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

Judgement reserved on **08.03.2021**
Judgement pronounced on **05.07.2021**

\+ **W.P.(C) 10939/2018 and CM No. 42617/2018**

M/S ESS ADVERTISING (MAURITIUS) S.N.C. ET COMPAGNIE (EARLIER KNOWN AS M/S ESPN STAR SPORTS MAURITIUS S.N.C.ET COMPAGNIE) .....Petitioner

Through: Mr. Porus Kaka, Senior Advocate with Mr. Prakash Kumar and Mr. Divesh Chawla, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(2)(2), INTERNATIONAL TAXATION, NEW DELHI

.....Respondent

Through: Ms. Vibhooti Malhotra, Senior Standing Counsel.

\+ **W.P.(C) 10940/2018 and CM No. 42619/2018**

M/S ESS DISTRIBUTION (MAURITIUS) S.N.C. ET COMPAGNIE

.....Petitioner

Through: Mr. Porus Kaka, Senior Advocate with Mr. Prakash Kumar and Mr. Divesh Chawla, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE -1(2)(2), INTERNATIONAL TAXATION, NEW DELHI

.....Respondent

Through: Ms. Vibhooti Malhotra, Senior Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J:

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Preface:

1. These writ petitions are directed against separate but identical orders. The orders impugned bear the same date and content. The first writ petition has been filed by ESS Advertising (Mauritius) S.N.C Et Compagnie (Earlier Known as ESPN Star Sports Mauritius S.N.C. Et Compagnie) [hereafter referred to as "ESSA"] while the second writ petition has been filed by ESS Distribution (Mauritius) S.N.C. Et Compagnie [in short "ESSD"]. However, ESSA and ESSD will collectively be referred to as petitioners unless the context requires otherwise.

2. The impugned orders, passed in the instant matters, concern the following:

i. orders containing reasons, dated 20.03.2018, based on which the Assessing Officer [in short "A.O."] issued a notice under Section 148 of the Income Tax Act, 1961 [in short "Act"] dated 29.03.2018;

ii. notices dated 29.03.2018, issued under Section 148 of the Act; and

iii. orders dated 24.09.2018, whereby the objections filed by the petitioners to the impugned reasons were disposed of by the AO.

3. Since the facts in both cases are similar, the above-captioned writ petitions are being disposed of via a common judgement.

3.1. The aforementioned orders concern the assessment year [in short "A.Y."] 2013-2014.

3.2. Before we set forth the core issues, which arise for consideration, in the above-captioned writ petitions, which are similar, it would be convenient, to outline, in detail, the facts and circumstances obtaining in one of the writ petitions, i.e., W.P. (C) 10939/2018 instituted by ESSA. We may note that counsel for the parties were agreed that the decision in W.P. (C) 10939/2018 would apply *mutatis mutandis* to the other writ petition as well, i.e., W.P. (C) 10940/2018.

Background facts pertaining to W.P. (C) 10939/2018:

4. ESSA is a partnership firm established under the laws of Mauritius. The two partners in ESSA are ESPN Mauritius Ltd. [now known as Worldwide Wickets, Mauritius]; an entity incorporated in Mauritius and having 99.9% share in the profits of ESSA. While the other partner, i.e., ESPN Network Pte Ltd.; incorporated in Singapore, held a 0.1% share in the profits earned by ESSA. This position also obtained in the AY in issue, i.e., AY 2013-2014. ESSA is engaged in the business of acquiring and allotting advertising time and programme sponsorship [hereafter referred to as "advertising time"] in connection with television programming. ESSA entered into agreements for the sale of advertising time with ESPN Software India Private Limited [now known as Star Sports India Private Limited (in short "SSIPL")], a company incorporated under the laws of India, which in turn has merged with Star India Private Limited. ESSA has claimed that it entered into the aforementioned agreement with SSIPL on a principal to principal basis and that SSIPL, on its own steam carried on the business of allotting advertisement time slots to various advertisers and advertising agencies in India.

5. On 28.11.2013, ESSA filed its return of income for the AY 2013-2014, wherein it declared its taxable income as Rs.4,22,65,500/-(as also the status of a firm), along with Form 3CEB, whereby it disclosed the amount received upon the sale of advertisement inventory from SSIPL. Initially, the return was processed under Section 143(1) of the Act, and intimation, in that regard was given on 08.08.2014. Thereafter, the return was picked up for scrutiny by the AO under Section 143(2) of the Act, and accordingly a notice was issued on 05.09.2014. In the course of the assessment proceedings, the respondent sought information from ESSA via several questionnaires, which were issued under Section 142(1) of the Act. In this context, it would be relevant to note that information was sought via communication dated 16.07.2015. ESSA appears to have filed with the AO in response, in quick succession, two replies dated 13.01.2016 and 21.01.2016. Consequent thereto, vide another notice dated 08.12.2016 issued under Section 142(1) of the Act, the respondent sought additional information from ESSA, which, according to it, was furnished via communication dated 19.12.2016.

5.1. It appears that the AO had made a reference under Section 92 CA (3) of the Act to the Transfer Pricing Officer [TPO] qua ESSA for determining Arm's Length Price [in short "ALP"] in respect of international transactions entered into by ESSA in the financial year [in short "F.Y."] 2012-2013, i.e., AY 2013-2014.

5.2. The record shows that the TPO, via order dated 05.09.2016, inter alia, informed the AO the following.

> "3. During the year, the assessee has reported the following International transactions in the Form 3CEB:

International Transaction	**Amount**
Receipt for [the] acquisition of	2,586,079,609

Advertisement airtime inventory	

4. The transfer pricing documentation which contains the functional and economic analysis along with other details has been examined and placed on record. This is a flipside case and the Indian company i.e. M/s Star Sports India Pvt. Ltd. (Formerly Known as ESPN Software India Pvt. Ltd.) is subject to TP Audit. The TP issues that arise in the international transaction between the assessee and its AE are being examined in the case of the AE. Accordingly, necessary action, if any, is being taken in the case of AE."

5.3. Unknown to the TPO who passed the order dated 05.09.2016, concerning ESSA, the TPO dealing with the Associated Enterprise [in short "AE"] referred to in the order dated 05.09.2016, i.e., SSIPL had the international transactions examined to determine the ALP. After examination of the transfer pricing documentation submitted by SSIPL, containing functional and economic analysis as prescribed under Rule 10D of the Income Tax Rules, 1962 [in short "Rules"], the TPO, vide order dated 31.08.2016, concluded that "no adverse inference is drawn in respect of the international transaction undertaken by the assessee [SSIPL] during the Financial Year 2013-14 [sic Assessment Year 2013-2014]".

