IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.377 OF 2012

Atomstroyexport a Joint Stock Company
incorporated under the laws of Russain Federation
and having its registered office at Russia
and address in India at C/o.
Nuclear Power Corporation of India Ltd.,
8th floor, South Wing, Vikram Sarabhai Bhavan,
Anushakti nagar,
Mumbai- 400 094. ...Petitioner.

V.

1) The Deputy director of Income-tax
(International Taxation)1(1).
Mumbai having his office at R.No.117,
1st floor, Scindia House,
Ballard Estate, Mumbai-400038.

2) The Director of Income -tax
(International Taxation) Mumbai
having his office at Room No.107,
1st floor, Scindia House,
Ballard Estate, Mumbai-400038.

3) The Union of India, through the
Secretary, Department of Revenue,
Ministry of finance, North Block,
New Delhi-110001.
….Respondents.

Mr. S. E. Dastur, Sr. Counsel along with Mr. Nitesh Joshi and Mr. Atul K. Jasani i/by Mr. Atul K. Jasani for the Appellant.
Mr. Tejveer Singh for the Respondents.

CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.

DATE : 01st August, 2012.

<u>JUDGMENT (Per M.S. SANKLECHA, J.)</u>:

By this petition under Article 226 of the Constitution of India the challenge is to the assumption of jurisdiction by the Deputy Director of Income Tax (International Taxation) (hereinafter referred to as “Assessing Officer”) under Section 147 to 151 of the Income Tax Act, 1961 (hereinafter referred to as the “the Act”). The Assessing officer has assumed jurisdiction by issuing a notice dated 28/3/2011 under Section 148 of the Act seeking to reassess the petitioner's income for assessment year 2004-05 (hereinafter referred to as the impugned notice) and dismissed the petitioner's objection to his above assumption of jurisdiction by an order dated 20/10/2011 (hereinafter referred to as the impugned order).

2) The petitioner is a joint stock company incorporated under the laws of Russain Federation. An agreement dated 20/11/1988 and a supplementary agreement dated 20/6/1998 were entered into between the then Union of Soviet Socialistic Republic and the Republic of India for co-operation in the construction of a nuclear

power station at Kudankulam, Tamil Nadu. Consequent to above, the Nuclear Power Corporation of India Limited (NCPL) and the petitioner entered into an agreement dated 20/7/1998 for setting up the power station.

3) In the course of executing the contract NPCL and the petitioner entered into three Offshore Service Contracts dated 17/12/2001, 28/3/2002 and 02/11/2002; and four Offshore Supply Contracts dated 12/2/2002, 23/8/2002, 23/8/2002 and 7/10/2003.

4) On 31/3/2006, the petitioner filed its return of income for assessment year 2004-05 declaring a total income of Rs.14.6 crores. In its return the petitioner offered for tax the amount received on account of the offshore service contracts by applying Section 44BBB of the Act. In so far as the offshore supply contracts were concerned, the petitioner did not offer the same to tax because according to them the transfer of title to the equipment under the offshore supply contracts had taken place outside India and the consideration for the same had also been received outside India. Therefore, according to the petitioner the amounts received on account of the offshore supply contracts were not chargeable to tax in India.

5) On 7/1/2008, the Assessing Officer issued a notice under Section 148 of the Act seeking to reopen the assessment for the assessment year 2004-05 on the ground that the Assessing Officer had reason to believe that the petitioner's income chargeable to tax had escaped assessment. The petitioner subjected itself to the jurisdiction of the Assessing Officer for reassessment.

6) During the course of reassessment proceedings the Assessing officer raised specific queries with regard to service contracts and the offshore supply contracts. By a letter dated 10/12/2008 the petitioner *inter alia* pointed out that under all the offshore supply contracts the sale and supply of equipment were outside India as the same were sold by the Petitioner on FOB basis outside India to NPCL. Further, the payments and consideration for the sale of equipment were also received by the petitioner outside India. The petitioner. contended therefore that no income accrued or arose in India in respect of offshore supply contracts to make it taxable in India.

7) Thereafter, the Assessing officer passed an order on 31/12/2008 under Section 143(3) read with Section 147 of the Act

reassessing the petitioner to tax for the assessment year 2004-05. It is important to note that the assessment order expressly records the aforesaid facts furnished by the petitioner as well as the petitioner's submission that no income would accrue or arises in India in respect of the Offshore supply contracts inter alia in view of the decision of the Supreme Court in **Ishikawajima Harima Heavy Industries Ltd. v. Director of Income Tax reported in 288 ITR Page 408.** In respect of the Offshore Service Contract the Assessing officer held that the same would be taxable as fees for technical services and royalty and consequently the benefit of Section 44BBB of the Act as claimed by the petitioner would not be available.

