2023: BHC-OS:5709-DB

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

WRIT PETITION NO. 1964 OF 2022

Tata Consultancy Services Ltd. } being a company incorporated } under the Companies Act, 1956 } and having its registered offce } at 9th Floor, Nirmal Building }

Nariman Point, Mumbai 400021. } Versus …Petitioner

1 .Deputy Commissioner of Income } -tax Circle-3(4), Mumbai having } his offce at 29th Floor, Centre One,} World Trade Centre, Cuffe Parade,} Mumbai – 400005. }

2. Principal Commissioner of } Income-tax-3, Mumbai having his } offce at Room No. 612, 6th Floor, } Aayakar Bhavan, Maharshi Karve} Road, Churchgate, Mumbai – } 400020. }

3. Additional/Joint/Deputy/Assis -} tant Commissioner of Income Tax } /Income-tax Offcer, National Face-} less Assessment Centre, Delhi. }

4. Union of India, Through Joint } Secretary & Legal Adviser Branch} Secretariat, Department of Legal } Affairs, Ministry of Law and } Justice, 2nd Floor, Aayakar Bhavan} M. K. Road, New Marine Lines, }

Mumbai – 400 020. } …Respondents

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Mr. J. D. Mistri, Senior Advocate a/w Mr. Nitesh Joshi i/b Mr. Atul K. Jasani, Advocate for petitioner.

Mr. Suresh Kumar, Advocate for respondents.

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CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.

RESERVED ON : 19th APRIL, 2023 PRONOUNCED ON : 27th JUNE, 2023

J U D G M E N T

[PER DHIRAJ SINGH THAKUR, J.]

1. The petitioner challenges the notice, dated 31st March, 2021 issued under section 148 of the Income Tax Act, 1961 ("the Act")

whereby the Assessing Offcer (A.O.) seeks to reopen the assessment for the assessment year 2013-14 on the ground that income for the said assessment year had escaped assessment

within the meaning of section 147 of the Act. The petitioner also challenges the order dated 3rd January, 2022 disposing of the

objections to the re-assessment.

2. Briefly stated the material facts are as under :

The petitioner claims that it is engaged in providing information technology and information technology enabled

services, besides India also in countries across the globe. It is stated that as a part of its business, it provides on-site services to its clients for which employees have to be deputed and in this particular case to the United States of America ("USA"). The employees of the company are sent on deputation and a deputation agreement is executed between the petitioner and the concerned employees, as per which the tax payable in India would be borne by the employee and the tax payable in USA by that employee was to

be borne by the employer company i.e. the petitioner.

It is stated that contractual obligations were discharged by the petitioner company by paying taxes in USA on the income of the employees deputed in that country. It is stated that on certain occasions the employees were held entitled to deductions and rebates in regard to the tax returns fled by such employees, which would result in a refund to an employee from out of the tax so deposited by the petitioner as an employer. The said amount of

refund in respect of the tax paid in USA on account of

deduction/rebate was to be further refunded to the petitioner company in accordance with an undertaking executed by such employees alongwith enabling documents.

3. It is stated that some of the employees considered this action of the petitioner to be improper under the California Labour Code. A Class Action Law Suit, therefore, was fled by the employees led by one Mr.Gopi Vedachalam in the United State District Court in the Northern District of California, wherein damages were claimed against the petitioner. The employees had also raised certain other disputes in the said civil suit which had been fled, wherein a settlement was fnally arrived at between the parties and an agreement dated 5th February, 2013 came to be executed.

4. As per the agreement, an amount of Rs.29.75 million USD equivalent to Rs.161.63 crores was to be paid to the concerned employees. The United Sates District Court for the Northern District of California ('the US Court'), by virtue of its order dated 18th July 2013 , allowed the application and granted approval to the service awards.

5. Return of income was fled by the petitioner for the assessment year 2013-14 on 14th November 2013, declaring an income of Rs.84,04,81,15,610/- and while computing the said income claimed deduction inter-alia of Rs.161.63 crores forming a part of the other expenses in the proft and loss account. The amount aforementioned was debited under the head 'other expenses' in the proft and loss account. The fact relating to the said settlement had also been adequately reflected in Note No.49 in the stand-alone accounts, in Note No.46 of the consolidated account and in the balance-sheet under the head "Other Current Liabilities". This fact had also been mentioned in the annual report for the fnancial year 2012-13 as also in the Notes forming part of the substantial statements.

