deliberation upon this issue by the AO at any time during the assessment proceedings. Obviously, forming an opinion could not have been possible for the AO in the face of the written submissions running into 407 pages having allegedly been filed two days before the passing of the assessment order. No mention at all has been made in the assessment order indicating the filing of the said submissions, what to talk of forming an opinion after deliberating the same. Hence, there is no change of opinion in the present case, because no opinion was ever originally formed nor there was any occasion to form any such opinion during the assessment proceedings. The assessee's

case is hence different on the facts from the cited cases, which therefore do not help the assessee's cause.”

10. However, in the counter affidavit, a more categorical and assertive stand has been taken by the respondents, who have pleaded and denied that the petitioner had filed reply dated 22nd March, 2006 in response to notice under Section 143(2) of the Act.

11. In order to determine and decide the controversy, we have examined the original records. Pursuant to order dated 15th January, 2013, passed by a Division Bench (Badar Durrez Ahmad and R.V. Easwar, JJ), the petitioner was permitted to carry out inspection of records pertaining to the assessment year 2003-04 including reassessment proceedings, on 22nd January, 2013 at 11.30 AM, at the office of the Assessing Officer. Thereafter, the petitioner filed additional affidavit on 25th February, 2013, stating that the assessment records were incomplete and papers were missing. Even admitted documents were not available on record. Order sheets relating to the original assessment were not on record. This fact was confronted to Mr. J.S. Rana, Inspector, Circle 1(1), International Taxation, New Delhi who was present at the time of inspection. The original assessment record was not page numbered and indexed. Page numbers on documents were missing or torn and adhesive tapes had been used to stick the torn documents. Reply/submission dated 22nd March, 2006 filed by BBC World (India) Pvt. Ltd. in compliance to the notice received under Section 133(6) of the Act was found to be on record but the notice under Section 133(6) was not on record. Another notice under Section 221 of the Act issued to a different assessee BBC World Distribution Ltd. was on record. The allegation made in the additional affidavit is that the respondents have reconstructed the original assessment record

and there has been interpolation, manipulation and removal of papers to justify and make out the case for reopening and deny that letter/submission dated 22nd March, 2006 was filed by the petitioner.

12. We have examined the original record but did not find the proceedings or order sheets relating to original proceedings on record. This is a serious lapse, and it is apparent that the proceeding sheets in the respondents' custody and charge, have been removed. The record belongs to the respondents and was in their custody and charge. It was/is their duty and obligation to maintain the records properly and as per law and to ensure their sanctity and accuracy. The records cannot and should not be interpolated or changed. The petitioner has as Annexure P-10 to the additional affidavit, filed copy of the order sheets relating to the original assessment proceedings and as per the petitioner on 22nd March, 2006, the following order was passed : "Present Sandeep Chaufla and Saloni Singhal and filed India specific revenue and expenses". The petitioner has also filed what is stated to be verbatim order sheets dated 28th February, 2006 and 2nd March, 2006 which again do not find place in the original records. It is obvious that when proceedings/hearings were held, then order/proceeding sheet should be available.

13. This High Court has in some cases earlier adversely commented about record maintenance by the Revenue as it is unacceptable and faults on the principle of good governance. Facts mentioned above do not disclose a commendable situation and in fact the situation appears to be alarming and perilous. This requires urgent effective remedial steps. Failure to maintain records has resulted in serious allegations being made that the papers/documents have been tempered or removed etc.

The papers/documents on record are not serially numbered and indexed. We also note that it is not practice of the department to give acknowledgement of papers submitted during the course of assessment proceedings.

14. There are various reasons why we feel that we should accept the contention of the petitioner that they had filed details or accounts of India specific revenue and expenditure during the original assessment proceedings and our reasons are indicated below:-

(i) The assessment order does not record that details of India specific income and expenditure were not filed;

(ii) In the original return filed by the assessee on 2nd December, 2013 declaring NIL income and in the revised return filed on 31st March, 2005, the petitioner made the following disclosure:-

“1. For the relevant period, i.e. 1 December 2002 to 31 March 2003, the assessee has incurred a loss on a worldwide basis. Accordingly, even if any income/loss were attributable to the Indian operations on a proportionate basis, the net result would be a loss.