8) The Commissioner of Income Tax (Appeals) by an order dated 30/11/2009 held that the petitioner was entitled to the benefit of Section-44BBB of the Act in respect of the offshore service contracts. However, he upheld the order of the Assessing Officer to the extent that it held that the service part of the offshore supply contract would be taxable in India.

9) Against the order dated 30/11/2009 of the Commissioner of Income Tax (Appeals), the Assessing officer as well as the petitioner

have filed appeals before the Income Tax Appellate Tribunal which are pending.

10) On 29/3/2011, the Assessing Officer issued the impugned notice seeking once again to reopen the assessment for the assessment year 2004-05 on the ground that he had reason to believe that the income chargeable to tax had escaped assessment for the assessment year 2004-05. Along with the impugned notice the reasons for reopening the assessment were furnished to the petitioner. The reasons for reopening the assessment as provided to the petitioner read as under:-

> *"The return of income disclosing a total income of Rs.14,06,95,494 was furnished on 31st march,2006.The return was processed on 28/3/2007.The case was not selected for scrutiny assessment and no notice u/s 143(20 was issued. Subsequently, a notice u/s.148 dated 7/1/2008 was issued to the assessee. The order u/s. 143(3) read with section 147 was passed on 31/12/2008 and the total income was determined at Rs.160,30,71,820/-. In the reassessment order dated 31/12/2008, the income from so called offshore services contract amounting to Rs.1217687860/- was treated as royalty. Another Rs.53853520/- received on account of services for deputation of specialists was treated as fee for technical services. Similarly, an amount of Rs.135413560/- received on account Training of Indian Personnel was treated as FTS. The amount of Rs.19,61,16,880/- received on account of services for*

contract No.26000 was held as FTS income. In the assessment, the receipts on account of four offshore supply contracts were treated as exempt. The CIT(A) in its appellate order has held that all the receipts treated as Royalty by the AO is to be taxed as business income under Section 44BBB of the I. T. Act.

The assessee was given a contract by Nuclear Power Corporation of India Ltd. (NPCIL) for construction of a Nuclear Power Station. It was a Turnkey project. For executing this contract, the assessee entered into various contracts -Offshore Supply contract and Offshore Service Contracts. There were 4 Offshore Supply contracts and 3 offshore Service Contracts. Although the power plant is to be erected in India, the assessee has termed the contract as Offshore Supply and Offshore Services Contract. The work of constructing the project is in India.

In the return of income, the assessee had claimed that the receipts on account of 4 Offshore Supply contracts as exempt from taxation in India, In respect of 3 Offshore Service Service Contracts, the assessee has filed its return of income. In respect of 3 offshore Service Contracts,the assessee has paid taxes under Section 44BBB of the I.T.Act. In respect of offshore Supply Contracts, the assessee has not disclosed any income in its return of income.

The Dispute Resolution Panel (DRP) in its directions for the A.Y. 2006-07 and 2007-08 has held that :

a) Receipts from offshore Services contracts are covered by provisions of section 44BBB of the Income Tax Act.

b) Receipts from Offshore Supply contracts are also covered by provisions of section 44BBB of the Income Tax Act.

The DRP has further held that Section 44BBB refers to computation of profits in case of foreign company engaged in the business of civil construction etc. In Turnkey Power Projects which are approved by the Central Government. The fact that this contract has been awarded on a turnkey basis to the assessee is evident from the contract dated 20/11/1998.

It is seen that the provisions of section 44BBB clearly indicates that sum payable for erection and construction of power plant is to be included in the amount for applying 10% of profit margin. In the case of power plaint being constructed on turnkey basis as envisaged in section 44BBB includes construction, erection and commissioning and these as such include equipment plant and machinery which are installed for setting up the power plant so as to make it a turnkey project .Accordingly, the sum payable for offshore supply should also be included for purposes of computing the profit @ 10%.

Accordingly, in order to compute the income u/s.44BBB, the revenue from all the contracts entered into by the assessee with Government of India or Indian Entity like Nuclear Power Corporation are to be included and, therefore, the profit rate of 10% as envisaged in section 44BBB is to be applied.

