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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 8221/2010

BBC WORLDWIDE LIMITED

..... Petitioner

Through: Mr M. S. Syali, Senior Advocate with
Ms Husnal Syali, Mr Mayank Nagi and Mr Aditya
Raj Singh, Advocates.

versus

**ASST. DIRECTOR OF INCOME TAX, CIRCLE 1(1),
INTERNATIONAL TAXATION, NEW DELHI**

..... Respondent

Through: Mr Raghvendra Singh, Junior Standing
Counsel for Mr Rahul Chaudhary, Senior Standing
Counsel.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

21.03.2016

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VIBHU BAKHRU, J

1. The Petitioner, BBC Worldwide Limited (hereafter 'the Assessee') has filed the present petition under Article 226 of the Constitution of India, *inter alia*, impugning a notice dated 30th March, 2009 issued under Section 148 of the Income Tax Act, 1961 (hereafter 'the Act') for reopening the assessment for Assessment Year (AY) 2002-03.

2. The Assessee is a company incorporated under the laws of UK and is a tax resident of UK within the meaning of Article 4 of the Double Taxation Avoidance Agreement between India and UK (hereafter 'the DTAA').

During the Previous Year relevant to AY 2002-03, the Assessee (through BBC World Division) operated the 'BBC World International News and Information Channel' (hereafter 'the BBC World Channel'). The Assessee earned revenues, *inter alia*, from the selling of airtime to Indian advertisers and from subscriptions for the BBC World Channel - which was otherwise a free to air channel (i.e., provided free of cost) - from various hotels.

3. The Assessee had entered into a marketing agreement with its step-down subsidiary in India - BBC Worldwide India Private Limited (hereafter 'BIPL'). In terms of the said agreement, BIPL had agreed to provide services of marketing and selling airtime to advertisers in consideration of 15% of the net proceeds from sale of air time.

4. The Assessee filed its return of income for the AY 2002-03 on 31st December, 2002 declaring an income of Rs.1,70,69,450/-. The said income comprised of Rs.1,30,00,000/- received as a lump-sum consideration from Prasar Bharti (Door Darshan) for a feasibility study to analyse the introduction of Digital Terrestrial Transmission in India; Rs.10,66,481/- received as royalty from Penguin Books India Private Limited on sale of books; and Rs.30,02,969/- as interest from loans advanced to BIPL.

5. In the notes to the return of income, the Assessee stated that it neither had a Permanent Establishment (hereafter 'PE') in India within the scope of Article 5 of the DTAA nor had any business connection in India, as contemplated under Section 9 of the Act. Thus, according to the Assessee, the revenues generated from the sale of airtime and subscription from hotels in India, which were its business income, were not chargeable to tax under the Act.

6. The return filed by the Assessee was processed under Section 143(1) of the Act on 20th February, 2003 but was subsequently picked up for scrutiny. Notices under Section 143(2) were issued on 2nd September, 2003, 28th July, 2004 and 9th September, 2004, whereby the Assessing Officer (hereafter 'the AO') called upon the Assessee to answer specific queries regarding its business in India and provide information as required for assessing the income.

7. In the meantime, the Assessee filed a revised return on 31st March, 2004; the income declared was not revised but the Assessee claimed a higher credit on account of Tax Deducted at Source and prepaid taxes.

8. The AO passed an assessment order for AY 2002-03 on 16th March, 2005. He rejected the Assessee's claim that it did not have a PE in India - he held that BIPL constituted Assessee's Dependent Agent PE - but accepted the Assessee's claim that it had incurred a loss. The AO restricted the loss allocable to India to Rs.7,29,39,000/- and attributed 20% of that loss to the activities in India; thus, assessing the loss attributable to the Indian PE at Rs.1,45,87,800/-.

9. The AO issued a notice under Section 148 of the Act on 30th March, 2009; that is, after a lapse of four years from the end of the relevant AY. In compliance with the aforesaid notice, the Assessee sent a letter on 4th May, 2009 stating that its revised return be treated as a return filed in response to the notice under Section 148 of the Act. The Assessee also sought reasons for reopening of the assessment. Subsequently, the AO issued notices under Section 143(2) of the Act and thereafter, on 10th August, 2010, provided the

Assessee with the reasons for reopening the assessment.