6. The petitioner claims that its return of income was selected for scrutiny by issuing a notice under section 143(2) of the Act, dated 5th September 2014. During the course of scrutiny

assessment, as is reflected from the order-sheet of the Assessing Offcer dated 16th November 2016, the petitioner was directed to furnish details in regard to various issues, one of which pertained to "details of claim made under class action suit (Rs.161.63 crores)

and its allowability" The queries and the issues on which clarifcation was sought by the Assessing Offcer were answered vide communication dated 28th November 2016 in the following

manner :

> "8. Note on class action suit :
>
> During the year, the Company entered into an agreement to settle for a sum of Rs.161.63 crores (USD 29.75), a class action suit fled in the United States of America Court relating to payments to employees on deputation. Based on the settlement TCS is relieved from all past and present litigation made by the company. Thus, the amount paid by TCS is towards settlement of employee litigation."

7. An additional reply was submitted on 16th November 2016, wherein it was yet again reiterated that the payment made under the settlement agreement was a cost incurred by TCS to put an end

to the ongoing litigation for purposes of ensuring smooth

functioning of the business in USA and further that expenses were neither penal in nature nor in respect of any wrongdoing committed by TCS US Branch but were

expenses incurred during the course of carrying out the business. It was, therefore, stated that payments made were deductible expenditure in the hands of TCS for tax purpose under section 37 (1) of the Act. As they were recovered wholly and exclusively for the purposes of business of the company.

8. An order of assessment then came to be passed on 16th February 2017 under section 143(3) of the Act, without making any disallowances in regard to the claim of Rs.161.63 crores, although there was no specifc discussion in the order of assessment in that regard.

9. A notice under section 148 dated 31st March 2021 came to be issued by respondent No.1. Return of income was fled pursuant to the receipt of the said notice on 21st April 2021 declaring a total income of Rs.84,54,68,32,080/-. Copy of the reasons recorded for purposes of reopening the assessment were sought along with a copy of the approval obtained under section 151 of the Act. The

reasons which were provided to the petitioner stated as under :

> The assessee had fled return of income on 14.11.2013 declaring its income of Rs 8404,81,15 ,610/- under normal provisions of the Income Tax Act and book proft of Rs. 15656,52,27,545/- u/s 115JB of the Income Tax Act. The case was selected for scrutiny and the assessment for AY 2013-14 was completed on 16.02.2017 determining income of Rs. 11351,41,97,376/- under normal provisions

of the Income Tax Act and Book Proft of Rs. 15956,01,97,867/- u/s 115JB of the Income Tax Act.

2. In the instant case, information has been received from DDIT (Investigation) Unit-2(4), Mumbai vide email dated 09.06.2020 that Tata Consultancy Services Ltd (hereinafter referred as "TCS") has paid penalty of Rs161.63 crores (29.75 million USD) in USA. TCS has not shown the penalty paid in USA in the annual report for the FY 2012-13 and FY 2013-14 by their directors and the auditor report.

This is clear violation of provisions of Foreign Exchange Violation and Tax Avoidance. The Act said that such adverse loss by violation, has to be in italics or bold letters. Such penalty cannot be shown as operational expenses and evade tax.

2.1 The information has been considered and analyzed carefully. Going through the information, it has been observed that an open enquiry was initiated by DDIT (Investigation) Unit-2(4), Mumbai in this case requesting the assessee to provide the details of law suit and payment by assessee of penalty of Rs 161.63 crores (29.75 million USD) and details of treatment of said amount in the books of accounts for AY 2013-14. It was seen from the submission that assessee had claimed the payments made in the USA against the Law suit in their books of accounts as an expense under the head "Other Expenses" for the FY 2012-13. Further Assessee was asked to explain the nature and allowability of the said expenses and was asked to submit the computation of income. However, it is seen that assessee has claimed it as "allowable expense" and has claimed that the said expense is paid by the TCS is towards the settlement against the class action suit and not the penalty. The amount incurred is towards the settlement cost is a cost incurred by the TCS to put an end to the on-going litigation and to ensure smooth functioning of its business in the USA. Thus, the assessee has claimed the said expenditure as deductible