2. For the relevant period, the revenue earned from sale of airtime in India were lower than the expenses relatable to such activities. Correspondingly, even if the assessee is held to have a business connection/PE in India for the said previous year, the result of the assessee’s activities relatable to such business connection/PE in India would also be a loss.”

(iii) In the assessment order dated 16th March, 2005, in the case of BBC Worldwide Ltd. for the assessment year 2002-03, the Assessing Officer, Circle 1(1), International Taxation, New Delhi had specifically observed as under:-

“ The assessee had vide its submissions dated 30.09.2004 submitted a copy of the report of WPMG, London. It was submitted that as per the audited accounts,

the BBC World Division has incurred a loss of UK Pounds 1,34,27,000/-. Out of the said amount a loss of UK Pounds 43,35,000/- was determined as pertaining to the India footprint of the channel. However, a perusal of these expenses showed that there were several heads like cable carriage costs, global programming, Singapore playout centre, contribution feed, PAS 10 Digital and others where it was not clear how these expenses were relateable to the Indian activities.

It was therefore, decided to consider only those expenses which had been incurred specifically in relation to channel activities in India. A computation in this respect was submitted by the assessee where it was claimed that even if India specific expenses alone were considered, there would still be a loss, as the said expenses exceed the revenue generated by the as from the sale of airtime in India on the channel. Details alongwith relevant vouchers were produced for examination in respect of expenses like Digitalization and distribution costs, staff costs, research and marketing costs, public relation, India-opt out-programming and legal/ professional fees. The nature of these expenses alongwith the furnished vouchers was examined in detail and the same was found satisfactory. Hence, the loss accruing to the Indian operation of the channel taken at Rs.7,29,39,000/-. However, most of the critical activities including programming and broadcasting are carried out abroad. Therefore, considering the activities being carried out in India and outside, it would be reasonable to attribute 20% of this loss to the channel activities in India. Hence, the loss attributable to the Indian PE is being restricted to Rs.1,45,87,800/-.”

(iv) The same Assessing Officer Mr. Saad Kidwai, Deputy Director of Income Tax, Circle 1(1), International Taxation, had also passed the original assessment order dated 24th March, 2006 in the case of the petitioner. Thus, the Assessing Officer in the last year, had examined and gone into the question of India specific income and expenditure. He held that only expenses that had been incurred in relation to channel activities in India could be taken into consideration. It was further held that computation in this regard was submitted and the BBC Worldwide Ltd. had claimed that even if India specific income and expenditure were

being considered, the net income would be at loss. On the basis of computation made, this was found to be correct and it was observed that the crucial activities including programming and broadcast were carried out abroad and it would be reasonable to attribute 20% of this loss/profit to channel activities in India. (The aforesaid finding of the Assessing Officer in the case of BBC Worldwide Ltd. for the assessment year 2002-03 will be also relevant when we deal with the question; “change of opinion” which has been addressed separately.)

(v) The assessment order dated 24th March, 2006, is reasonably detailed and incorporates the chart submitted by the petitioner, listing out activities carried out in India and outside India. The original assessment order records as under:-

“The assessee has also furnished a detailed chart listing out the activities being carried on in India and abroad. The same is reproduced below:-

Nature of activity	Carried outside India	Carried in India
Half hour news capsules are combined by putting together news from all over the world international programs are commissioned/ bought/ licensed from outside sources	√	X
It is ensured that the news and programs comply with the appropriate requirements and standards	√	X
The channel schedule of news and programs is put together including breaks for advertisements	√	X
Translation is also done in case the programs are to be aired in languages other than English e.g. in Japan	√	X

The channel is broadcast all over the world using satellite links	√	X
Cable operators in various countries are contracted to carry the channel on their networks. Some countries pay license fee (other than India).	√	√
Selling agents are appointed in various countries across the world, including India, who identifies the potential advertisers on the Channel.	√	√
Negotiations are done with the potential advertisers and airtime is sold.	√	X
Effective marketing steps are undertaken to promote the channel. Using PR Channels, the markets in the world are constantly informed about new initiatives and programs.	√	√
Research is carried out – out of audiences and viewership patterns	√	√

Considering the information furnished above, it would be correct to attribute 20% of the profits (loss) to the assessee's PE in India.