10. On 20th August, 2010, the Assessee filed its objections to the initiation of reassessment proceedings under Section 147 of the Act, which the AO rejected by an order dated 1st December, 2010. And, this led the Assessee to file the present writ petition.

11. Mr M.S. Syali, learned Senior Advocate appearing for the Assessee referred to the assessment order and contended that the same disclosed that the AO had examined all relevant material and, thereafter, accepted that the Assessee had incurred a loss; a part of which was attributable to India. He contended that the AO had reopened the assessment on the basis of assessment for other AYs, including assessment for subsequent AYs made in respect of the entities, which had succeeded to the Assessee's business in question. He contended that the AO was seeking to review the assessment made on the said basis, which is impermissible as being a mere change of opinion.

12. Mr Syali further referred to the submissions filed by the Assessee during the assessment proceedings in compliance with the information sought by the AO. In particular, Mr Syali drew the attention of the court to a statement of computation of the loss of BBC World Channel attributable to Indian activities. The said statement - which was filed with the AO on 30th October, 2004 - included the revenues from the sale of airtime as well as subscriptions from hotels in India. He also referred to the submissions filed by the Assessee on 18th February, 2005 in response to the queries raised by the AO. He pointed out that the said submissions also included details of

revenues from sale of airtime as well as subscriptions from hotels. He contended that the AO had examined all the relevant materials and, the reasons provided for reopening the assessment clearly indicated that the assessments were being reopened merely on account of change of opinion and for reviewing the assessment order passed by the AO.

13. He further referred to the reasons recorded by the AO for reopening the assessment of BBC World News Limited (formerly known as BBC World Limited) for AY 2003-04 which was subject matter of challenge in W.P.(C) 9064/2011. He referred to the decision of this court in **BBC World News Limited vs Assistant Director of Income Tax: (2014) 362 ITR 577 (Delhi)**, allowing the aforementioned writ petition and quashing the proceedings initiated for reopening of assessment for AY 2003-04 in the case of the petitioner therein. In particular, he referred to paragraph 14 of the said judgment wherein this Court had referred to the assessment order dated 16th March, 2005 in the case of the Assessee for AY 2002-03 - the reopening of which is impugned in this petition - and had concluded that the AO had examined the India specific income and expenditure of the Assessee relating to channel activities in that year. The Court had, *inter alia*, on the aforesaid basis concluded that reassessment notice issued for AY 2003-04 was hit by the principle of change in opinion as the assessment order dated 16th March, 2005 indicated that the same AO had examined the question of attribution of income to the PE - that is, BIPL- in India for the AY 2002-03.

14. Mr Raghvendra Singh, learned counsel appearing for the Revenue countered the contentions advanced by Mr Syali and submitted that the

principle of change of opinion was not applicable in the facts of the present case as, according to him, the Assessee had failed to provide the necessary records as mandated under Section 44AB of the Act. He submitted that in absence of the Assessee not discharging its onus to produce all primary materials, the question of a change of opinion would not arise as the AO would have no occasion to form an opinion. He argued that the assessment order was passed on the statement produced by the Assessee which indicated that the Assessee had incurred a loss in relation to its channel activities. Since the AO was now questioning the veracity of the said statement furnished by the Assessee, the principle of change of opinion would not be applicable.

15. Mr Singh then referred to the decision of this Court in **Dalmia Pvt. Ltd. v. Commissioner of Income Tax and Anr.** (2012) 348 ITR 469 (Del.) and on the strength of this decision submitted that in cases where the AO had not applied its mind to the material produced, there would be no question of a change of opinion.

16. Insofar as the decision of this Court in **BBC World News Limited** (*supra*) is concerned, he submitted that the said decision would not be applicable; first of all for the reason that the said decision did not pertain to the Assessee. Secondly, he submitted that in any event, the said decision could not be relied upon as it had proceeded on the basis of discussion and finding recorded in assessment order which was now being reopened and, therefore, the observations made by this Court in respect of that assessment order (assessment order dated 16th March, 2005 for the AY 2002-03) could not come in the way of the AO from reopening that assessment.