5.4. Resultantly, insofar as SSIPL was concerned, the AO, after considering the TPO's order dated 31.08.2016, accepted the returned income of SSIPL which was pegged at Rs.1,20,82,13,340/-, vide order dated 25.11.2016, passed under Section 143(3) of the Act vis-à-vis AY 2013-2014.

5.5. In the interregnum, during the assessment proceedings, two queries were raised by the AO on 26.09.2016.

a) First, whether there was any change in ESSA's business model (or in the factual matrix) that was considered in the previous year relevant to AY 2011-2012 and other previous years?

b) Second, why the assessment for the AY in issue should not be made or completed based on the assessments made in the previous years when there was no change in the business model/factual matrix of the case.

5.6. On 29.09.2016, the ESSA tendered its reply to both queries. Insofar as the first query was concerned, ESSA responded to the same by stating that there was no change in the business model or the factual matrix in the period in issue relatable to AY 2013-2014 as compared to the preceding years. Insofar as the second query was concerned, ESSA, inter alia, asserted that it does not have a permanent establishment in India and that the AO had erred in concluding that SSIPL was working solely for ESSA. In other words, according to ESSA, SSIPL was not its dependent agent. ESSA also asserted that the concerned AO had failed to appreciate the provisions of Articles 5(4) and 5(5) of the Double Taxation Avoidance Agreement entered into between India and Mauritius [in short "DTAA"].

5.7. The AO, however, was not persuaded and thus passed a draft assessment order dated 23.12.2016; which according to ESSA, was served upon it on 03.01.2017. The rationale employed by the AO was that the facts and circumstances obtaining in the AY in issue, i.e., AY 2013-2014 were similar to those which arose in AY 2012-2013 and other earlier AYs and therefore, should result in the same outcome. It was also noticed that the decision of earlier AYs was pending before the appellate authorities.

5.8. Being aggrieved, ESSA filed objections with the Dispute Resolution Panel [in short "DRP"], on 01.02.2017. A copy of the said objections was filed with the AO on the succeeding day, i.e., 02.02.2017. The DRP disposed of the objections vide order dated 11.09.2017, wherein it concluded that it did not have jurisdiction in the matter as ESSA was not an "eligible assessee" within the meaning of Section 144C(15)(b) of the Act [as it stood on that date], as

neither the TPO had proposed any variation in its income and nor was ESSA a foreign company. Consequently, the DRP declined to issue any directions in the matter and dismissed the proceedings without considering other grounds of objections taken by ESSA.

6. Faced with this situation, the AO, employed a different approach and as it appears took steps for initiating proceedings against ESSA under Section 147 of the Act. As per the respondent, a note was generated on 20.03.2018 for recording reasons for initiating proceedings under Section 147 of the Act. Pertinently, this note proffers the following reasons for initiating reassessment proceedings.

> "During the year under consideration, the Assessee received gross advertising revenue of Rs.2,85,60,79,609/-. In earlier year and subsequent year, a part of the advertising revenue has been attributed to the Permanent Establishment of the Assessee in India and taxed as its business income. In this case, the A0 passed a draft assessment order u/s 144C(1)/143(3), dated 23/12/2016, proposing addition of Rs.85,68,23,883/- on account of Profit from Advertisement business under head PGBP. Being aggrieved the assessee filed its objections appeal before the Hon'ble DRP-1, New Delhi. The Hon'ble DRP-1, New Delhi has passed an order uls 144C (5), dated 1 1/09/2017. The DRP has held that the assessee is not an 'eligible assessee' as neither it is a foreign company nor it is a case where variation has arisen to the income or loss returned as a consequence of the order of the Transfer Pricing Officer passed u/s 92CA(3) of the Act.
>
> Thus, the DRP has held that they do not have jurisdiction over the case. Consequently, the DRP has declined to issue-any direction in this case and has dismissed the proceedings 'before it. The findings of the DRP issued order under section 144C(5) are binding upon the AO under section 144C(10). Therefore, the draft assessment issued on 23.12.2016 was not taken to its logical conclusion by passing an order u/s 143(3) of the IT Act. Thus, no assessment was made under the provisions of section 143(3) r/w 144C(13) or else under the provisions of section 143(3) in conformity with the directions of DRP. Thus this is a case where return of income has been filed but no regular assessment has been made. Thus the Explanation 2 to section 147 is attracted in this case. …
>
> **xxx** **xxx** **xxx**
>
> 3. In view of the foregoing paras, I have reasons to believe that the income chargeable to tax amounting to Rs.85,68,23,883/- has escaped assessment for Assessment Year 2013 - 14 in this case."

7. The respondent claims that the aforementioned note dated 20.03.2018 was submitted for consideration and approval of Additional Commissioner of Income Tax [in short "ACIT"] for issuance of notice under Section 148 of the Act to ESSA, which was obtained on 28.03.2018. The notice under Section 148 of the Act was, accordingly, issued on 29.03.2018. This notice, as alluded to hereinabove, was premised on the supposition that the AO had reason to believe that ESSA's income chargeable to tax amounting to Rs.85,68,23,883/- qua AY 2013-2014 had escaped assessment. Thus, according to the said notice, the AO proposed to assess/reassess the ESSA's income/loss for the said AY, and therefore, required it to deliver a return within 30 days in the prescribed form.

7.1. ESSA responded to the aforesaid notice vide reply dated 25.04.2018. Via the said reply, ESSA indicated, in no uncertain terms, that the AO should treat the return originally filed by it as a return filed in response to the notice issued under Section 148 of the Act. Besides this, ESSA also sought reasons for initiating proceedings under Section 147 of the Act in line with the judgement of the Supreme Court rendered in ***GKN Driveshafts (India) Ltd. vs. ITO***, [2003] 259 ITR 19 (SC).

7.2. The AO complied with the request. The reasons which were said to have been recorded by the AO, as noted above, on 20.03.2018, were received by ESSA on 29.06.2018, via e-mail. On 02.08.2018, ESSA filed its objections with the AO. The objections were disposed of by the AO, as noted above, vide order dated 24.09.2018; this order was received by ESSA via email dated 25.09.2018.