The assessee has furnished audited global accounts of M/s BBC World Ltd. and the same are therefore being used to compute the taxable income of the assessee's PE in India.”

Particulars	Amount	Amount in Rupees
Global turnover of the BBC World Limited (as per audited accounts) (A)	7,929,000	591,344,820
Global Profit/(loss) on ordinary activities before taxation before taxation of the BBC World Limited (B)	(4,550,000)	(339,339,000)
Ratio of global profit to global turnover (C = B/A*100)	(57.38%)	

Airtime sales revenue generated from India	(C)	811,090	60,491,084
Total Profit/(Loss) from Indian activities on the basis of global profit rate	[D = B/A*C]		(34,712,376)
20% of above profit attributable to Indian activities	[E = D*20/100]		(6,942,475)

Exchange rate 1 UKP = Rs.74.58 (TT buying rate on 31st March, 2003).

Assessed at a loss of Rs.69,42,475/- issue necessary forms.”

(vi) The Assessing Officer was, therefore, aware and conscious of the details of the activities of the petitioner in India and outside India and thereafter has observed that it would be correct to attribute 20% of the profit/loss to the petitioner’s PE in India. He has elucidated that audited global accounts of the BBC World Ltd. i.e. the petitioner should be used to compute assessable income of the petitioner in India, which was computed at loss of Rs.69,42,475/-. Before passing the assessment order, the transfer pricing issue was referred to the Transfer Pricing Officer who had submitted his report/order under Section 92CA(3) of the Act dated 7th March, 2006. Thus, the computation of Indian PE income was not only examined by the Assessing Officer but also by Transfer Pricing Officer in respect of international transactions between the petitioner and the Indian subsidiary.

(vii) Original file reveals that audit objection was raised on the ground that the petitioner was allowed loss of Rs.69,42,475/- as against returned NIL income. Carried forward of the said loss, it was observed, had resulted in potential tax loss. The said objection was raised by the Deputy Director General of Audit and is dated 8th October, 2007. The audit objection was replied, inter alia, stating that the facts in the

assessment year 2003-04 were identical to the earlier assessment year 2000-01, wherein it was held that the BBC Worldwide Ltd. had an agency PE in India in the form of BBC Worldwide (India) Pvt. Ltd. The aforesaid stand could not have been changed in the subsequent year on the ground that it would result in assessment at loss. This was followed by another reply to the audit memo stating that the Assessing Officer had allocated loss to Indian operations considering the provisions of Article 7 of the Treaty, read with Rule 10 of the Income Tax Rules, 1962.

(viii) The respondents have not filed any affidavit of Mr. Saad Kidwai, Assessing Officer who had conducted assessment proceedings for the assessment year 2002-03 to controvert and deny the contention of the petitioner that they had filed letter dated 22nd March, 2006 along with relevant details with the Assessing Officer.

(ix) The contention of the respondents that letter dated 22nd March, 2006 written by the petitioner is not specifically adverted to in the assessment order and, therefore, it should be assumed that no such letter was filed is unacceptable. The petitioner is not the author of the assessment order and could not have dictated and directed how the assessment order should be written. The Assessing Officer as the author had to decide what he wants to record and mention in the assessment order. This aspect has been dealt with by the Full Bench of this Court in *CIT versus Usha International Limited*, (2012) 348 ITR 485 (Delhi) (FB), wherein it has been observed as under:-

It was argued on behalf of the Revenue that for determining whether or not it is not a case of change of opinion, reference can and should be made only to the assessment order and the discussion or the reasons stated therein. Reliance was placed on the decision of this court in CIT v. H. P. Sharma [1980] 122 ITR 675 (Delhi) and Consolidated Photo and Finvest Ltd. v. Asst. CIT [2006]