17. We have heard the learned counsel for the parties.

18. As mentioned above, during the relevant Previous Year, one of the Assessee's divisions, BBC World, operated the BBC World Channel. The said Channel was 'free to air' channel and the principal source of revenue was the sale of advertisement airtime on the said channel. In addition, the Assessee also earned revenues from hotels as subscription to the said channel. The controversy in the present petition relates to assessing the Assessee's income from the aforesaid revenue streams, that is, (a) sale of advertisement airtime; and (b) income from distribution – subscription to the BBC World Channel by various hotels.

19. In order to consider the issues involved, it is relevant to refer to the proceedings relating to the Assessee for AYs 2000-01, 2001-2002 and 2003-04; these indicate the backdrop in which the present controversy arises.

20. For the AY 2000-01 relevant to the previous year 1999-2000, the AO held that the BIPL was the Assessee's PE in India and, accordingly, sought to tax the Assessee's income from sale of airtime in India. The Assessee disputed that it had any business connection or PE in India; however, without prejudice to its contentions that it had no business connection/PE in India, the Assessee filed details of receipts and expenses attributable to Indian operations. These indicated that the Assessee had incurred a loss during the relevant period. The AO rejected such computation on the ground that the accounts were not audited and could not be relied upon. The AO then proceeded to estimate the taxable income attributable to Assessee's activities in India at 20% of the total revenue of Rs.13,89,09,000/-.

Accordingly, the Assessee's taxable profits were determined at Rs.2,77,81,800/-.

21. The Assessee appealed against the said order before the Commissioner of Income Tax (Appeals) [hereafter 'the CIT(A)']. The CIT(A) did not accept the Assessee's contention that it did not have a PE in India. However, relying on CBDT's Circular No.742/765, he concluded that it was reasonable to estimate the Assessee's profits as being 10% of the total revenues attributable to India. Accordingly, he estimated the taxable profit of the Assessee from sale of airtime at Rs.13,89,000/-. Aggrieved by the aforesaid order dated 21st January, 2006, the Assessee filed a further appeal before the Income Tax Appellate Tribunal ('ITAT').

22. The ITAT accepted the Assessee's contention that in view of the decisions of the Supreme Court in **DIT v. Morgan Stanley and Company Inc: 292 ITR 416 (SC)** and the Bombay High Court in **SET Satellite (Singapore) Private Limited v. DDIT: 307 ITR 205 (Bom)**, the Assessee's revenues from sale of airtime could not be taxed. This was so because BIPL was assessed in respect of revenues from Indian activities which were determined on Arm's Length basis; thus the entire income attributable to India activities was captured in the net of tax, *albeit* in the hands of BIPL. Accordingly, the ITAT allowed the Assessee's appeal by its order dated 15th January, 2010.

23. For the AY 2001-02, the AO by its order dated 26th March, 2004 rejected the Assessee's contention that it did not have a PE in India and estimated the Assessee's income on the same basis as in AY 2000-01.

However, the Assessee deducted the marketing commission payable to BIPL from the revenues and estimated the taxable profit as 10% of the net revenue.

24. For the AY 2003-04, the AO accepted the Assessee's statement of its worldwide turnover and profits. The AO noted that the Assessee's sales revenue generated from India was 4.76% of its total sales revenue and applying the same proportion to the Assessee's global profits, computed the Assessee's profits from India at Rs.26,55,183/-. The Assessee further held that 20% of the above profits were attributable to activities in India and accordingly, estimated the taxable profits as Rs.5,31,037/-.

25. The Assessee appealed against the assessment orders dated 26th March, 2004 and 24th March, 2006 for AY 2001-02 and 2003-04 respectively before the CIT(A) and the said appeals were heard together. The CIT(A) passed an order dated 24th March, 2008, and following its earlier decision for AY 2000-01, computed the Assessee's taxable profits at 10% of the gross receipts without allowing any deduction.