> expenditure. Under section 37(1) of the Income Tax Act 1961. Further as per information available with the department, Class action Law suit was over the wages dispute and breach of contract and US federal laws. TCS was facing the class Suit action and was made to pay Rs 161.63 crores (29.75 million USD) settlement over its' practice of forcing its' employees to sign over their tax refunds cheques when they fnished working in the USA. Also, no response for the same has been clearly brought out in the reply fled by the Assessee. The Assessee has also not fled the copy of the legal suit, in support of the Rs.161.63 crores expenses claimed by it in it's consolidated fnancial statements for the FY 2012-13.
>
> 2.2 As it is evident from the material evidence on records that assessee has failed to submit the copy of legal suit in support of Rs.161.63 crores expenses. Therefore I am of the view that income to the extent of amount of Rs 161.63 vrores (29.75 million USD) as explained above, has escaped assessment.
>
> 3. In view of the above the undersigned has reason the believe that the income exceeding Rs.1,00,000/- has escaped assessment within the meaning of Section 147 of the Act. Therefore proposal for reopening of AY 2013-14 by issuing notice u/s 148 of the Act is being made u/s 151 of the Act for your kind perusal and approval.
>
> 4. In view of the reasons recorded above, I am of the opinion that income chargeable to tax has escaped assessment for A. Y. 2013-14 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for A. Y 2013-14.

10. Objections to the reopening of the assessment were fled by the petitioner in which it was highlighted that the reassessment was bad in law and without jurisdiction on account of the fact that since the notice under section 148 was

issued after four years from the end of the relevant assessment year 2013-14, the Assessing Offcer had to show that there was failure on the part of the

petitioner to disclose fully and truly all material facts during the original assessment proceedings under section 143(3) of the Act. It was also highlighted that Rs.161.63 crores had been paid and claimed as deduction had not only been reflected in the return and

the documents reference whereto has already made in the preceding paragraphs, but further that the said issue had specifcally been flagged by the Assessing Offcer under Section 143(3) proceedings, an explanation called which was accordingly rendered and deemed to have been considered notwithstanding the fact that there was no formal reference to such a claim in the order of assessment which came to be passed fnally under section 143 on 3rd January 2022. It was also stated that the reopening was nothing

but a mere change of opinion based upon the report of the investigation wing of the department. Even otherwise it was highlighted stated that there was no legal basis for the Assessing Offcer to believe that income had escaped assessment.

11. The objections to the reopening were rejected by virtue of order dated 3rd January 2022. The basis for rejecting the

contentions of the petitioner can be found in paragraph No.2 of the order, which reads as under :

> (d). The re-opening is on the basis of a mere change of opinion:
>
> All the three above noted objections are dealt collectively and found not tenable in the light of the information available NOW with the department that Class action Law suit was over the wages dispute and breach of contract and US federal laws. You were facing the class Suit action and were made to pay Rs 161.63 crores (29.75 million USD) settlement over your 'practice of forcing your employees' to sign over their tax refunds cheques when they fnished working in the USA.
>
> The documents submitted by you during the course of original assessment proceedings u/s 143(3) were furnished in routine course in compliance to regular notices. THE REAL NATURE OF SO-CALLED
> SETTLEMENT AMOUNT was of a penalty for settlement of allegations of wrong doing and liability. This fact couldn't be deciphered by the AO in a normal manner and good faith even after with due diligence at the time of original assessment. Above information received by DDIT (Investigation) Unit-2(4), Mumbai vide email dated 09.06.2020 is suffcient to establish the availability of tangible incriminating material with the current offcer having jurisdiction over the case. As per explanation 1 of the section 147 "mere production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of the foregoing provisions of section 147 of the I Act."
>
> Evidently, the issue had not been examined during the original assessment proceedings as you had not submitted the facts fully and truly at that time. Hence the reopening of the case after four years is justifed and its not a case of change of opinion as THE REAL NATURE OF SO-CALLED SETTLEMENT

> AMOUNT could not be ascertained by the then Assessing Offcer with due diligence in the absence of specifc fact which came to the notice of the department at this time after the receipt of email in Investigation Wing.