281 ITR 394 (Delhi). The relevant portion of the judgment in H. P. Sharma (supra) reads as under (page 698) :

"Adverting to the next question as to whether the resorts to reassessments under sections 147(b) and 148 of the Act were justified or not, it is noteworthy that both the Income-tax Officer and the Appellate Assistant Commissioner have clearly observed that the assessee had not disclosed at the original assessment stage that the rents realised exceeded those mentioned in the municipal records. The Tribunal has not controverted this finding, perhaps it did not consider it appropriate to go into the same after having held that the municipal valuation should have a sway over the rent realised. My learned brother has on this score sent the matter back to the Tribunal for giving a finding on this aspect. I will only like to observe in this connection that the second Explanation to section 147 itself makes it clear that the production before the Income-tax Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section. The Supreme Court too has, in the decision of Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) and CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC), observed that information in order to justify reassessment may be obtained even from the record of original assessment from an investigation of the material on record or the facts disclosed thereby or from other enquiry or research into facts or law. 'To inform' means to 'to impart knowledge' and the detail available to the Income-tax Officer in the papers filed before him does not by its mere availability become an item of information. It is transmuted into an item of information in his possession only if, and only when, its existence is realised and its implications are recognised. Where the Income-tax Officer had not in the original assessment proceedings applied his mind, the reassessment proceedings are valid [see in this respect the decisions of the Kerala and Madras High Courts in United Mercantile Co. Ltd. v. CIT [1967] 64 ITR 218 (Ker) and Muthukrishna Reddiar v. CIT [1973] 90 ITR 503 (Ker) and A. L. A. Firm v. CIT [1976] 102 ITR 622 (Mad)]. It need hardly be said that change of opinion presupposes that there was earlier

a formation of an opinion. When no such opinion was formed, it will be too far-fetched to assume that a change in that opinion was being effected. Further, the safest and surest guide for ascertaining whether any such opinion was formed at the original assessment stage is to look to the assessment order itself. When it, of its own, does not reveal that the matters and controversies now sought to be raised by way of reassessment were at all before the Income-tax Officer or considered by him, it would be entirely surmiseful and, therefore, not permissible to still import their existence and consideration. This can, however, be permissible only where the assessment record of that stage overwhelmingly brings out that the matter did come for due consideration and was in fact considered. Mere silence on a matter or absence of discussion in the original order does not imply that the Income-tax Officer adjudicated upon the same one way or the other." (emphasis supplied)

We may note that the said decision was not dealing with section 147 of the Act, as amended with effect from April 1, 1989, but was with reference to section 147(b) of the Act under which an Assessing Officer could reopen assessment on the basis of "information". The term "to inform" it was observed means to impart knowledge and it does not mean mere availability. It gets transmuted into an item of information only when its existence is realized and its implications are recognized. However, it is not possible to agree with the observations made in paragraph 16, which have been underlined. The reason is that experience shows that the Assessing Officers do examine several aspects and raise queries but when the written opinion is expressed in the form of the assessment order, there is no discussion or elucidation on certain aspects and issues decided or held in favour of the assessee. The assessee is not the author of the assessment order and has no control over what the Assessing Officer wants to state or mention. It is in this context that the Delhi High Court in CIT v. Eicher Ltd. [2007] 294 ITR 310 (Delhi), observed as under (page 315) :

"In Hari Iron Trading Co. v. CIT [2003] 263 ITR 437 (P&H), a Division Bench of the Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such

points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. We agree. Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessed before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse."

(x) Similarly, the contention that the Assessing Officer had specifically referred to reply dated 22nd March, 2006 written by BBC Worldwide (India) Pvt. Ltd., but has not referred to the reply of the same date by the petitioner, deserves to be rejected for the aforesaid reasons set out in sub-para (ix). Reference to reply given by BBC Worldwide (India) Pvt. Ltd. in the assessment order was relevant as in the said reply, they had pleaded that agency PE did not exist as they had no authority to conclude contracts on behalf of the petitioner. The Assessing Officer has specifically recorded that the petitioner had agency PE in India.