7.3. On the same day, i.e., 25.09.2018, ESSA received a notice under Section 143(2) of the Act dated 24.09.2018.

Background facts pertaining to W.P. (C) 10940/2018:

8. ESSD is a partnership firm established under the laws of Mauritius. The two partners in ESSD are ESPN Mauritius Ltd. [now known as Worldwide Wickets, Mauritius]; an entity incorporated in Mauritius and having, 99.9% share in the profits of ESSD. While the other partner, i.e., ESPN Asia Ltd.; incorporated in Labuan, Malaysia, held a 0.1% share in the profits earned by ESSD. ESSD is engaged in the business of distribution of sports and sports-related television programmes broadcasted by ESPN Star Sports, Singapore via non-standard television. ESSD entered into agreements with SSIPL for the distribution of its aforementioned channels.

9. On 28.11.2013, ESSD filed its return of income for the AY 2013-2014, wherein it declared its taxable income as Rs. 2,93,89,260/-. The return was accompanied by Form 3CEB, wherein, inter alia, ESSD disclosed having received from SSIPL Rs. 4,90,07,43,680/- towards gross subscription remittance. Via this return, ESSD claimed a refund of Rs. 24,56,97,480/-.

9.1. On 05.09.2014, the AO issued a notice to ESSD under Section 143(2) of the Act. However, on 25.02.2015, the AO issued an intimation to ESSD under Section 143(1) of the Act.

9.2. ESSD revised its return on 30.03.2015. The only change brought about by the revised return was in respect of ESSD's claim for the refund. ESSD claimed additional credit qua taxes, deducted at source. Accordingly, the refund claimed was enhanced from Rs. 24,56,97,480/- to Rs. 25,41,48,240/-.

9.3. During the assessment proceedings, various details were sought by the respondent from ESSD, via questionnaires, served under Section 142(1) of the Act. In this context, it is averred by ESSD that, on 09.12.2015, it received a questionnaire dated 16.07.2015, issued by the AO, under Section 142(1) of the Act. It appears, in response, ESSD placed on record, its submissions qua the same on 13.01.2016 and 21.01.2016.

9.4. In the interregnum, the matter was referred by the AO to the TPO. The TPO on 05.09.2016, as in the case of ESSA, stated that SSIPL was being subjected to a transfer pricing audit and that necessary action, if any, would be taken in the case of the AE i.e. SSIPL.

9.5. On 26.09.2016, the AO raised certain queries which were identical to those that were raised qua ESSA. In response thereto, submissions were filed by ESSD on 29.09.2016. The AO, once again, served a questionnaire on ESSD which was received by it on 08.12.2016 seeking additional information, which, according to ESSD, was furnished by it via communication dated 19.12.2016.

9.6. On 23.12.2016, the AO passed a draft assessment order under Section 144C(1)/143(3) of the Act qua ESSD. The proposed addition to the returned income on account of the subscription fee received by ESSD, which, according to the AO, took the character of royalty was Rs. 4,90,07,43,680/-. A perusal of the draft assessment order would show that the AO has also held that the subscription income received by ESSD was its business income attributable to the PE in India. The AO, however, proposed the alternate route of treating the subscription income as royalty as the net tax effect was higher and therefore beneficial to the revenue.

9.7. Being aggrieved, ESSD filed its objections with the DRP on 01.02.2017. A copy of the same was filed with the AO on 02.02.2017. The DRP, in ESSD's case as well, declined to issue any direction, via its order dated 11.09.2017, as it concluded that ESSD was not an "eligible assessee" within the meaning of Section 144C(15)(b) of the Act. It is this order which triggered the proceedings under Section 147 of the Act. Consequently, a notice under Section 148 of the Act was issued qua ESSD on 29.03.2018. ESSD filed a response vis-à-vis the same vide reply dated 25.04.2018. Inter alia, ESSD indicated in its reply that its revised return should be treated as the return filed in response to the notice

issued under Section 148 of the Act. Besides this, ESSD called upon the AO to furnish the reasons available on record for initiating the proceedings under Section 147 of the Act.

9.8. In response to this request, on 29.06.2018, the AO furnished a copy of the note dated 20.03.2018 which contained the reasons for initiating the impugned proceedings, albeit, via e-mail. The note also adverted to the approval received by the AO from the ACIT under Section 151 of the Act. The endorsement made in this regard read as follows: "This is [a] fit case for issue of [sic "issuing"] notice u/s 148 of the IT Act, 1961. Approved"

9.9. ESSD filed its objections vis-à-vis the reasons recorded for initiation of reassessment proceedings on 02.08.2018. These objections were disposed of by the AO vide order dated 24.09.2018. The objections were received by ESSD via email dated 25.09.2018. Furthermore, ESSD also received on the same date, via e-mail of even date, i.e., 25.09.2018, a notice dated 13.09.2018, issued under Section 143(2) of the Act.

10. As can be seen from the facts narrated hereinabove vis-à-vis ESSA and ESSD, the cases concerning these two entities have followed the same trajectory, except for minor differences, which have been set forth hereinabove.

Submissions made on behalf of the petitioners:

11. The submissions on behalf of the petitioners were advanced by Mr. Porus Kaka, learned senior counsel, who was instructed by Mr. Prakash Kumar. These can be paraphrased as follows.

i. Firstly, even before the issuance of the draft assessment orders dated 23.12.2016, orders passed in other AYs had held that the petitioners were not an “eligible assessee” within the meaning of Section 144C(15) of the

Act [as it stood, at the relevant time]. In this context, reference was made to the following orders.

Date of orders	Assessment Year (AY)	Proceedings
26.12.2014	AY 2010-2011	Order passed by the DRP.
27.03.2015	AY 2011-2012	Final assessment order passed under Section 143(3) of the Act and not a draft assessment order as petitioners were not eligible assessees,
10.03.2016	AY 2012-13	Final assessment order passed under Section 143(3) of the Act and not a draft assessment order as petitioners were not found to be eligible assessees,
23.03.2016	AY 2010-2011	This Court quashed the draft and final assessment order as petitioners were not found to be eligible assessees.

ii. Secondly, the respondent sought to initiate (re)assessment proceedings, although, such an attempt had been repelled by this Court vide judgment dated 31.10.2017, passed in W.P 11968/2016 and W.P. (C) 11971/2016 [concerning AY 2010-2011] and in W.P. (C) 12031/2016 and W.P. (C) 11972/2016 [concerning AY 2008-2009].

iii. Thirdly, the respondent has chosen repeatedly to raise the issue that ESSA has a PE in India; a reference to which has been made by this Court in its aforementioned judgment dated 31.10.2017.