26. Aggrieved by the order dated 24th March, 2008 passed by the CIT(A), the Assessee preferred appeals before the ITAT being ITA No. 2458 (Del)/2008 and 2459 (Del)/2008 for AYs 2001-02 and 2003-04 respectively. The said appeals were also heard together. The Assessee contended that no income could be attributable to its Indian activities since BIPL - which was held to be the Assessee's PE in India - was taxed on its income. The Assessee relied upon the decision of the Supreme Court in **Morgan Stanley** (*supra*) and the decision of the Bombay High Court in **SET Satellite**

(Singapore) Pvt. Ltd. (supra). The aforesaid contentions were accepted and the ITAT allowed the Assessee's appeals by a common order dated 23rd July, 2010.

27. The Revenue appealed against the order dated 23rd July, 2010 passed by the ITAT for AY 2001-02 and 2003-04 as well as the ITAT's order dated 15th January, 2010 for AY 2000-01 in this Court. The said appeals (being ITA No.1341/2010, ITA No. 703/2011 and ITA 705/2011) were heard together and disposed of by a common order dated 30th September, 2011 whereby this Court concurred with the ITAT's view and held that no question of law arose in those appeals.

28. In the aforesaid backdrop, we now proceed to examine the reasons recorded by the AO for forming a belief that income of the Assessee for AY 2002-03 has escaped assessment.

29. The reasons recorded by the AO are lengthy and runs into 11 pages. However, examination of the said reasons indicate that the AO had, essentially, decided to reopen the assessment on account of the following reasons:

(A) The AO had noticed that in AY 2003-04, the Assessee had shown global profits and since, its Indian revenues constituted 4.76% of the global revenue from sales, the profit relating to Indian sales were determined as Rs.26,55,183/- and 20% of that profit was attributed to Indian activities. This, According to the AO indicated that the Assessee was earning profits from activities relating to telecast of the channel and since, the business had

remained the same in the previous year, the AO reasoned that the Assessee had earned income in AY 2002-03 also, which income had escaped assessment.

(B) The Assessee had not furnished the documentary evidence in support of its claim for loss but had merely furnished summary figures.

(C) BBC World Ltd., the successor of the Assessee in respect of the business in question, was assessed for AYs 2004-05 to 2006-07 and in those assessments, it had been held that the global loss was not on account of activities in India and could not be attributed to the PE in India.

(D) That the Assessee's taxable income was liable to be computed at 10% of the net advertising revenues in terms of the CBDT Circular No. 742. The AO reasoned that, although, the said Circular had been withdrawn in 2001, nonetheless, the basis indicated therein could be used for assessing the income of the Assessee. The AO noticed that in assessment relating to 2003-04 onwards, the Assessee's claim for loss had been rejected for various reasons.

(E) That the Assessee's income from distribution (i.e. subscription from hotels) was liable to be taxed as royalty as was held in the assessment - for the AY 2006-07 pertaining to BBC World Distribution - Assessee's successor for its distribution business.

The AO also recorded that "*the Assessee did not furnish the material true facts during the proceedings.*"

30. In order to examine whether the aforesaid reasons only indicate a

mere change of opinion as contended on behalf of the Assessee, it would be necessary to examine the assessment order and the information provided by the Assessee on the basis of which the assessment was framed by the AO.

31. The assessment order indicates that the AO had examined the agreement between the Assessee and BIPL for selling of its airtime under which BIPL was entitled to 15% of the net proceeds from sale of advertisement time. Further, the AO also called for information under Section 133(6) of the Act from some of the major advertisement agencies, which were clients of the Assessee. In response to the information sought, one of the large advertisement agency, M/s R.K. Swamy BBDO Advertising Private Limited, responded by, *inter alia*, stating that they did not deal with the overseas offices of the Assessee but interacted and negotiated only with the representatives from the local office and had presumed that the local office in India was an authorised agent of the Assessee.