The details of payment received by the assessee in respect of all the 7 contracts are as under:

Contract No.	Contract Name	Amount in USD	Amount in INR
20500	Delivery of equipments with long manufacturing cycle	5199544	286731962

22600	Delivery of Equipments and materials	68090615	2006081931
22700	Supply of equipments & raw material from third countries	18690000	841391400
26000	Supplies from CIS countries & functions to be performed by the contractor for offshore Supplies	754130	33650359
	Total	92734289	3167855652

Contract No.	Contract Name	Amount in INR
16200	Elaboration of Wording Documentation	1217687860
22800	Contract for deputation of specialist	53853520
24700	Offshore Training Contract	135413560
	Total	1406954940

The assessee has disclosed income 'under' section 44BBB on the receipts amounting to Rs.14,06,95,494 (10% of Rs.140,69,54,940) only. Such income is disclosed in respect of only three contracts. The assessee had a total receipts amounting to Rs.457,48,10,591/- from the turnkey project being carried out in India. Thus, the income that the assessee is supposed to disclose in its return of income should have been Rs.45,74,81,059/-/- (10% of Rs.4,57,48,10,591/-). Thus receipts of Rs.3167855651/- have not been disclosed in the return of income.

As a result, income to the extent of Rs.31.67.85,565/- has escaped assessment within the meaning of section 147 of the Income tax Act, 1961.Such income thus been subjected to relief to which the assessee is not entitled.

As the assessee has not disclosed proper income in its return of income therefore, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147.Therefore, notice under section 148 is being issued."

11) On 26/4/2011, the petitioner objected to the reopening of the assessment. The petitioner pointed out that in this case the condition precedent for issuing the impugned notice (as issued after more than 4 years from the end of the relevant assessment year) is that not only must there be a reasonable belief that income has escaped assessment but there must also be a failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. In this case the petitioner contended that both the conditions precedent had not been satisfied. In fact there is no allegation in the grounds that the petitioner has failed to disclose truly and fully all material facts necessary for assessment. Further, during the reassessment proceedings consequent to the notice dated 7/1/2008 under Section 148 of the Act, the Assessing officer had examined the issue with regard to taxability of the payments received

under the four offshore supply contracts in detail and did not bring the same to tax as he was satisfied that in respect thereof no income arose in India. Consequently, action regarding reopening of the assessment for the assessment year 2004-05 is merely based on a change of opinion and therefore, is completely without jurisdiction.

12) On 20/10/2011, the Assessing officer by the impugned order rejected the petitioner's objection to the reopening of assessment for the assessment year 2004-05. The relevant portion of the order is as under:

> *"2. By this order, I propose to dispose the objections raised by the assessee in terms of the principles laid down by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd. vs. ITO (2003) 259 ITR 19.*
>
> *3. The objections filed by the assessee against the reasons recorded have been gone through properly. The contentions of the assessee cannot be accepted for the following reasons:*
>
> *(I) The Re-assessment was made under s. 143(3) r.w.s. 147 by the AO and later on DRP while deciding the assessee's case for A.Y.2006-07 and 2007-08 has held that the work undertaken by the assessee for setting up of nuclear Power Station is of a Turnkey contract which is taxable u/s 44BBB of the I.T. Act, 1961. Hence, all the receipts by the assessee in connection with the work should be combined and taxed accordingly.*
>
> *3.1 While there can be no dispute with the general propositions, this office is unable to accept that there was failure to comply with requirements of Section 147. The relevant portion of Section 147 of the Act*

reads as follows:

“if the AO has 'reason to believe' that any income chargeable to tax has escaped assessment for any A.Y., he may, subject to the provisions of Section 148 to 153, assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this Section or re-compute the loss of the depreciation allowance or any other allowance, as the case may be, the assessment year concerned/”

In the above Section, the main term is 'reason to believe' and the same has been interpreted by numerous judicial authorities.

3.1.2. The principles behind all the judgments (related to this phrase and referred by the assessee in its objections) is that the AO should not use genral and irrational material to come at the conclusion that income has escaped assessment and that is all that was taken into consideration by the AO while recording reasons for re-opening the case in hand. In the present case, reasons recorded for re-opening are sufficient to prove that there are material facts a& reasonable grounds on which one can have 'reason to believe' for reopening the case, as income chargeable to tax has escaped assessment.