iv. Fourthly, the Income Tax Appellate Tribunal [in short "Tribunal"] has, in at least four AYs, held that the transaction entered into between ESSA and SSIPL is at Arms' Length, and therefore, no income is attributable to it. The finding to this effect has been returned by the Tribunal vide order dated 20.08.2018 qua AYs 2003-2004 and 2004-2005. Likewise, via

order dated 22.10.2020, the Tribunal has rendered a similar finding vis-à-vis AY 2009-2010 and AY 2011-2012.

v. Fifthly, the order dated 24.09.2018, whereby objections filed by the petitioners were disposed of did not deal with the specific submissions made concerning the unavailability of fresh tangible material, non-taxability of profits from advertising business (in case of ESSA) and subscription income (in case of ESSD) as they had no PE in India, and more specifically, the ground that the impugned action amounted to change of opinion. The said order did not even deal with the orders of this Court that were placed on record.

vi. Sixthly, (re)assessment proceedings can only be initiated if the AO has reasons to believe that certain income has escaped assessment albeit based on the emergence of new facts/information. Section 147 of the Act does not confer on the AO the power to arrive at a different conclusion by reviewing material that is already on record. Since no fresh material/information was brought on record, the AO did not have the power to reopen the assessment proceedings. [See: ***Commissioner of Income Tax vs. Kelvinator of India Ltd,*** (2010) 320 ITR 561 (SC), ***Commissioner of Income Tax-V vs. Orient Craft Ltd.,*** (2013) 354 ITR 536 (Delhi), and ***BPTP Limited vs. Principal Commissioner of Income Tax (Central)-III & Anr.,*** (2020) 421 ITR 59 (Del)].

vii. Seventhly, the draft assessment orders [i.e., orders dated 23.12.2016] was passed, for the AY in issue, i.e., AY 2013-2014, by the AO knowing fully well that the petitioners had already been held as not being "eligible assessees" in terms of Section 144C(15)(b) of the Act.

viii. Eighthly, the reason given for initiating (re)assessment proceedings, i.e., that the draft assessment orders were not taken to their logical conclusion can never form a sustainable reason for reopening the assessment for the following reasons.

a) The DRP set aside the draft assessment orders [as it was illegal], and therefore, was binding on the AO.

b) Since the draft assessment orders were illegal, and they could never have, logically, ended up as orders under Section 143(3) of the Act.

c) Reopening of assessment can never be justified to overcome, what was, to begin with, illegal action of the respondent.

d) The respondent, after considering the entire material on record, adjudicated, inter alia, on the issue concerning PE (in the case of petitioners) and royalty (in the case of ESSD) in the draft assessment order(s) which was passed under Section 143(3) read with Section 144C of the Act. Once such an order was passed, the concerned officer had completed his part of the assessment proceedings, albeit, as required under Section 144C of the Act in a draft form.

e) A draft assessment order is final, once passed, insofar as the AO is concerned, pending the directions that DRP may issue while disposing of the objections filed by the assessee. The AO is bound by the decision that the DRP may take on the objections filed by the assessee. Given the failure of the respondent to act as per the scheme of the statute (and, in not adhering to the decisions of this Court as also the DRP), the respondent could not have formed

reasons to believe that the petitioners' income chargeable to tax had escaped assessment. [See ***Principal Commissioner of Income-tax-6 vs. Moser Baer India Ltd.***, (2020) 114 taxmann.com 549 (SC), and ***Coperion Ideal (P.) Ltd. vs. Commissioner of Income-tax – II***, [2015] 378 ITR 525 (Delhi)(Mag.)]

ix. Ninth, Explanation 2 to Section 147 of the Act is applicable only if the assessment order was not framed. In these cases, assessment orders were framed by the AO, which, were, however, not confirmed by the DRP. The DRP held that the orders were invalid, as petitioners were not eligible assessees within the meaning of Section 144C(15)(b) of the Act. Therefore, the reason, given, that the draft assessment orders remained "inchoate" is not sustainable in law. In any event, the said explanation cannot be used to reopen an invalid order, which was passed contrary to the decision of this Court and was founded on AO's illegal conduct.

x. Tenth, SSIPL does not act wholly or exclusively on behalf of the petitioners. Furthermore, SSIPL has not concluded any contract on behalf of the petitioners, and hence, cannot be considered as their agent. SSIPL has been accorded remuneration at ALP; a fact which has been accepted by the TPO and therefore, nothing further is attributable to the income of the petitioners'. [See***: DIT v/s Morgan Stanley*** (2007) 292 ITR 416(SC), ***ADIT v/s E-Funds IT Solutions Inc*** (2017) 399 ITR 34(SC), ***Honda Motor Co. Ltd. v/s ADIT*** (2018) 255 Taxman 72(SC), ***DIT v/s BBC Worldwide Limited*** (2011) 203 Taxman 554 (Del), ***Set Satellite (Singapore) Pte. Ltd. v/s DDIT*** (2008) 307 ITR 205 (Bom) & ***DIT v/s B4U International Holding Ltd*** (2015) 374 ITR 453 (Bom)].

xi. Eleventh, initiation of reassessment is contrary to the provisions of Section 149(1)(b) of the Act having regard to the fact that the petitioners do not have a PE in India and/or no income is attributable to them. The impugned notices, and orders setting out reasons and disposing of objections raised qua the same, is contrary to the provisions of Article 5 read with Article 7 of the DTAA and in disregard of the principles enunciated by the Courts.

xii. Twelfth, the sanctions granted under Section 151 of the Act, have been accorded without due application of mind. The sanctions granted by the concerned officer are mechanical as is evident from the reasons given while approving initiation of impugned proceedings: "This is [a] fit case for issue of [sic "issuing"] notice u/s 148 of the IT Act, 1961. Approved" [See ***CIT vs. S Goyanka Lime & Chemical Ltd.,*** (2019) 237 Taxman 378 (SC), ***Chhugamal Rajpal vs. S.P. Chaliha***, (1971) 79 ITR 603 (SC), ***PCIT vs. NC Cables Ltd.***, (2017) 391 ITR 11 (Del) and ***United Electrical CO (P.) Ltd. vs. Commissioner of Income-Tax***, (2002) 258 ITR 317 (Del)]

Submissions advanced on behalf of the respondent:

12. On behalf of the respondent, arguments were advanced by Ms. Vibhooti Malhotra. Ms. Malhotra argued, broadly, on the following lines.