32. Based on the information received, the AO concluded that the BIPL constituted a 'Dependent Agent Permanent Establishment' of the Assessee under the DTAA. As noticed earlier, a similar conclusion was also drawn by the AO for the AY 2000-01, 2001-02 and 2003-04. The Assessee, without prejudice to its contention that it did not have a PE in India submitted that the sale of airtime in India had resulted in a net loss and, therefore, no tax was payable. In support of its contention, the Assessee submitted the audited statement indicating worldwide loss of BBC World Division (the Assessee's division that operated the BBC World Channel). The Assessee also provided a statement indicating that BBC World Division had incurred a loss of UK Pounds 1,34,27,000 out of which losses that could

be attributed to the Indian operations, were estimated at UK Pounds 4,335,000 (i.e, Rs.29,77,31,000/-). The Assessee emphasized that for the purposes of the aforesaid calculation, it had allocated revenues of Rs.6,84,52,000/- (UK Pounds 990,000) to Indian operations even though the said revenues were not generated from India or from Indian activities of the Assessee. The Assessee explained that the same was done for the purposes of matching allocation of revenues with allocation of expenses which in turn was done by allocating revenues over the number of households in India and other countries to which the BBC Channel was beamed. The Assessee also furnished a report of KPMG London in support of its computation.

33. The Assessee, without prejudice to its other contentions, further contended that even if BIPL was held to be the Assessee's PE in India or a business connection under Section 9 of the Act, the commission paid to BIPL constituted adequate compensation for the activities conducted in India. The same was also held to be at Arm's Length and following **Morgan Stanley** (*supra*) and **SET Satellite (Singapore) Private Ltd.** (*supra*), no further revenues from the activities in question could be brought to tax under the Act.

34. In addition to the income from sale of airtime, the Assessee had also declared an income of Rs.1,30,00,000/- which was received from Prasar Bharti to conduct a study to analyse the introduction of Digital Terrestrial Transmission in India. This amount was in nature of 'fee for technical services' as per Article 13 of the DTAA and, therefore, was offered to tax at the rate of 15% of the gross fee. The royalty of Rs.10,66,481/- received from

the sale of books was also offered to tax at the rate of 15% in terms of Article 13 of the DTAA. The interest of Rs.30,02,969/- received by the Assessee from loans extended to BIPL was offered to tax at the rate of 15% of the gross amount under Article 12 of the DTAA.

35. The AO examined the report of KPMG, London and noticed that certain expenses, which were stated as pertaining to the India footprint of the BBC World Channel, were not clearly relatable to the Indian activities. He decided to consider only those expenses which were incurred specifically in relation to the channel activities in India. Accordingly, the Assessee submitted another computation which also indicated a loss. The said statement is reproduced below:

"Computation of loss in respect of Indian footprint of BBC World Channel (only on the basis of expenses specifically relating to India)

**Assessment Year 2002-03
Financial Year 2001-02**

Particulars	Amount in UKP	Amount in Rupees
Revenue from advertisement/ sponsorship earned in India		
In USD	250,000	17,278,000 *
In Rs.	677,000	48,628,000 *
Hotel Distribution Revenues	41,000	2,823,000
Total	968,000	68,729,000
Less: Specific costs relating to India footprint/Activities		
Digitisation and other distribution costs	191,000	13,204,000
India-opt out programming	946,000	65,372,000
Research costs	108,000	7,458,000
Distribution Staff and Admin costs	408,000	28,227,000
Marketing costs – India	258,000	17,564,000
PR - India	116,000	8,087,000
Legal and Professional fee	25,000	7,756,000
Total	2,052,000	141,668,000
Profit/(Loss)	(1,084,000)	(72,939,000)

* This amount of revenue is net of commission paid to BWIPL for their services availed."

36. The AO verified the aforesaid statement. The assessment order indicates that the details of expenses alongwith relevant vouchers were produced for examination and the AO had noted that *"the nature of the expenses alongwith the furnished vouchers were examined in detail and the same was found satisfactory"*. Accordingly, the AO accepted the loss attributable to the Indian operations of the BBC World Channel at Rs.7,29,39,000/-. He further attributed 20% of that loss to the activities in India; thus, restricting the loss attributable to the Assessee's Indian PE (i.e, BIPL) at Rs.1,45,87,800/-.

