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

Decided on: 17.01.2017

\+ **W.P.(C) 8163/2010**

HCL TECHNOLOGIES LTD. ..... Petitioner

Through : Sh. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Sh. Vaibhav Kulkarni, Advocates.

versus

ASST. COMMISSIONER OF INCOME TAX AND ANR.

..... Respondents

Through : Ms. Lakshmi Gurung, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner questions a notice issued by the respondents (hereafter "the Revenue") under Sections 147/148 of the Income Tax Act (hereafter "the Act") proposing to reopen the completed assessment for 2005-2006. The earlier assessment had been framed under Section 143 (3) of the Act. The notice that the petitioner questions was issued on 4th March, 2010; the scrutiny assessment ("original order") was made by the Assessing Officer ("AO") on 26th December 2008 at a net taxable income of ₹ 2,16,07,60,309/- allowing a deduction under Section 10A of the Act, to the extent of ₹2,20,93,33,432/-.

2. The petitioner is assessed to income tax and is engaged in the business of development and export of computer software and ITES services. It filed its return of income for AY 2005-06 on 31.10.2005 whereby it declared an income of Rs.18,95,23,990/- under normal provisions of the Act. The original return claimed a deduction under Section 10A of the Act to the tune of Rs.2,57,24,87,070/- which was supported by the Chartered Accountant's certificate in Form 56F. However, the petitioner filed a revised return in March, 2007 declaring an income of Rs.1,17,48,138/-. This time, it claimed deduction under Section 10A at Rs.2,75,57,24,990/-. The AO, by notice of 22.10.2007 raised specific question and called for information with respect to the deductions claimed under Section 10A which included details of income and all expenditure. The petitioners furnished the details of information sought on 14.11.2007. The AO, after examining the revised returns, the audited accounts and other relevant documents accompanying the return as well as the response of the petitioner accepted the deduction claimed under Section 10A and completed the original assessment by making the order on 26.12.2008. He determined net taxable income of Rs.2,16,07,60,309/-. This he did after allowing a deduction under Section 10A at Rs.2,20,93,33,432/-. On 04.03.2010, the Revenue issued the impugned notice proposing to reassess the income. The petitioner filed its response and elicited a copy of the "reasons to be recorded". The reasons to be recorded in support of the reassessment notice was thereafter furnished. The material part of the reassessment notice says that the assessee had not exercised the option to non-applicability of provisions of Section 10A and did not file the declaration.

3. The reassessment notice alleged that the petitioners' claim for setting off losses in the STP units as against the income and profits of other units, was unwarranted and that it should have made a declaration to the effect under Section 10A (8) rather than claiming it under Form 56F. It was besides, contended in the notice that Section 70/71 of the Act were not structured to allow such set off. The second ground claimed for reopening the completed assessment was that the software licensing fee paid by the assessee could not have been validly allowed as revenue expenditure, under Section 37 as it fell in the capital field. The petitioner objected to both these reasons, pointing out that the AO, in the original proceeding, by specific queries as well as through the questionnaire issued on 22nd November 2007, had sought all these details. It was also contended that there was no failure to disclose material facts or information, and furthermore, that the software licensing expenditure was legitimate revenue expense. The petitioners' objections, were, however, rejected. It has, therefore, approached this court.

4. The petitioner argues that all relevant particulars were furnished during the original proceedings and that the original order took note, exhaustively of the material facts. It was pointed out that the P/L accounts filed with the revenue at that point in time, contained specific notes with respect to treatment of the separate units. Furthermore, the losses/profits as a whole of the Section 10A units, after due computation, were claimed as a deduction in the returns, which is in conformity with the text of the law and decisions of various courts. Learned counsel urged that the impugned reassessment notice is nothing but a review, which is not allowed, in terms of Section 147/148 having regard to the judgments of the Supreme Court. As

regards the question of software license is concerned, it was argued that though the revenue claims that it falls in the capital stream, there is nothing to show, *prima facie* that a license fee as opposed to consideration for acquisition of an asset, was ever paid.

5. Counsel for the revenue argued that the petitioner assessee was bound to treat the accounts of the Section 10A units separately, which it did not and that consequently, the reassessment notice was legal and justified. It was submitted that Sections 70 and 71 do not permit set off of losses or profits from Section 10A units with normal losses or profits and therefore, the relief claimed and granted originally, was premised on flawed understanding, based on concealment of facts. It was urged that once the revenue unearths a misrepresentation or misstatement of facts, it is empowered to re-open a completed assessment. Counsel also urged that the AO's original order merely discussed the correctness of the petitioners' claim in respect of 31 units, as against 13 licensed units and disallowed that plea. The emphasis was not on the admissibility or otherwise of the set off, which was a material fact, but which escaped scrutiny. Counsel also submitted that the software license fee clearly resulted in a capital advantage as it resulted in an asset of enduring nature. The AO erred in allowing that claim.

6. It is evident from the above discussion that the issue here is whether the revenue's impugned notice satisfies the test of "tangible material" discerned or made available. The jurisdictional precondition to invoke the power under law is that the AO must have reasons to believe, on the basis of materials, (implying thereby some material not existing on record) which point to illegality or withholding of information, or presentation of

inaccurate particulars, by the assessee. In the present case, the "reasons to believe" are a recital of events, including the previous order of assessment, which permitted the deduction, the assessment order after scrutiny. The notice does not anywhere indicate what was the new material which came to light, that threw into focus the fact that the assessee's behavior in not disclosing material particulars, attracted the provision under Section 147/148. The order of the AO contains an insight into the fact that there was an inquiry into the Section 10A claim; in fact, the assessee has placed on record a letter written to the AO, containing replies to the queries in respect of the deduction claim, dated 14th November, 2007. The AO did not rest content with this, and made more specific queries by a questionnaire containing as many as 40 queries: more than 10 of which related to the Section 10A claim. The petitioner furnished its response to these. It was after considering these materials, that the AO passed the original order. That order did not interestingly grant the petitioner all the relief claimed; it was based on a scrutiny of the law and the facts. To say that the AO ignored, or that the petitioner did not disclose that losses could not be set off against non-Section 10A units, is entirely misconceived, having regard to the materials considered originally by the AO, and the materials placed on record in this petition, relating to the original claim. Therefore, the reassessment notice on this score, is clearly an impermissible review.

7. As far as the software licensing fee issue is concerned, the court notices that this is purely a second look at the nature of the expenditure. Again, here the AO had addressed queries and after recording satisfaction

with the answers, granted the relief. Therefore, this issue was not legitimately open to revision.

8. In view of the foregoing discussion, the impugned notice cannot be sustained. It and all proceedings emanating from it, are hereby quashed. The writ petition and pending applications are allowed in these terms. No costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JANUARY 17, 2017