i. An alternate statutory remedy that was equally efficacious was available to the petitioners, and therefore, the instant writ petition should not be entertained. [See: ***CIT vs. Chhabil Dass Agarwal,*** (2014) 1 SCC 603]

ii. The petitioners have wrongly sought to place reliance on this Court's order dated 23.03.2016 [passed in W.P. (C) Nos. 2384/2015 and 2397/2015 concerning AY 2010-2011]. This Court, via the said order,

quashed final assessment orders and reiterated the principle that assessment orders passed contrary to the requirement of Section 144C of the Act are, entirely without jurisdiction. This observation was made by this Court, in the said order, as it took exception to the AO attempting to finalize the assessment; conduct which was found contrary to the principles laid down in the judgement of the Supreme Court rendered in ***Union of India vs. Kamlakshi Finance Corporation Limited***, 1992 Supp (1) SCC 443. Thus, the said judgement dated 23.03.2016 is distinguishable. In the present cases, the AO has validly exercised his jurisdiction for initiating reassessment proceedings. In the instant cases, although, scrutiny proceedings were initiated, final assessment orders could not be framed as the DRP declined to issue any directions qua the draft assessment orders. Therefore, the action taken by the AO aligned with this Court's decision dated 23.03.2016. Significantly, this Court in the aforementioned judgement, clarified that it had not expressed any opinion regarding the validity of proceedings taken out against ESSA and ESSD [i.e., the petitioners] under Section 147 and 148 of the Act.

iii. The contention of the petitioners, that (re)assessment proceedings could not have been initiated in the absence of new and tangible material and therefore the impugned action of the AO suffers from an error of change of opinion, is without merit as it flies in the face of provision of explanation 2 appended to Section 147 of the Act.

iv. The assertion made on behalf of the petitioners that the draft assessment orders passed by the AO were final insofar as AO was concerned, is flawed. It is an admitted fact that the additions proposed in the draft assessment orders were not examined on merits by the DRP given the conclusion reached by it that the petitioners were not eligible assessees. Had such a step been taken, it is only then the AO could have completed

the proceedings, having regard to the provisions of sub-section (5) and (13) of Section 144C of the Act. [See ***Principal Appraiser (Exports), Collectorate of Customs and Central Excise and Ors. vs. Esajee Tayabally Kapasi***, 1995 (80) ELT 3]

v. The draft assessment orders passed by the AO were "inchoate" and cannot be termed as an assessment creating binding obligations either on the respondent or the assessees, i.e., ESSA and ESSD, in these cases. The reliance placed by the petitioners on the judgement of the Supreme Court in ***C.A. Abraham v. Income-tax Officer, Kottayam and Anr.*** [1961] 41 ITR 425 (SC) is misplaced, as the draft assessment orders in the present cases did not produce any definitive consequences. The instant cases fall squarely within the ambit of Explanation 2 attached to Section 147 of the Act. Furthermore, it requires to be emphasized that a draft assessment order is final qua the AO only when assessment jurisdiction is exercised under Section 144C of the Act.

vi. Since no final assessment orders were passed, (re)assessment proceedings could have been initiated against the petitioners. [See ***Deputy Commissioner of Income-tax vs. Zuari Estate Development & Investment Co. Ltd.***, [2015] 373 ITR 661.

vii. The petitioners had raised objections on merits against the draft assessment orders before the DRP; the main issue being, as to whether the advertising revenue (in case of ESSA) and subscription fee received from SSIPL (in case of ESSD) was taxable in the AY in issue, i.e., AY 2013-2014. The DRP has not expressed any view on this aspect.

viii. This apart, since no original assessment has been carried out, it was not necessary for the AO to come up with fresh tangible material to form "reasons to believe" that the taxable income of the petitioners had

escaped assessment. [See ***Indu Lata Rangwala vs. Deputy Commissioner of Income-tax***, [2016] 384 ITR 337 (Delhi]

ix. Since the draft assessment orders did not attain finality, there could be no impediment in law in initiating (re)assessment proceedings on the same material which led to the framing of the draft assessment orders. [See ***Krishna Developers and Company vs. Dy. Commissioner of Income Tax***, [2018] 400 ITR 260 (Guj)]

Analysis and Reasons:

13. Having heard learned counsel for the parties, and perused the record, what has emerged and qua which there is no rebuttal is that, before the draft assessment orders dated 23.12.2016 for the AY in issue, i.e., 2013-14 were passed, there was in place the order of the DRP dated 26.12.2014, concerning the assessees [i.e. petitioners in the instant cases], which was confirmed by this Court via order dated 23.03.2016 [related to AY 2010-2011], which noted that the petitioners were not eligible assesses within the meaning of Section 144C(15)(b) of the Act. Pertinently, the petitioners' declared status, even then, was, a non-resident foreign partnership firm.

13.1. Therefore, at the relevant time, the AO could not have taken recourse to the procedure for assessment provided under Section 144C. It needs to be emphasized that Section 144C falls in Chapter XIV which is titled "Procedure for Assessment".

13.2. Notably, for two AYs, i.e., AY 2011-2012 and 2012-2013, recourse was taken for passing final assessment orders qua the petitioners to the provisions of Section 143(3) of the Act. These orders were passed on 27.03.2015 (AY 2011-2012) and 10.03.2016 (AY 2012-2013).

13.3. Therefore, there was no good reason, according to us, for the AO to resort to the procedure for assessment provided under Section 144C of the Act when such orders [i.e., the aforementioned orders] had already been passed and there was no change in the status of the petitioners in the AY in issue, i.e., AY 2013-2014. The petitioners' status in AY 2013-2014, as in the above referred years, continued as a non-resident foreign partnership firm. The AO, however, as noticed above, took the aid of the assessment regime prescribed under Section 144C of the Act despite the TPO having passed two separate but similar orders dated 05.09.2016, which concluded that no action was called for qua the petitioners though, their associated enterprise, i.e., SSIPL was being subjected to TP Audit.

13.4. Therefore, it is difficult to fathom, why the AO would continue to embark on a route that would lead, figuratively speaking, to perdition.

13.5. It is when the DRP, via its orders dated 11.09.2017, ruled once again, that the petitioners were not eligible assessees within the meaning of Section 144C(15)(b) of the Act, as neither the TPO had proposed a variation in their returned income and nor were they a foreign company, did the AO take recourse to the impugned proceedings. It is pertinent to note, as noticed above, that the DRP had concluded that it did not have jurisdiction in the matter, and therefore, was not inclined to issue any directions in the case. The proceedings qua the petitioners were, accordingly, dismissed.