37. The above narration clearly indicates that the AO had conducted a detailed examination and thereafter, assessed the income of the Assessee. The fact that while assessing income in respect of the business in question (whether in the hands of the Assessee or the entities to whom the Assessee's business was transferred) for other AYs, the AO had not relied on the accounts produced by the Assessee and had proceeded to estimate the Assessee's income on a presumptive basis, would provide the AO no reason to believe that the Assessee's income had escaped assessment in the current AY. An examination of the assessment order clearly indicates that the AO had also rejected the statement of allocation of revenues (supported by a report from KPMG London) and proceeded to assess the income by allowing deduction of only those expenses that pertained to the activities in India. The AO had examined the statement of computation of loss provided

by the Assessee (as reproduced above) and also examined the relevant vouchers which the AO found to be 'satisfactory'. Concededly, there is no material which would indicate that any of the accounts, vouchers or details provided by the Assessee was inaccurate or false.

38. In this view, it is apparent that the impugned notice under Section 148 of the Act has been issued only on account of change of opinion, the same is liable to be set aside.

39. It is now well settled that the provisions of Section 147 of the Act do not permit review of an assessment order but permit assessment/reassessment if the AO has reason to believe that the income of the Assessee has escaped assessment; and, admittedly, a change of opinion provides no such reason. The Supreme Court in its decision in **CIT v. Kelvinator of India Limited: (2010) 2 SCC 723** has authoritatively held that reopening of assessment on a mere change of opinion is not permissible and the said reason is excluded from the purview of Section 147 of the Act.

40. The reliance placed by Mr Singh on the decision of this Court in ***Dalmia (supra)*** is also misplaced. In that case, the AO had called for details of sundry creditors from the Assessee, the Assessee had furnished details of certain sundry creditors but had failed to furnish details of creditors to the extent of Rs.52,84,058/-. However, the AO made an addition of only Rs.19,86,551/- on the ground that the Assessee had not furnished the requisite confirmations. It is, in the aforesaid context that the Court held that the AO could not have formed the opinion in respect of other unconfirmed sundry creditors. The facts of that case are materially different

from the facts of the present case. In the present case, the AO had examined the statement of computation furnished by the Assessee. The AO had also examined in detail the vouchers and had found the same to be satisfactory. Thus, the present case squarely falls in the category of a change of opinion and not where the AO had not formed an opinion.

41. In the aforesaid context, it may be mentioned that the Supreme Court in **Indian and Eastern Newspaper Society v. CIT: (1979) 119 ITR 996 (SC)** had diluted its earlier view expressed in **Kalyani Mavji and Co vs Commission of Income Tax: (1976) 102 ITR 287 (SC)** that an assessment could be reopened in cases whether an AO had made a mistake and held as under:

"Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered] by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147(b). Reliance is placed on Kalyanji Mavji and Co. v. Commissioner of Income Tax : [1976] 102 ITR 287 (SC), where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922. it appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to

reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in *Maharaj Kamal Singh v. Commissioner of Income Tax* (supra), *Commissioner of Income Tax v. Raman and Company* (supra) and *Bankipur Club Ltd. v. Commissioner of Income Tax* : [1971]82ITR831(SC), and we do not believe that the law has since taken a different course. Any observations in *Kalyanji Mavji and Co. v. Commissioner of Income Tax* (supra) suggesting the contrary do not, we say with respect, lay down the correct law."

42. In **Commissioner of Income Tax v. Usha International**: (2012) 348 ITR 485 (Delhi) - this Court after referring to its earlier decision in **CIT v. DLF Powers Limited**: (2012) 345 ITR 446 (Delhi) and **BLB Limited v. ACIT**: (2012) 343 ITR 129 (Delhi) observed as under:

"Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion"

43. Thus, even in cases where AO has made a mistake or has made an error in assessing the income of an Assessee, a recourse to Section 147 of the Act is not available and the appropriate course would be for the Commissioner to pass an order under Section 263 of the Act, if he finds that the assessment order is erroneous inasmuch as its prejudicial to the interest of the Revenue.

