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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 1058/2011**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION-II
..... Appellant

Through: Mr. Rahul Kaushik, Senior Standing Counsel

versus

ROLLS ROYCE INDUSTRIAL POWER INDIA LTD.....Respondent

Through: Mr. M.S. Syali, Senior Advocate with Mr. Satyen Sethi, Mr. Mayank Negi & Mr. Arth Taran Panda, Advocates

WITH

\+ **ITA 1061/2011**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION-II
..... Appellant

Through: Mr. Rahul Kaushik, Senior Standing Counsel

versus

ROLLS ROYCE INDUSTRIAL POWER INDIA LTD.... Respondent

Through: Mr. M.S. Syali, Senior Advocate with Mr. Satyen Sethi, Mr. Mayank Negi & Mr. Arth Taran Panda, Advocates

AND

+ **ITA 1063/2011**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION-II
..... Appellant

Through: Mr. Rahul Kaushik, Senior Standing Counsel

versus

ROLLS ROYCE INDUSTRIAL POWER INDIA LTD.... Respondent

Through: Mr. M.S. Syali, Senior Advocate with Mr. Satyen Sethi, Mr. Mayank Negi & Mr. Arth Taran Panda, Advocates

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

O R D E R

% 18.05.2017

Dr. S. Muralidhar, J.:

1. These are three appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') against the common order dated 5th October, 2010 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1410, 1411 and 1413/Del/2007 relating to Assessment Years ('AYs') 1998-1999, 1999-2000 and 2001-2002.

2. It must be mentioned at the outset that at the time of admission of these appeals, on 23rd March, 2012, there were 7, 4 and 6 questions of law framed in ITA Nos. 1058, 1061 and 1063 of 2011 respectively. In each of the said appeals, the first question framed reads as under:

> "(1) Whether on the facts and circumstances of the case, ITAT was right in law in holding that assumption of jurisdiction under section 148 of the Income tax Act, 1961 was not valid?"

3. The other questions pertain *inter alia* to the treatment of payments received by the Assessee from the operation and maintenance of power plant projects i.e. whether these receipts were taxable either as business income or as fee for technical services (FTS). In these three appeals, however, the Court proposes to confine its examination to the first question viz., the validity of the assumption of jurisdiction under Section 148 of the Act.

4. Having heard learned counsel for the parties, the Court is satisfied that the said question has, for reasons to follow, to be answered in favour of the Assessee. Resultantly all consequential assessment orders are rendered invalid thus obviating the need to examine the other questions that pertain to the additions made under the consequential assessment orders. The Court however clarifies that the other questions framed in these appeals, and which arise in certain other connected appeals of the Revenue against the Assessee for other AYs are left open to be decided in the other appeals.

5. The Assessee, a company incorporated under the laws of the United Kingdom (U.K.), during the AYs in question, was engaged, *inter alia*, in the business of erection, commissioning, supervision, operation and maintenance of power plants. The business activities in India were carried out by the Assessee through various projects, offices, located in India. These, according to the Revenue constituted the Assessee's permanent establishment in India under Article 5 of the Double Taxation Avoidance Agreement (DTAA) between India and U.K.

6. The Assessee's returns for the three AYs in question i.e., AYs 1998-99, 1999-2000 and 2001-2002 were picked up for scrutiny and the assessments were completed by the Assessing Officer (AO) by passing assessment orders under Section 143(3) of the Act. Placed before the Court are copies of the questionnaires issued by the AO for the relevant AYs and the replies thereto filed by the Assessee. These questionnaires refer to the nature of the transactions and the payments received in relation thereto.

7. For the Financial Year 2004-2005 , the Assessee filed applications dated 25th June, 2004 and 27th May, 2004 under Section 195(3) of the Act for issuance of nil deduction of Tax Deducted at Source ('TDS'). The Assistant Director of Income-Tax ('ADIT') Circle-II (1), International Transactions, by an order dated 20th July, 2004 declined the application. He, *inter alia*, proposed to initiate reassessment/revision proceedings under Sections 147/263 in respect of the earlier orders to bring the correct income to tax in accordance with law. The plea taken in this order was that payments received by the Assesse, pursuant to the Operations and Maintenance (O&M) Agreements should be treated as fees for technical services ('FTS') within the meaning of Explanation 2 to Section 9(1)(vii) of the Act and Article 13(4) (c) of the DTAA between India and U.K.