13.6. What is important, though, is that the draft assessment orders concerning the petitioners, [which were passed vis-à-vis the AY in issue, i.e., AY 2013-2014] - have been passed under Section 144C(1)/143(3) of the Act. More importantly, in both the draft assessment orders, which are dated 23.12.2016, there is a detailed discussion made as to why the income of the petitioners is attributable to PE in India and in particular, vis-à-vis ESSD, as to why the

income received from subscriptions took the character of royalty. Furthermore, the variation in the taxable income proposed, both in the case of ESSA and ESSD, i.e., Rs.85,68,23,883/- and Rs.490,07,43,680/- is the exact sum, which the respondent says, has escaped assessment. This is evident upon a perusal of the two notes containing reasons, which are dated 20.03.2018.

13.7. The only reason given in the said notes, for triggering the impugned proceedings, is that since the draft assessment orders dated 23.12.2016 were not taken to their "logical conclusion" on account of the orders passed by the DRP on 11.09.2017, there was no "regular assessment" made and hence, the impugned action was in order. In support of this plea, reference is made to Explanation 2 to Section 147 of the Act[1] and the judgement of this Court dated 17.02.2016, passed in W.P. (C) 4262/2015, titled ***Honda Cars Ltd. vs. Deputy***

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[1] Section 147 Income escaping assessment.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(*a*) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(*b*) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

[71][(*ba*) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;]

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been under assessed; or

(*ii*) such income has been assessed at too low a rate; or

(*iii*) such income has been made the subject of excessive relief under this Act ; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]

[71a][(*d*) where a person is found to have any asset (including financial interest in any entity) located outside India.]

Commissioner of Income Tax & Anr.[2]. As would be evident, from the date of the judgement rendered in ***the Honda Cars*** Case, despite the view of this Court that assessment procedure provided under Section 144C was only available against eligible assessees, the AO chose to ignore the dicta; although the AO knew, as noticed above, that the TPO had not ordered any variation in income and that the status of the petitioners [i.e., that they were non-resident foreign partnership firm] was not in doubt.

13.8. As is clear from the facts, which have emerged in this case, once a scrutiny notice was issued under Section 143(2) of the Act, the route open, if at all, to the AO for framing an assessment order was the one provided under Section 143(3) of the Act, as was done in AYs 2011-2012 and 2012-2013, vide order dated 27.03.2015 and 10.03.2016.

14. The AO, however, chose to assess the petitioners, by resorting to the procedure provided under Section 144C of the Act despite the record concerning the previous AYs showing that such attempts had failed and there was (in the AY in issue, i.e., AY 2013-2014) no change in circumstances/status of the petitioners.

14.1. As noticed above, the draft assessment orders for AY 2013-2014 have not only been passed under Section 144C but also Section 143(3) of the Act. It almost appears that the AO had made up its mind that, if the DRP were to hold once again that the petitioners were not eligible assessees, the draft assessment orders would be sustained under Section 143(3) of the Act. The DRP, instead, dismissed the proceedings vide order dated 11.09.2017.

14.2. The question, therefore, which arises for consideration is: whether the respondent can continue with the impugned proceedings based on the same

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[2] In short "***Honda Cars*** Case"

material which was examined and qua which opinion was rendered by the AO while passing the draft assessment orders?

14.3. There can be no dispute that the material that has been used for triggering the impugned proceedings is the same material that was available to the AO while passing the draft assessment orders. The notes which contained reasons for initiating the impugned proceedings make no bones about the fact that the same material has been used. The only argument advanced is that the exercise did not culminate in the passing of the orders under Section 143(3) of the Act. Clearly, the respondent took recourse to Section 147/148 of the Act as she found that she did not have any room to vary the taxable income declared by the petitioners, as proposed, under the provisions of Section 143(3) of the Act.

15. Thus, the moot question, which arises for consideration, is: should the respondent be permitted to assess the petitioners' income chargeable to tax, which, according to the respondent, had escaped assessment in the facts and circumstances obtaining in the instant cases?

15.1. We are consciously using the expression 'assess' as against 'reassess' since according to the respondent, no assessment has taken place. That being said, the exercise of assessing petitioners' income, in the instant cases, under Section 147 of the Act, could only have been carried out if it was based on new material and fresh facts that had not already been disclosed.

15.2. Explanation 2(b) to Section 147 of the Act cannot be divorced from the main provision and read in isolation. Therefore, even if we were to accept the argument advanced on behalf of the respondent that the assessment proceedings remained "inchoate", assessment under Section 147 of the Act could only have been completed based on fresh facts and not based on material already traversed.

15.3. The case in point is the judgement of the Division Bench of this Court in ***KLM Royal Dutch Airlines vs. Assistant Director of Income-tax***[3], [2007] 292 ITR 49 (Delhi). This was a case where the assessee had filed returns for two AYs in which it had declared NIL taxable income, and consequently, sought a refund of tax that had already been deposited. The assessee had been served in the first instance, a notice under Section 143(2) of the Act, and thereafter, notices under Section 148 of the Act. The Division Bench of this Court allowed the writ petitions which assailed the proceedings initiated under Section 147/148 of the Act and while doing so, made the following relevant observations.

> "7. … The neat question which arises before us is whether on the commencement of assessment proceedings must they first be brought to their logical conclusion by framing an assessment before embarking on the proceedings as envisaged in section 147/148 of the Income-tax Act; or more precisely stated, can resort to section 147 be made even whilst the normal assessment proceedings are pending conclusion. To find the answer we must keep in perspective that every return of income filed under section 139 may not result in its active and in-depth perusal or consideration by the Assessing Officer as it may receive an automatic onward passage under section 143(1). However, once an inquiry has been initiated by the Assessing Officer, it cannot but result in either the return being accepted as having been correctly computed by the concerned assessee, or for an assessment being conducted and concluded thereon by the Assessing Officer. The provisions of section 147 would have no role to play at this stage of the proceedings. Once a return of income attracts the attention and scrutiny of the Assessing Officer, it is his bounden duty to delve into every aspect thereof. The Assessing Officer is sufficiently empowered to ask for all information necessary for framing the assessment. The only fetter on the amplitude of his discretion is that the assessment must be framed within the time limit set-down by section 153 which, in substance, is two years from the end of the assessment year in which the income was first assessable or one year from the end of the financial year. A perusal of its second sub-section makes it clear that proceedings under section 147 are altogether different to those under section 143. This distinction appears to have escaped the attention of the revenue. Sub-section (2) stipulates that no order under section 147 shall be made after the expiry of one year from the end of the financial year in which notice under section 148 was served.
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> 8. Section 147 of the Income-tax Act deals with the powers of the Assessing Officer to 'assess' or reassess the income chargeable to tax which has escaped assessment. Section 148 contemplates making the 'assessment', reassessment or recomputation under section 147. Keeping the factual matrix before us in perspective,