3.1.3. In the case of 'Bawa Abhai Singh V/s. DCIT (2001) 1 17 Taxman 12', Delhi High Court elaborated on this issue. Relevant portion of this order reads as below:

“The only condition for action is that AO should have reason to believe that income has escaped assessment, which belief can be reached in any manner and is not qualified by a precondition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended Section 147(a) and the AO can under the amended provision legitimately reopen the assessment in respect of an income was has escaped assessment viewed in that angle power to reopen assessment is much wider under the amended provision and can be exercised even after assessee has disclosed fully and truly all

the material facts. There must be relevant material before the AO on the basis of which he may form a belief. It may be said that information must be something more that a rumour or gossip or hunch. There must be some material which can be regarded as information, on the basis of which the AO can have reason to believe that action under s. 147 is called for. Information means the communication or reception of knowledge or intelligence. It includes knowledge obtained from investigation, study or insurrection. Reasons which may weigh with the AO may be the result of his own investigation and may come from any source that he considers reliable. Formation of his belief is not a judicial decision but is an administrative decision."

The principle that emerges from the above judgment is that if the AO has some information based upon which he has reason to believe that the income has escaped assessment for any assessment year under the provisions of the Act, he/she can reopen the case u/s 147 of the Act. In the case under reference, it is apparent from the record that the AO has acted fairly & judiciously and had enough reasons to believe for reopening the case.

4. The necessary prerequisite for issuance of notice u/s. 148 is the formation of belief that income chargeable to tax within the meaning of Section 147 of the Act has escaped assessment on the basis of information and material available with the AO. The reassessment proceedings initiated after issuance of the notice would necessarily require enquiries to ascertain the correct tax liability of the assessee.

5. Accordingly, the objection of the assessee stands disposed off. The assessee is directed to co-operate in the assessment proceedings and submit the details / information as called for vide notices issued during the assessment proceedings under the I.T. Act, 1961."

13 Mr. S.E. Dastur, Senior Counsel in support of the petition submits as under:

a) The impugned notice is without jurisdiction as the conditions precedent for issuing the same have not been satisfied. Though the assessment is sought to be reopened is more than 4-years from the end of the relevant assessment year. It is not alleged in the impugned notice that there was a failure on the part of the petitioner to fully and truly disclose all material facts relevant for assessment.

b) There was no reasonable belief on the part of the respondent to conclude that income has escaped assessment. This is so, as all facts with regard to the offshore supply contracts were examined by him during the reassessment proceedings and the same were not brought to tax. Therefore, the impugned notice issued now is mainly on account of a change of opinion and not on any tangible material.

c) On merits, no part of the petitioner's income arising out of offshore supply contract had escaped assessment as equipments were not only sold and supplied outside India but the consideration for the same was also received by the petitioner outside India. Consequently, no part of the income arising on account of the offshore supply contracts had arisen in India. The reasons for reopening the reassessment itself record that in the assessment proceedings the receipts on account of the four offshore supply contracts were treated as exempt.

d) The impugned order dated 20/12/2011 rejecting the petitioner's objection to initiation of reassessment proceedings by the impugned notice is a non speaking order. The impugned order does not deal with the various objections raised by the petitioner.

14) As against the above Mr. Tejveer Singh Counsel appearing for the respondent submits as under:

a) The objections raised by the petitioner to the reopening of the assessment by the impugned notice are not tenable and the same had had been appropriately disposed of by impugned order. Therefore, he submits that the impugned notice is not without jurisdiction ; and

b) The Court should not issue a writ in the present proceeding to stop the respondents from reassessing the petitioner for the assessment year 2004-05.During the course of reassessment proceeding the petitioner can submit on merits that no tax is at all payable under the offshore supply contracts and the same would be considered and disposed of on merits.

In view of the above, it is his submission that the present writ petition should not be entertained.

15) In cases such as this, where the assessment is sought to be opened after the expiry of 4 years from the end of the relevant assessment year the respondent revenue must not only have reason to believe that income chargeable to tax has escaped assessment but such escapement of income must be due to the petitioner's failure to fully and truly disclose all material facts necessary for assessment. In the present case, the reasons recorded for reopening of the assessment by the notice dated 28/3/2011 itself records that the receipts on account of the four offshore supply contracts was treated as exempt in the assessment proceedings. Further, though the reasons

record that the petitioner had not disclosed proper income in his return of income, it does not allege that there was any failure on the part of the petitioner to fully and truly disclose all material facts necessary for the assessment. This is particularly so as the four offshore supply contracts were the subject matter of consideration and were duly considered while passing the order dated 31/12/2008 under Section 143 read with Section 147 of the Act. In fact, the petitioner's objection on the aforesaid ground has not been dealt with in the impugned order dated 20/10/2011.