12. Mr. Mistri, learned Senior Counsel for the petitioner has very elaborately taken us through the various documents on record to show how the claim of deduction in regard to Rs.161.63 crores was reflected in the proft and loss account, in the stand-alone accounts with the consolidated accounts as also reflected in the balance-sheet and the annual report. Mr.Mistri besides reiterating the issues which were highlighted in the objection before the Assessing Offcer during the re-assessment proceedings urged that the Assessing Offcer had raised specifc queries and sought justifcation for the claim of deduction in regard to the amount paid on account of settlement of the class action suit. It was, therefore, urged that there was no failure on the part of the petitioner to disclose fully and truly all material facts and further that the reopening was nothing but a change of opinion of the Assessing Offcer based upon the report received by the Assessing Offcer from the Investigation Wing of the department.

13. Mr. Kumar, on the other hand, sought to urge before us that the claim of deduction allowed by the Assessing Offcer during the scrutiny assessment proceedings was otherwise not allowable in terms of the provisions of section 37 of the Act inasmuch as the amount paid by the petitioner to settle the class action

suit was in the nature of the penalty and therefore could not have been claimed as 'operational expenses', which ought to have been disallowed under section 37 of the Act. It is stated that the assessee had not fled a copy of the suit in support of its claim during the course of assessment proceedings, and therefore, there was a failure on the part of the assessee to disclose fully and truly all material facts. It

was further asserted that the facts which have now been highlighted, based upon the report received from the investigation wing of the department, could not have otherwise been discovered by the Assessing Offcer during the earlier assessment proceedings despite due diligence, and therefore, it was urged that the reopening was perfectly legal and justifed.

14. We have heard learned counsel for the parties.

15. It is not denied that the notice that has been issued under section 148 of the Act, dated 31st March 2021 seeks to reopen an assessment for the assessment year 2013-14. According to the law, which is applicable to the present case, as it existed before 1st April 2021, with a view to invoke the provisions of section 147 for reopening, the Assessing Offcer had to satisfy the jurisdictional condition of 'his reason to believe that income chargeable to tax had escaped assessment'. If

the reopening of the assessment is beyond the period of four years from the end of the relevant assessment year, an additional jurisdictional condition has to be satisfed that in

a case where an assessment under section 143(3) of the Act had been completed, the assessee had failed to disclose fully and truly all material facts necessary for assessment during such assessment proceedings.

16. In the instant case, the Assessing Offcer has in fact alleged that the petitioner had failed to disclose fully and truly material facts necessary for the assessment for the assessment year 201314 . However, a bald statement made in the reasons recorded would not satisfy the jurisdictional condition as prescribed for purposes of invoking section 147 of the Act. Whether or not there was in fact a failure to disclose fully and truly can be seen from the material on record. In the present case, as stated in the preceding paragraphs, the claim of the petitioner with regard to deduction of Rs.161.63 crores on account of settlement of class action suit was not only specifcally reflected in the relevant documents but the issue had also been specifcally gone into by the Assessing Offcer.

17. We have seen that a specifc query was raised by the Assessing Offcer during the scrutiny assessment proceedings as is reflected from the order-sheet dated 16th November 2016 whereby the Assessing Offcer had sought specifc details of claims made under class action suit (Rs.161.63 crore) and had sought

justifcation for its allowability.

The query so raised was responded to by the petitioner which was before the Assessing Offcer. Finally, an order of assessment came to be passed on 3rd January 2022 wherein the claim was not disallowed. It, therefore, is clear that the issue with regard to the claim of deduction on account of payment made to settle a class action suit was not so embedded in the documents as could not with due diligence have been noticed by the Assessing Offcer rather in this case, the claim had been noticed, queries raised, response called, which came to be furnished, and therefore, must be deemed to have been considered. In such a case, it cannot by any stretch of imagination, be said that there was any failure to disclose fully and truly any of the material facts.

18. The argument that the petitioner had failed to provide to the Assessing Offcer a copy of the plaint/suit fled against the petitioner before the Court in USA which it is alleged constitutes a failure on the part of the assessee to disclose fully and truly a material fact, in our opinion, does not at all impress or appeal to us in any manner. Nothing could have prevented the Assessing Offcer from calling for a copy of the pleadings which were fled before the Court in USA if at all it was found to be necessary. Therefore, the argument advanced clearly deserves to be rejected.