44. There is yet another aspect that needs to be noticed. The impugned notice under Section 148 of the Act has been issued beyond the period of four years from the end of the relevant AY. There has been a material amendment to Section 147 of the Act with effect from 1st April, 1989; the proviso to Section 147, introduced with effect from 1st April, 1989, carves out an exception to the main provision. In terms of the said proviso to Section 147 of the Act, if an assessment under sub-section (3) of Section 143 of the Act has been made for the relevant AY, no action under Section 147 of the Act can be taken after expiry of four years from the end of the relevant AY unless any income chargeable to tax has escaped assessment for such AY by reason of failure on the part of the assessee: (i) to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148; or (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year. [See: **Haryana Acrylic Manufacturing Company v CIT: (2009) 308 ITR 38 (Delhi)**]

45. In the present case, although the AO has recorded that the Assessee *"has not produce any documentary evidence in support of its claim of losses. Assessee merely furnished summary figures"*, the same is clearly erroneous as the assessment order indicates that the Assessee had produced vouchers which were examined in *detail* and *found satisfactory*.

46. We are also unable to accept the contention that the Assessee had not maintained books of accounts as required under Section 44AB of the Act and, therefore, had failed to produce the primary facts necessary for his assessment.

47. The Supreme Court in **Calcutta Discount Company v. Income Tax Officer: (1961) 41 ITR 191 (SC)** had held that:

"The words used are" omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case."

48. The question whether the Assessee had failed to produce the primary facts would depend, first of all, on the primary facts as are necessary for assessing the income of the Assessee; and secondly, on the facts as available with the Assessee. In the present case, the Assessee did not maintain any India specific books of accounts for BBC World Channel as its operations were not limited to India alone and further, according to the Assessee, its business income was not chargeable to tax in India. Nonetheless, the Assessee had produced a statement of its global accounts and also produced details of India specific expenditure, which was examined and verified by the AO.

49. It is necessary to observe that the issue in the present case is not that the Assessee has not correctly recorded its affairs in its books of accounts but one of attribution of income. The primary accounting data is recorded in vouchers and posted in ledgers; the attribution of income or profits to a particular tax jurisdiction is an exercise, not of recording accounts, but of estimation based on the recorded data. In the present case, there is no doubt as to the veracity of accounts maintained by the Assessee. The Assessee had on the basis of its accounts also furnished a statement of allocation of loss

allocable to its India operations. The AO rejected the same and decided to estimate the income attributable to Indian activities by taking the gross revenue from sale of airtime in India and subscription received from hotels and reducing the same by India specific expenses; the necessary data for the same was provided for by the Assessee and verified by the AO. There is no material to even remotely suggest that such accounts were not accurate. Concededly, the Assessee provided all material that was desired by the AO and was available with it. Therefore, it is not open for the AO to now allege that there was omission or failure on the part of the Assessee to fully and truly disclose all material facts for his assessment.

50. Whether there has been a failure or omission on the part of an Assessee to fully and truly disclose all material facts for the purposes of assessment has to be viewed in the context of the relevant facts of each case. The Assessee must truly disclose all facts as available with him which are relevant for the purpose of his assessment. Thus, even in cases, where an assessee has not maintained the necessary records or accounts as required in law, he is bound to disclose all facts in his knowledge which are relevant for the purposes of his assessment including making a candid disclosure that the requisite records have not been maintained by him. The Assessee must not conceal any material fact that he knows, or should have reasonably known, would have a bearing on his assessment. Once the Assessee has discharged this burden, it is up to the AO to draw the necessary inferences for assessing the income of an assessee and assessee cannot be faulted for the same (See: **CIT v. Burlop Dealers Ltd.**: AIR 1971 SC 1635, **ITO v. Madnani Engineers Works Ltd.**: (1979) 118 ITR 1 (SC) and **Haryana Acrylic**

(*supra*).

51. In case of absence of records, the AO can assess the income of an assessee on the basis of a reasonable estimation. In such cases, it would not be open for the AO to subsequently hold that the Assessee had failed or omitted to truly and fully disclose all material facts and reopen the assessment on the basis that he should have estimated the income by adopting a different method. In the present case, there is no material to hold that the Assessee had withheld or concealed any material information; on the contrary, the Assessee had specifically pointed out that it had not maintained India specific books of accounts. The Assessee had furnished the records that it maintained and also answered all the queries raised by the AO; the fact that another AO had adopted a different method of estimating the income attributable to Indian activities can hardly be a reason to reopen the assessment or to allege that the Assessee had failed to truly and fully disclose material facts for the purposes of its assessment.