[3] In short "***KLM Royal Dutch Airlines*** Case"

it becomes critical to define the word assess since the Assessing Officer is avowedly not reassessing or recomputing the income presented by the assessee for taxation in the form of its return. It is trite that the words assess, reassess or recompute are not synonymous of each other. It seems to us that an assessment must entail a conscious and concerted calculation carried out by the concerned officer with a view to determine the amount of tax payable by any person. The exercise commencing with section 139 and ending at section 145A cannot be interpreted as identical to or overlapping section 147/148/149. They are predicated on different circumstances and operate in disparate dimensions. The Income-tax Act makes it incumbent upon every person whose total income exceeds the maximum amount which is not chargeable to Income-tax to file a return of income in order to kick-start the normal assessment procedure. However, it may happen that a person fails to file a return of income, say for the assessment year 2000-01, even though he is liable to pay tax. It could also happen that a person may file a return of income incorrectly offering for purposes of taxation a sum lower than the correctly calculated income. Both these situations have been obviously kept in view in 2nd Explanation to section 147 and in its clauses (a) and (b). In either event the Assessing Officer would invoke the powers conferred upon him by section 147 of the Income-tax Act culminating with the completion of the assessment. It is also conceivable that the incorrectness of the return may not be detected or noticed within the time period set-down in section 153. In these circumstances if the Assessing Officer has reason to believe, predicated on information received by him, that income chargeable to tax has escaped assessment, he would invoke the powers under section 147. On the other hand, where a return of income has been filed but has been taken at its face value, without any proceedings under section 143(2) and 143(3) having been conducted, no assessment exercise would obviously have been undertaken. After the expiry of the time period set-down in section 153, this situation can be remedied by the Assessing Officer by invoking section 147. …

9. … However, in the present case since inquiries had been initiated under section 143(2), it became mandatory that they should have culminated in an order under section 143(3).

10. In *Trustees of H. E. H. the Nizam's Supplemental Family Trust v. CIT* [2000] 242 ITR 381 the Apex Court has observed that it is "settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 of the Income-tax Act, 1961, cannot be issued, i. e. , no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. …

11. We would arrive at this very destination even if we were to traverse along a different dialectic, namely, if we were to analyse the circumstances in which section 147 of the Income-tax Act could be invoked. There is plenitude of precedents on this aspect of the law; hence only some of them shall be discussed. The question that had arisen before the Bombay High Court in *Western Outdoor Interactive (P.) Ltd. v. A. K. Phute, ITO* [2006] 286 ITR 620 was whether, upon the rectification being set aside by the Commissioner (Appeals), notice for reassessment on the same grounds could validly be initiated; there was no failure on the part of the assessee to disclose material facts and no fresh information had been received by the Assessing Officer. At best, it was possible to say that two views were available and in such a situation it

was held that the said provision was not available. In particular, the Bench noted the following enunciation of the law in *Indian Oil Corpn. v. ITO* [1986] 159 ITR 956 (SC) :

> "The principles on this branch of law are well-settled.
>
> To confer jurisdiction under clause (a) of section 147 of the Act beyond the period of four years but within a period of eight years from the end of the relevant year under section 148,. . . two conditions were required to be fulfilled: the first is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax had been underassessed or escaped assessment; the second is that he must have reason to believe that such escapement or underassessment was occasioned by reason, so far as relevant for the present purpose, to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied. See, in this connection, the observations of this court in *Calcutta Discount Co. Ltd. v. ITO* [1961] 41 ITR 191 .
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> ** ** **
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> As is well-settled now by the several authorities of this court and of several High Courts, there must be materials to come to the conclusion that there was 'omission or failure to disclose fully and truly all material facts necessary for the assessment of the year'. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for the assessment. Therefore, an obligation is to disclose facts; secondly, those which are material; thirdly, the disclosure must be full and fourthly, true. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, for computing or determining the proper tax due from the assessee, it is necessary to know all the facts which help the assessing authority in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assesssing authority has to draw inferences as to certain other facts. But on the primary facts, it is for the taxing authority to draw inferences. It is not necessary for the assessee to draw inferences for him. See, in this connection, the observations in Calcutta Discount Ltd. 's case (supra). " (p. 967)

12. The Full Bench of this Court in *CIT 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 Assessing Officer 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 Assessing Officer concerned after due and proper application of mind.

xxx **xxx** **xxx**

> 15. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the Assessing Officer for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year, it would have to be assumed that since proceedings had not been opened under section 143(2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to section 147, provided fresh material had been received by the Assessing Officer after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the Assessing Officer had attempted to travel the path of section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law."

15.4. In sum, the sum and substance of the aforesaid discussion is that, AO has no power to carry out an assessment based on a mere change of opinion on the same set of facts and materials which was available on record. The AO's power under Section 147 of the Act does not extend to carry out the review of the material that was always available on record, and by this route conclude that the assessee's income chargeable to tax has escaped assessment. [See ***Commissioner of Income-tax, Delhi vs. Kelvinator of India Ltd.***[4], [2010] 187 Taxman 312 (SC)]

15.5. Besides this, there is another aspect of the matter which requires to be highlighted. This aspect concerns the grant of approval under Section 151[5] for

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[4] In short "***Kelvinator*** Case"

[5] [**Sanction for issue of notice.**

151. (1) In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 [93][by an Assessing Officer, who is below the rank of Assistant Commissioner [94][or Deputy Commissioner], unless the [95][Joint] Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice] :

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

issuance of notice under Section 148 of the Act. As noted in the narration of the facts, concerning the above captioned writ petitions, the ACIT, while granting approval on 28.03.2018, made the following identical endorsement.