19. Mr. Mistri, learned senior counsel for the petitioner urged that the re-assessment is nothing but a change of opinion. It was contended that the Assessing Offcer could not be said to have any reason to believe that income had escaped assessment as there was no tangible material to come to a conclusion that there was an escapement of income from assessment and that in the garb of reopening the assessment, review would take place. It was also urged that there was no change of law and there was no new material on record which would have given the Assessing Offcer the basis for his reasons to believe that income had escaped assessment. This assertion, however, was met by Mr.Kumar, learned counsel for the revenue, who stated that there was

information received from the investigation wing of the department that the petitioner company had paid a penalty of Rs.161.63 crores which had not been shown in the annual report for the assessment year 2013-14 by the Directors and the Auditors and further that the penalty could not be shown as 'operational expenses' which has thus resulted in evasion of tax. According to the reasons recorded,

reassessment was justifed as the assessee had claimed the
deduction as allowable expenses and not as penalty. In other words, what is sought to be alleged is that what was paid was in fact a penalty and if it had been reflected so in the relevant documents during the course of assessment proceedings, the same would not have been allowed under section 37 of the Act.

20. The next question that arises for consideration is whether what was paid by the petitioner in terms of the agreement to settle the class action suit was actually a penalty. If it was not, even then, in our opinion, the case of the revenue would fail for purposes of reopening under section 147. To see as to whether the payment was a penalty or not, we need to refer to the relevant documents in the shape of the agreement executed between the claimants and the defendant-petitioner herein, as also the order passed by the Court

in USA. As per the agreement, an amount of Rs.29.75 million USD equivalent to Rs.161.63 crores was to be paid to the concerned employees. The United Sates District Court for the Northern District of California ('the US Court'), by virtue of its order dated 18th July 2013 , allowed the application and granted approval to the service

awards.

What is important to note here is that the order dated 18th July 2013 did not in the least reflect that there was any violation of law which had resulted in the payment of the employees in the class action much less has any such provision been specifcally referred to or identifed in the said order.

21. Contents of the agreement further reveal that the defendant petitioner herein, in the class action suit, did not at any point of time, admit any wrong doing or violation of any of the laws which were applicable to the litigating parties. On the other hand, the petitioner, as a defendant, while reiterating that it had strong defences on merits to the class action suit expressed a desire to settle the issues to avoid expense, risk and uncertainty of continuing the proceedings. The agreement further records as

under :

> "…..Nothing in this Agreement should be, is intended to be, or will be construed as an admission by Defendants of any wrongdoing, or that Plaintiff's claims in this Action have merit or that Defendants have any liability of Plaintiff's or the Class Members on those claims….."

22. On a reading of the settlement agreement as also the order of US Court it cannot remotely be suggested that the payment made

for settling the litigation was a penalty. A penalty, as defned by the Black Law Dictionary (9th Edition), is "punishment imposed on a

wrongdoer, usually in the form of imprisonment or fne."

23. According to Corpus Juris, penalty is imposed in exercise of the police powers of the legislature, which has the power to subject any particular violation to penalty and may go further and subject

the same violation to both a penalty and criminal prosecution.

It further draws a distinction between a penalty imposed for a civil obligation and a penalty imposed as a punishment for a crime. A civil penalty is stated to be a fne assessed for violation of a statute or regulation and includes a statutory penalty which is a

penalty imposed for a statutory violation.

A penalty imposed for a tax delinquency also has been held to be a civil obligation, remedial and coercive in its nature and is different from the penalty for a crime or a fne or forfeiture

provided as punishment for the violation of criminal or penal laws.

24. It can thus be seen that in a case of civil penalty payment of an amount as penalty can either be on account of a penalty clause which may either be paid voluntarily by a party if it abides strictly by the terms and conditions of the

contractual provision, and if not, the same may be enforced in an adjudicatory process by a Court or a statutory authority, in which case, the condition precedent would be a process of adjudication. In the present case there has certainly not been any 'assessment' of a fne to be paid as a penalty by any judicial, quasi judicial and/or statutory forum. However, there is no basis for us to hold that the amount paid for settling the class action suit was in fact an amount representing a predetermined penalty amount either on the basis of the agreement between the parties and much less from the order accepting the terms of settlement so

arrived at.