8. Aggrieved by the above order, the Petitioner applied to the Director of Income Tax ('DIT') under Section 264 of the Act. By an order dated 20th December, 2004, the DIT set aside the order of the ADIT, holding that the "Assesse here is neither making available technical knowledge, experience nor is developing and transferring technical plan or design." He concluded

that the services rendered under the O&M Agreements "cannot be considered as ancillary or subsidiary to the enjoyment of any right prescribed as 'royalty'." Further, "under Article 13 therefore the fee for technical services does not fit into the nature of receipt the assessee is having."

9. Notwithstanding the above orders, the AO proceeded to reopen the assessments under Section 147 read with 148 of the Act for the three AYs in question, i.e., 1998-1999, 1999-2000 and 2001-2002. The reasons therefor were issued by the AO on 28th March 2005. It was noted *inter alia* by him therein that in the original assessment orders under Section 143(3) of the Act "no opinion with regard to taxation of these technical services has been formed by the then AO." It was further stated that "the facts relating to the nature of income being fees for technical services have never been brought to the notice of the AO."

10. The Assessee objected to the reopening *inter alia* on the ground that it was based on mere 'change of opinion'. Its objections were rejected by an order dated 9th September, 2005.

11. The reassessments were completed by treating the payments as FTS. The Assessee then carried the matter by way of appeals to the Commissioner of Income Tax (Appeals) [CIT(A)]. By a common order dated 29th December, 2006 passed in the appeals pertaining to the three AYs in question, the CIT(A), relying on the decision of the Division Bench ('DB') of this Court in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax, [2006] 281 ITR 394(Del)***, came to the conclusion that since

the original assessment orders were silent on the aspect of treating the payments received by the Assessee as FTS, the jurisdictional pre-condition for attracting Section 147 stood fulfilled.

12. Aggrieved by the above order, the Assessee went before the ITAT. In the impugned order, the ITAT noted that while for AYs 1998-1999 and 1999-2000 the notices under Section 148 of the Act were issued after four years, the notice for the AY 2001-2002 had been issued within four years. The ITAT referred to the decision of the Full Bench ('FB') of this Court in ***CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del)***. It also noted the decision of this Court in ***CIT vs. Eicher Ltd. (2007) 294 ITR 310(Del)*** where it was held that if the entire material had been placed by the Assessee before the AO at the time when the original assessment was made and the AO had applied his mind to material and accepted the view of the Assessee, then the assessment cannot be reopened merely on the basis of change of opinion.

13. The ITAT examined the assessment orders, queries raised by the AO and the other material on record and concluded that the Assessee had duly disclosed the very nature of its activities. As regards the observation of the AO that the Assessee should have filed the accounts of each project individually, instead of filing the consolidated statement of accounts, the ITAT noted that the Assesse had been filing audited accounts. It opined that "it was the duty of the AO to have examined this aspect in the scrutiny assessment." Further, the AO had called for information in that regard and the Assessee had submitted an explanation on its activities. The ITAT,

therefore, held that it was "a different perception of the new incumbent on the same details." Thus, the assessment has been reopened by the AO "only on the basis of the change of opinion". Further, the ITAT noted that for the AYs 1998-1999 and 1999-2000, the AO was unable to point out which material facts had not been disclosed by the Assessee. The Assessee's appeals were allowed and the reassessment orders set aside.

14. This Court has heard the submissions of both Mr. Rahul Kaushik, learned Senior Standing Counsel for the Revenue and Mr. M.S. Syali, learned Senior Counsel for the Assessee. The Court has also perused the notices/questionnaires issued by the AO in the course of the assessment proceedings and the replies thereto by the Assessee. The Court has also perused the original assessment orders passed under Section 143(3) of the Act and the reasons for the reopening of the assessments.

15. The main plank of the submission of the Revenue before the CIT(A), which has been adverted to by the ITAT in the impugned order, is the decision of the DB of this Court in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax*** (*supra*). In particular, reliance is placed on the following observations:

> "19.....The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the assessing officer proposes to examine in the course of re-assessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the assessing officer and had been held in favour of the assessee is too farfetched a proposition to merit

acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the assessing officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening computed assessments would be applicable only to situations where the assessing officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the assessing officer either generally or in the form of a reply to the questionnaire served upon the assessed. What is important is whether the assessing officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

16. The fact of the matter is that later Benches of this Court, including two Full Benches in ***CIT v. Kelvinator of India Ltd.***(*supra*) and ***CIT v. Usha International Ltd., (2012) 348 ITR 485*** have disagreed with the view expressed by the DB in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax***(*supra*). In fact, the decision of the FB in ***CIT v. Kelvinator of India Ltd.***(*supra*) was affirmed by the Supreme Court in ***CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)***.