15. In the present case reassessment proceedings have been initiated after four years from the end of the relevant assessment year and as per the first proviso to Section 147 of the Act, it has to be shown that there was failure on the part of the assessee to disclose fully and truly all facts necessary for the assessment. In the 'reasons to believe' it is mentioned that absence of "crucial information" relating to income and expenditure on account of activities of the petitioner in India had resulted in

improper computation of income for the assessment year 2003-04. Thus, as per the reasons to believe itself, in case the petitioner had furnished statement showing income and expenditure from Indian activities in the course of the original assessment proceedings, there was no lapse or failure on the part of the assessee i.e. the petitioner. Once it is held that the said details were furnished vide letter/reply dated 22nd March, 2006, the reassessment notice, would fail and falter. Letter/reply dated 22nd March, 2006 enclosing the details would go to the very root and falsify the averments made in the reasons to believe. The said reasons would be factually incorrect and reassessment notice bad and contrary to the first proviso to Section 147 of the Act.

16. Even otherwise, we feel that the present case would be covered and reassessment notice is hit by the principle of “change of opinion”. We have already quoted above the assessment order passed in case of BBC Worldwide Ltd. for the assessment year 2002-03 wherein the question of attribution of Indian income and expenditure was examined by the same Assessing Officer i.e. Mr. Saad Kidwai who had passed the assessment order in question. The petitioner is the successor and was undertaking the same activities which were undertaken by BBC Worldwide Ltd. in the assessment year 2002-03. We have also quoted above the chart in the assessment order dated 24th March, 2006 passed by the Assessing Officer which refers to India and outside India activities. In the written submissions filed by the petitioner on 27th February, 2006 before the Assessing Officer on the question of attribution of income, it was stated as under:

“4.1.1. Without prejudice to the above, it was mentioned in the return that: For the relevant period i.e. 1 December 2002 to 31 March 2003, the assessee company incurred a

loss on a worldwide basis. Accordingly, even if any income/loss were attributable to the Indian operations on a proportionate basis, the net result would also be a loss. Please see attached a copy of the audited accounts of the assessee company for the Year ended 31 March 2003 as **Annexure IV** (Refer Page 4 of the annexure).

As per the said audited accounts, the loss for the four months of operations, i.e. from 1 December 2002 to 31 March 2003 is UKP 4,550,000 (equivalent Rs. 339,339,000 @ Rs. 74.58/UKP at the year-end exchange rate) [Refer Schedule 14 to the audited accounts at Page 14].

As per the global audited accounts, the turnover for 4 months is UKP 7,929,000 (equivalent Rs. 591,344,820 @ Rs. 74.58/UKP at the year-end exchange rate) [Refer Page 9, Schedule 2 (a) to the audited accounts]

The gross advertisement revenue receivable (turnover) by the assessee from India for the four months of its operations is Rs. 60,491,084. The break-up of the same is given as under:

Particulars	Amount in Rs.
On Rupee denominated deals	53,860,225
On Dollar denominated deals *	6,630,859
Total	60,491,084

*Converted at the exchange rates prevailing on the relevant dates. The assessee does not have a branch or other office or place of business in India. Also, it does not carry out any independent activity in India. Its Indian operations are a part of the global operations of the company. The accounts of the assessee are maintained globally in UK and it does not maintain any country specific accounts.

Therefore, in order to compute the income/loss attributable to the Indian operations [without prejudice to its claim that it does not have a PE in India], Rule 10(ii) of Income-tax Rules, 1962 can be resorted to. Circular no. 6/2001 dated 5 March 2001 also provides for such treatment in similar situations.

Rule 10(ii) requires that in case the actual amount of income accruing or arising to any non-resident through a business connection cannot be definitely ascertained, the amount of such income for the purpose of assessment may be calculated on the amount which bears the same proportion to the total profits and gains of business of such person as the receipts so accruing bear to the total receipts of the business.

It is pertinent to note that the Hon'ble Special Bench of Delhi Tribunal in the case of **Motorola Inc. (96 TTJ 1)** held that:

"The following steps are involved in computing the income attributable to the PE:

First the global sales and the global net profit have to be ascertained. From the accounts presented before us as well as

before the Income-tax authorities, the global net profit rate has been

ascertained at 10.8% and 6.1% by the CIT (Appeals) to which no objection has been taken either side. This percentage has to be

applied to the Indian sales and by Indian sales, we means the total

contract price for the equipment as a whole and not the bifurcated price which the Assessing officer has referred to in the assessment

order. This will also be consistent without view that the software and the hardware constitute one integrated equipment. The resultant figure would be the net profit arising in respect of the Indian sales. Out of this figure of net profit 20% shall be attributed to the PE to cover the three activities mentioned above. The A.O. is directed to compute the income of the PE as directed above."