In the present case, a bald assertion made in the reasons recorded that what was paid was in fact was a penalty would not make the deduction liable to be disallowed in terms of Explanation – 1 to section 37 of the Act. For purposes of reference, Explanation to Section 37 envisages that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

Section 37 reads as under:

> 37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profts and gains of business or profession".
>
> [Explanation 1.- For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.
>
> [Explanation 2.- …….
> [Explanation 3.- …….

25. In fact if the settlement agreement and consequent payment made by the Petitioner were indeed in violation of any law, the same would certainly not have been accepted by the concerned Court in the U.S.. The fact that the settlement had the approval of the Court in the U.S. itself suggests that the payment made was for a lawful purpose. In any case we would fnd it perverse to even think or hold that an amount paid towards settling a civil class action suit would be either an offence or one prohibited by law so as to disallow a claim of deduction in terms of Explanation to Section 37 of the Act. In any case a penalty imposed for breach of a civil obligation would be outside the purview of the Explanation 1 to Section 37 of the Act. Admittedly, it is not the case of the revenue that the alleged penalty imposed upon the petitioner was a part of a sentence in criminal proceedings

which if it were, would certainly result in denying to the petitioner the beneft of the deductions claimed.

26. In Jindal Photo Films Ltd. V/s Deputy Commissioner of Income Tax [1] , the Court, in the light of the facts before it and in the background of section 147 of the Act, observed : "

> "…….all that the Income-tax Offcer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Offcer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is
>
> merely a fresh application of mind by the same Assessing offcer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Offcer. That order stands till today. What the Assessing Offcer has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Offcer to initiate proceedings under Section 147 of the Act.

[1] [1998] 234 ITR 170 (Delhi)

> It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Offcer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this Court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the suffciency or adequacy of the material available. However, the present one is not a case of testing the suffciency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Offcer to initiate the proceedings under Section 147/148 of the Act."

27. In the backdrop of aforementioned law as stated in Jindal Photo Films Ltd.(Supra) it can be seen that other than the information which was received by the A.O. from the DDIT (Investigation) Unit-2(4), Mumbai that the Petitioner had paid a penalty of Rs.161.63 crores in USA, there was no material available with the A.O. in support of such an information that the payment made was in fact 'as a result of a penalty imposed'. A plain piece of information without any cogent material in support thereof in our opinion would not justify the reopening of the assessment more so when the A.O. in the regular assessment under Section 143(3) of the Act had gone into the allowability of the claim for such a

deduction in the said assessment proceedings.

Apart from the bare information received by the A.O., there was no material received by the said A.O. as the same is not reflected in the reason so recorded

which would justify the reopening of the assessment, the A.O. in fact seeks to accord a fresh consideration to an issue which already stands concluded in the regular assessment proceedings.

28. A reference to the agreement would show that what was agreed to be paid was on account of a pure settlement between the parties. It was also made clear in the agreement that the settlement was being arrived at for purposes of avoiding expense, risk and uncertainty and further that the agreement would not be construed as an admission by the defendants of any wrongdoing or that the plaintiff's claim had any merit or that the defendants have any liability to the plaintiffs or class members on those claims. The agreement also reflects that the same would not be construed as an admission of wrongdoing or liability on the part of any party to the said agreement. Even the order passed by the Court recording approval to the said agreement did not even in the least refer the amount payable in any manner as a penalty amount.

29. We are therefore of the view that the A.O. had no reason to believe that the payment made towards settlement of the class action suit was a payment towards a penalty imposed and on that account we hold that there was no reason for the A.O. to believe that income had escaped assessment.

In the light of the above to hold that what was paid by the petitioner was a penalty, in fact, would be without any basis and aimed at reviewing an order passed earlier by the Assessing Offcer who had specifcally gone into the allowability of the claim. We also have no hesitation in holding that a mere assertion in the absence of any material would not constitute a 'tangible material' for purposes of reopening an assessment.

30. In our opinion, therefore, there would be no basis for the Assessing Offcer for forming his reason to believe and the basis so reflected on the face of it appears to us to be totally perverse.

31. Be that as it may, we allow this petition. The impugned notice dated 31st March, 2021 under Section 148 and the impugned order dated 03rd January, 2022 are set aside.

(KAMAL KHATA, J.) (DHIRAJ SINGH THAKUR, J.)