> "This is fit case for issue of notice u/s 148 of the IT Act, 1961. Approved"

15.6. The notes recording reasons dated 20.03.2018, which were before the ACIT, clearly pointed out the following.

i. First, the draft assessment orders which are dated 23.12.2016 were passed under Section 144C/143(3) of the Act.

ii. Second, the DRP had held that the petitioners were not being eligible assessees as they were neither a foreign company nor had the TPO ordered a variation of their income. Consequently, the DRP had dismissed the proceedings filed before it.

iii. Third, the only reason approval for initiating proceedings under Section 147/148 of the Act was sought to be taken was on account of the draft assessment orders not reaching a logical conclusion.

15.7. Given this backdrop, the ACIT while giving approval under Section 148 of the Act, ought to have applied his mind, to the crucial question as to whether any new or fresh facts had come to the notice of the AO for triggering the

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(2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of [95][Joint] Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the [95][Joint] Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.]

[96][*Explanation.*—For the removal of doubts, it is hereby declared that the Joint Commissioner, the Commissioner or the Chief Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of notice under section 148, need not issue such notice himself.]

provisions of Section 147/148 of the Act. The ACIT, on the other hand, mechanically replicated the language of the provision [i.e., Section 151 of the Act] by making the aforesaid endorsement in both cases.

15.8. What the ACIT forgot was that this endorsement was really his conclusion and the reasons which were to form a link between the material that was placed before him and was required to be appraised by him, were missing. The approval, thus, given by ACIT, in our view, is flawed in law and cannot pass muster. The observations made in ***Synfonia Tradelinks (P.) Ltd. vs. Income-tax Officer,*** [2021] 127 taxmann.com 153 (Delhi) being apposite are extracted hereafter.

> "10. In our view, the sanction-order passed by respondent no.2 presents, metaphorically speaking 'the inscrutable face of sphinx' ***(See: Breen v. Amalgamated Engineering Union [1971] 2 QB 17500; Also see: State of H.P. v. Sardara Singh, (2008) 9 SCC 392)***. In our view, the satisfaction arrived at by the concerned officer should be discernible from the sanction-order passed under Section 151 of the Act. In this context, the observations made by the Supreme Court in ***Chhugamal Rajpal vs. S.P. Chaliha***, (1971) 1 SCC 453 being apposite are extracted hereafter:
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> "… **Further the report submitted by him under Section 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under Section 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under Section 148. To Question 8 in the report which reads "whether the Commissioner is satisfied that it is a fit case for the issue of notice under Section 148", he just noted the word "yes" and affixed his signatures thereunder.** We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under Section 148. **The important safeguards provided in Sections 147 and 151 were lightly treated by the Income Tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under those provisions as of little importance. They have substituted the form for the substance.** "
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> [Emphasis is ours]
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> 10.1. Also see the observations made in the judgment of the Division Bench of this Court in ***The Central India Electric Supply Co. Ltd. vs. Income Tax Officer, Company Circle – X, New Delhi & Anr***., (2011) SCC OnLine Del 472 : (2011) 333 ITR 237.

"19. In respect of the first plea, if the judgments in Chuggamal Rajpal's case (supra); Chanchal Kumar Chatterjee's case (supra); and Govinda Choudhury & Sons's case (supra) are examined, the absence of reasons by the assessing officer does not exist. This is so as along with the proforma, reasons set out by the assessing officer were, in fact, given. However, in the instant case, the manner in which the proforma was stamped amounting to approval by the Board leaves much to be desired. It is a case where literally a mere stamp is affixed. It is signed by a Under Secretary underneath a stamped 'Yes' against the column which queried as to whether the approval of the Board had been taken. **Rubber stamping of underlying material is hardly a process which can get the imprimatur of this Court as it suggests that the decision has been taken in a mechanical manner. Even if the reasoning set out by the ITO was to be agreed upon, the least, which is expected, is that an appropriate endorsement is made in this behalf setting out brief reasons. Reasons are the link between the material placed on record and the conclusion reached by an authority in respect of an issue, since they help in discerning the manner in which conclusion is reached by the concerned authority.** Our opinion is fortified by the decision of the Apex Court in Union of India v. M.L. Capoor and Ors. MANU/SC/0405/1973 : AIR 1974 SC 87 wherein it was observed as under:

27. ... We find considerable force in the submission made on behalf of the Respondents that the "rubber-stamp" reason given mechanically for the supersession of each officer does not amount to "reasons for the proposed supersession". The most that could be said for the stock reason is that it is a general description of the process adopted in arriving at a conclusion. ... ...

28. ... If that had been done, facts on service records of officers considered by the Selection Committee would have been correlated to the conclusions reached. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. ...

(emphasis supplied)

This is completely absent in the present case. **Thus, we find force in the contention of learned Counsel for the Appellant that there has not been proper application of mind by the Board and if a proper application had taken place, there would have been no reason to re-open the closed chapter in view of what we are setting out hereinafter."**

[Emphasis is ours]

16. Therefore, the argument advanced on behalf of the respondent, that the petitioners should be relegated to an alternate remedy cannot be sustained as the errors committed in the instant cases go to the root of the respondent's jurisdiction. As noticed above, the stand taken that Explanation 2(b) appended to Section 147 of the Act would come to the aid of the respondent is completely misconceived given the fact that, in instant cases, the proceedings under the said provision have been undertaken based on a review of the material which was already available on record.

17. As noticed by the Division Bench of this Court, in its judgement dated 31.10.2017, passed in a batch of writ petitions (the lead petition being W.P. (C) 11968/2016), concerning the petitioners herein, [pertaining to AYs 2010-2011 and 2008-2009] that, the questions relating to whether or not, the petitioners had a PE in India, had been engaging the revenue since AY 2003-2004. Undoubtedly, the respondent was attempting to regurgitate old facts by taking recourse to the provisions of Section 147/148 of the Act, which, according to us, is not permissible.

18. The failure to arrive at a logical conclusion in a Section 144C proceeding cannot become the ruse for initiating the proceedings under Section 147/148 of the Act in the absence of new material emerging before the AO which gives the AO reason to believe that assessee's income chargeable to tax had escaped assessment.

Conclusion:

19. Thus, for the foregoing reasons, we are of the view that the above-captioned writ petitions would have to be allowed, and consequently, the notices issued under Section 148 of the Act dated 29.03.2018, the underlying reasons contained in the notes dated 20.03.2018, and the orders disposing of the

objections dated 24.09.2018 would have to be quashed. It is ordered accordingly. Resultantly, pending applications shall stand closed.

20. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

JULY 05, 2021 *Click here to check the corrigendum, if any*