In the case of the assessee, the data required for computing income/loss under Rule 10(ii) is available like global turnover, global loss and Indian turnover. Accordingly, the net loss from sale of airtime in India is computed as under:

Particulars	Amount in UKP	Amount in Rupees
Total revenue of BBC World Channel (A)	7,929,000	591,344,820
Revenue generated from India		
Airtime Sales in India (in USD)	88,909	6,630,859
Airtime Sales in India (in INR)	722,181	53,860,225
Total revenue generated from India(B)	811,090	60,491,084
Total Profit/(Loss) of BBC World		(339,339,000)
Proportionate Profit/(Loss) for India		
(C*B/A)	(465,438)	(34,712,376)

[Exchange rate 1 UKP = Rs.74.58 (TT buyig rate on 31 March 2003)]

The above loss may be attributed on reasonable basis to the operations carried out in India. A chart showing operations carried out outside India and in India is enclosed as **Annexure V**. The net attributable loss is eligible for carry forward and set off in subsequent years.

4.1.2. In view of paragraph 4.1.1 above, without prejudice to our claim at point 4.1 above, in case the assessee is held to constitute a business connection/permanent establishment in India for the relevant financial year, there would be a proportionate loss attributable to such activities (Refer Point 4.1.1). In such case, the assessee would be entitled to carry forward the said losses, if any, to subsequent years for set off against any future incomes.”

17. In the order dated 13th December, 2011 rejecting the objections, the subsequent Assessing Officer had mentioned that there was non application of mind by the Assessing Officer in the original assessment proceedings, which was apparent as the assessment order was passed on 24th March, 2006, merely 2 days after the purported submissions dated 22nd March, 2006 running into 407 pages were filed by the petitioner. It is not the volume of the record which is determinative but the relevance of the selective papers on the issue in question. Again, it was for the

Assessing Officer to pass the assessment order. The contention was raised and the papers and details were filed on the question of attribution of income to the Indian PE, is apparent even from the reply dated 27th February, 2006. Once the detailed submissions were made, the Assessing Officer had to apply his mind and form an opinion. The petitioner in their written submissions dated 27th February, 2006 had specifically referred to the appropriate or reasonable method to compute income attributable to Indian PE. This issue had been examined in the immediate preceding assessment year i.e. assessment year 2002-03 in case of the predecessor BBC Worldwide Ltd. by the very same Assessing Officer Mr. Saad Kidwai, Deputy Director of Income Tax. As noticed above, the original assessment order further records and mentions the manner and mode of computing and attributing of profit/loss to the petitioner PE India India. It stands specifically mentioned in the original assessment order that it would be correct and proper to attribute 20% of the worldwide profit/loss to the petitioner's PE in India. Hence, the Assessing Officer had gone into the question of attribution of income under Article 7(4) read with Rule 10 of the Rules. This fact has also been asserted by the successor Assessing Officer in the reply to the audit objections. We have also noted the assertions made by the petitioner in their two returns of the income relating to attribution of income to Indian PE.

18. From the reasons recorded by the Assessing Officer, it is apparent that in the subsequent assessment years i.e. 2004-05 to 2006-07, the Assessing Officer had adopted a different formula or criteria to compute income attributable to the Indian PE. In the said assessment orders global loss, if any, was ignored on the ground that it was not on account of activities of the petitioner in India and, therefore, cannot be