17. The Full Bench of this Court in ***CIT v. Usha International Ltd.***(*supra*), specifically overruled the decision of the DB in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax***(*supra*). Even prior thereto, in ***KLM Royal Dutch Airlines v. ADIT [2007] 292 ITR 49***, another DB of this Court noticed the anomaly that had resulted from the decision in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax*** (*supra*), which was contrary to other decisions, including the decision of the FB in ***CIT v. Kelvinator of India Ltd.***(*supra*). This was noticed by the DB in ***KLM Royal Dutch Airlines v. ADIT*** (*supra*) where it observed:

> "16. The Full Bench of this Court in *Commissioner of Income-Tax v. Kelvinator of India Ltd. [2002] 256 ITR 1* had opined that the amendments introduced into Section 147 with effect from 1.4.1989 have not altered the position that a mere change of opinion of the AO was not sufficient ground for embarking on a reassessment. Calcutta Discount was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in *Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax* , inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of Section 143, but under the third Sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view in this case that of the Gujarat High Court as in *Gruh Finance Ltd. v. Joint Commissioner of Income-Tax (Assessment) , Praful Chunilal Patel v. M.J. Makwana, Assistant CIT and Garden Silk Mills Ltd. v. Deputy CIT (No. 1)*. The Full Bench of this Court has taken into consideration both *Praful Chunilal Patel* as well as *Garden Silk Mills*. In *Kelvinator* the Full Bench had also analysed the earlier Division

> Bench decisions, namely, *Jindal Photo Films Ltd. v. Deputy Commissioner of Income-Tax* presided over by R.C. Lahoti J. (as learned Chief Justice of India then was) and *Bawa Abhai Singh v. Deputy Commissioner of Income-Tax [2002] 253 ITR 83* comprising Arijit Pasayat and D.K. Jain JJ. (as their Lordships then were). It is quite possible that had the Court in *Consolidated Photo* been made aware of the consistent opinion of this Court in *Jindal Photo* and *Bawa Abhai Singh*, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court."

18. There is no manner of doubt that the decision of the DB of this Court in ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax***(*supra*) is no longer good law. The main plank of the Revenue's case before this Court, therefore, fails. Nevertheless, the Court proceeds to examine the question of validity of the reopening of the assessments for the AYs in question.

19. The fact of the matter is that during the course of the original assessments under Section 143 (3), the AO did serve upon the Assessee a detailed questionnaire. The AO examined the nature of the transactions involving the Assessee and the payments received therefor. The reopening was not based on any fresh material. By revisiting the same materials the successor AO now concluded that the payments received by the Assessee pursuant to the O&M Agreements should be treated as FTS. In the circumstances, the view taken by a successor AO on the same material was indeed nothing but a mere change of opinion. It is a well-settled legal proposition, as explained in ***Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191(SC)*** that once an Assessee has discharged the burden of not only producing the account books and other documents, but also the specific

material relevant to the assessment, "it is for the Income-tax Officer to draw the proper inferences of fact and law therefrom and the Assessee cannot further be called upon to do so for him." In ***Indian Oil Corporation v. ITO [1986] 159 ITR 956***. the Court pertinently observed "it is for the taxing authority to draw inference. It is not necessary for the Assessee to draw inference." These observations apply on all fours to the case on hand. Here the Assessee had discharged its burden of disclosing fully and truly all the material facts before the AO during the original assessments. There was no basis for the successor AO to conclude that "no opinion with regard to taxation" of the payments received for the services rendered had been formed by the AO. It is plain that the pre-condition for invoking Section 147 did not exist. The assumption of jurisdiction under Section 148 of the Act was not valid.

20. Consequently, the question framed by this Court on the above aspect is answered in the affirmative, i.e., in favor of the Assesse and against the Revenue. The appeals are dismissed, but with no order as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 18, 2017/tp