16) Besides the above, our Court in the matter of **Hindustan Lever Limited v. R.B. Wadkar reported in 268 ITR Page 332** has set aside a notice u/s.148 of the Act seeking to reopen an assessment *inter alia* on the ground that the reasons recorded by the Assessing Officer nowhere states that "there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year". On the aforesaid ground itself the assumption of jurisdiction by the Assessing officer is illegal.

17) On merits also the impugned notice is without jurisdiction for the reason that the same has been issued merely on account of a

change of opinion as all facts with regard to petitioner's offshore supply contracts were considered and dealt with in the reassessment proceeding leading to the order dated 31/12/2008. In fact the petitioner's submission that amounts received under the four offshore supply contracts were not taxable in view of the decision of the Supreme Court in **Ishikawajima Harima Heavy Industries Ltd. Vs. Director of Income tax** (supra) as no income arose or accrued in India were also recorded in the order dated 31/12/2008. Therefore, the impugned notice under Section 148 of the Act is merely on account of change of opinion as no fresh tangible material was available with the Assessing Officer to issue the impugned notice.

18) The Apex Court in the matter of **CIT v. Kelvinator India Limited reported in 320 ITR 561 has observed as under:-**

> *"However, one needs to give a schematic interpretation to the words "reasons to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would*

*take place. One must treat the concept of"change of opinion" as an in built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a life link with the formation of the belief***".***

19) Therefore, reassessment has to be based on fulfillment of certain pre conditions and in the garb of reopening an assessment revenue is not permitted to review its earlier order. The reopening of assessment has to be based on some tangible material which leads to a reasonable belief that income has escaped assessment. In the present case, all the material which is the basis of seeking to reopen the assessment was examined in the earlier reassessment proceeding leading to the order dated 31/12/2008 under Section 143(3)read with Section 147 of the Act. Consequently there was no tangible material to lead to a reasonable belief that the income has escaped assessment for the assessment year 2004-05. The reason for reopening the assessment for the assessment year 2004-05 also places reliance upon the dispute resolution panel directions for the assessment year 2006-07 and 2007-08 wherein direction dated 13/8/2008 states that receipts from offshore supply contracts are also to be considered while applying Section 44BBB of the Act in respect of suppli contracts. However, this direction by the Dispute Resolution Panel is its view/opinion on the facts considered during the reassessment proceeding leading to the order of the Assessing officer dated 31/12/2008. Further, the opinion of the Dispute Resolution Panel dated 13/8/2008 was available to the Assessing officer when he passed the order dated 31/12/2008 under Section 143(3) read with Section 147 of the Act on reassessment proceedings. Therefore, there is no tangible material for the Assessing Officer to form a reasonable belief that income has escaped assessment. All facts were considered while passing the order dated 31/12/2008 under Section 143(3) read with Section 147 of the Act as is evident from the fact that in the order dated 31/12/2008 subjects the service portion of the four offshore supply contracts to tax.

20) As held by this Court in the matter of **Bhavesh Developers v. Assessing officer reported in 329 ITR 249** that a power to reopen an assessment after a lapse of four years is an exceptional power conferred upon the revenue. The conditions as laid down for exercise of such an exceptional power must be strictly fulfilled and in its absence, exercise of such a power is not sustainable. The impugned notice has been issued merely on account of change of

opinion. There has been no failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment. (assessment includes reassessment in view of Section 2(8) of the Act). Consequently, the condition precedent for assuming jurisdiction is not satisfied. Therefore, the impugned notice is bad in law.

21) The impugned order rejecting the petitioner's objection to initiation of reassessment proceedings does not deal with the objections of the petitioner. In any event as we have held, the impugned notice is without jurisdiction and therefore, the impugned order is also bad.

22) In view of the above, the impugned notice and the impugned order dated 28/3/2011 and 31/12/2011 respectively are quashed and set aside. The writ petition is accordingly disposed of with no order as to costs.

(M.S. SANKLECHA, J.) **(S. J. VAZIFDAR, J.)**