52. In our view, the controversy in the present petition is also fully covered by the decision of this Court in **BBC World News Ltd.** (*supra*). Although, the said decision was rendered in the case of BBC World News Ltd. (formerly known as BBC World Ltd.), the Court had noticed that the same AO who had passed the assessment order in that case had also examined the questions involved in detail in the case of the Assessee for AY 2002-03. It is relevant to note that the BBC World Division (the Assessee's Division which operated the BBC Channel) was transferred to a newly incorporated company – BBC World Ltd. (subsequently known as BBC World News Ltd.) with effect from 1st December, 2002. The Agreement

between the Assessee and BIPL also stood novated in favour of BBC World Ltd. with effect from. 1st December, 2002. Thus, for the AY 2003-04, both the Assessee and BBC World New Ltd. filed their returns of income, which included revenues from sale of advertisement airtime; the Assessee accounted for revenues from 1st April, 2002 to 30th Nov, 2002 and BBC World News Ltd. accounted for airtime revenues for the period 1st December, 2002 to 31st March, 2003. Both the Assessee and BBC World News Ltd. claimed that the said revenues were not taxable as they had no business connection/PE in India. Thus, for the AY 2003-04, the issue concerning taxability of income from sale of airtime of BBC World Channel was common to both BBC World News Ltd and the Assessee. Whilst, the AO sought to reopen the assessment of BBC Worldwide News Ltd. for AY 2003-04, we are informed by Mr Syali that no such proceedings were initiated in the case of the Assessee for AY 2003-04.

53. It is relevant to notice the reasons recorded for reopening the assessment of BBC Worldwide News for AY 2003-04, which reads as under:-

“The assessee is a company incorporated under the applicable laws of United Kingdom (U.K.) and is engaged in running and operating the BBC World Channel. With effect from 1st December 2002, the airtime sales/marketing agreements between BBC Worldwide (India) Private Limited (BWIPL) and BBC Worldwide Limited were novated by assignment to the assessee. Accordingly, BBC Worldwide (India) Private Limited (BWIPL) acts as an agent in India for the assessee for soliciting advertisement for the sale of airtime on the channel and for providing marketing support to the channel in India. The assessee has claimed in the notes to the return of income that it

does not have any business connection or permanent establishment in India as envisaged under Sec.9(1)(i) of the I.T.Act, 1961 and Article 5 of the DTAA between India and U.K. respectively. Therefore, its income arising from the operations carried out in India is not liable to be taxed in India. On this basis a return of income was filed at NIL income.

The assessment order in this 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 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.

This 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. This also satisfies the pre-requisite condition stated under explanation 2 to section 147. Relevant portion of section 147 of the Act reads as below:

“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 understood the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) Where an assessment has been made but – (i) income chargeable to tax has been underassessed or

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

(iii) Such income has been made the subject to excessive relief under this Act; or

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed”.

In view of the above, I have reason to believe that the income of the assessee for A.Y. 2003-04 chargeable to tax has escaped assessment. In this case, not more than six years have elapsed from the end of the relevant Asstt. Year (i.e. A.Y. 2003-04) and income of more than 1 lakh has escaped assessment, therefore, the notice u/s 148 r.w.f. 147 of the I.T. Act, 1961 satisfies the time limit for issue of notice as provided in Section 149 of the Act.

As required by section 151 of the Income-Tax Act 1961, the reasons are hereby put up for the kind perusal & recording of satisfaction.”

54. It is apparent from the above, the reasons recorded by the AO for reopening the assessment of the Assessee in AY 2002-03, in substance, bear similarity to the reasons recorded by the AO for reopening of the Assessment of BBC World News Ltd. for AY 2003-04. In the aforesaid context, this Court had quashed the reassessment proceedings, *inter alia*, for the reasons that the AO had examined the computation furnished by the Assessee in this case, that is, in the Assessee's assessment for AY 2002-03.

Thus, clearly, the aforesaid decision would *a fortiori* apply to this case also.

55. In view of the above, the notice dated 30th March, 2009 issued under Section 148 of the Act is quashed.

56. The petition is allowed but in the given circumstances, the parties are left to bear their own costs.

MARCH 21, 2016
RK

VIBHU BAKHRU, J

S. MURALIDHAR, J