attributable to the Indian PE. In these assessment years, it was held that the statement showing loss due to Indian activities did not represent the correct position. The aforesaid stand in subsequent years i.e. 2004-05 to 2006-07 mentioned in the reasons to believe was contra and different from the stand and reasoning given in the assessment order dated 16th March, 2005 for BBC Worldwide Ltd. relating to the assessment year 2002-03. It is also different from the criteria adopted and applied by the Assessing Officer in the original assessment order dated 24th March, 2006. Therefore, it would be correct to infer and hold that the Assessing Officer during the course of the proceedings for the AY 2003-04 had gone into the question of attribution of profits to the Indian PE and adopted the criteria and formula which was adopted in the earlier year i.e. 2002-03 in the case of predecessor, BBC Worldwide Ltd. During the original proceeding, it may have been open to the Assessing Officer to adopt a different mode or method but he did not consider this to be reasonable and proper. At this stage, we only note that it is common knowledge that BBC World News and channel, was/is broadcast all over the globe and was/is a 24 hour news channel. They have to incur expenses for creating programmes and capsules which were shown and had footprint in India. Advertisement revenue was earned from India as the channel was viewed in India and abroad. The present stand of the respondents is that entire expenditure for creating programmes etc. should be excluded and only India specific operations have to be computed, did not appeal to the earlier/original Assessing Officer. He did not think it appropriate to take the said criteria and had attributed on the basis of the turnover, 20% of the global loss/earnings to the activities attributable to Indian PE. This is a matter of perception or opinion

and, therefore, principle of 'change of opinion' is applicable. In *Usha International Ltd. (supra)*, it has been observed :-

The questions of law at serial Nos. 1 to 3 referred to the Full Bench are interconnected. They deal with the term and facets of the term "change of opinion". The expression "change of opinion" postulates formation of opinion and then a change thereof. In the context of section 147 of the Act it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.

The word "opinion" is derived from the latin word "opinari" which means "to believe", "to think". The word "opinion" as per the Black's Law Dictionary means a statement by a judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. RamanathaAiyar (third edition) explains the term "opinion" to mean "something more than mere retaining of gossip or hearsay ; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question . . . An opinion is a conviction based on testimony . . . they are as a result of reading, experience and reflection".

In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection to use the words in Law Lexicon by P. RamanathaAiyar. The question of change of opinion arise when an Assessing Officer forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand.

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It is, therefore, clear from the aforesaid position that :

(1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion.

The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

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In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/original proceedings may have examined the subject-matter, claim, etc., because the aspect or question may be too apparent and obvious. To hold that the Assessing Officer in the first round did not examine the question or subject-matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction, etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his

mind. However, this would depend upon the facts and circumstances of each case.”

19. There is a third reason why we think that the petitioner must succeed. Reasons to believe must have nexus and live link with the formation of opinion by the Assessing Officer that taxable income had escaped assessment. We have noted the reasons to believe mentioned above. As per mandate of Section 149(1)(b), income escaping assessment should be or likely to exceed Rupees one lac. This required prima facie computation of income escaping assessment. This in turn required examination of data or figures relating to “Indian operations”. If we accept the stand of the Revenue, then the said data and details were not available in the records for the assessment year 2003-04. It is not the contention of the Revenue that figures for the assessment year in question for the “Indian operation” were available in the records for subsequent or other years and were examined. Figures and data for every assessment will alter and change. This being the position and stand of the Revenue, the Assessing Officer could not have formed any prima facie or tentative opinion that income had escaped assessment as the petitioner had positive income from “Indian operations”, if we take into account “actual expenditure” incurred relating to Indian operations. In the absence of the said details, the averment made in the reasons to believe will be only a guess work or surmise and not cogent or reliable material to form a prima facie view. We understand that the Assessing Officers may be handicapped in such cases but there are sufficient provisions in the Act to get hold of the said data before proceedings are initiated or reasons are recorded. There is nothing to indicate and show the data and figures of the year in question were ascertained or gathered from records for other assessment years or otherwise.

20. In view of the aforesaid, we allow the present writ petition and quash the reassessment proceedings initiated by issue of notice under Section 148 dated 30th March, 2010 relating to assessment year 2003-04. We also quash the order dated 13th December, 2011 dismissing the objections to the reopening. Copy of this order will be sent to the Chairman of Central Board for Direct Taxes for appropriate and necessary action to ensure proper record maintenance and issuance of suitable directions.

21. The writ petition stands disposed of accordingly. In the facts of the present case, there will be no order as to cost.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

February 21st, 2014
kkb