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THE 2<sup>nd</sup> KIIT UNIVERSITY NATIONAL MOOT COURT COMPETITION, 2014

05<sup>TH</sup> – 07<sup>TH</sup> SEPTEMBER 2014

MOOT PROBLEM: I

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**Cheetah & Chetak Pvt. Ltd -- Petitioner**

vs.

**Income tax authority -- Respondent**

Zeon is a private company incorporated in the Cayman Islands but carries on its software business primarily through Singapore. However, Zeon has not been able to obtain a Tax Residency Certificate from Singapore, in order to claim Singapore tax residency for Indian tax purposes. Zeon is an IT & ITES company, having several employees across the world, including India. Zeon had presence in India through a liaison office. The Indian liaison office is primarily engaged in liaising with potential clients, and provided them with presentations that discussed the various software products that Zeon has to offer.

After many years of perseverance, hard work and dedication, Zeon has designed software which has the possibility of changing how the world thinks. The software, called Neo, was the most revolutionary product that the human resource industry has seen. The software was in the nature of shrink-wrapped software. The software could predict how well a new recruit would perform in an organization that was going to hire him/her. Incidental to this, the software also predicted how well the employee would blend in the organization with respect to the culture, values etc. of the organization.

In AY 2003-04, an Indian manufacturing private limited company (Cheetah & Chetak Private Limited), having its registered office in Mumbai decided to buy this software as it was facing some issues with the employees that it was hiring. An agreement was entered into between the manufacturing company and Zeon for purchase of software (“**Agreement**”). After negotiations, the price of the software was fixed for INR 35,00,000. However, there was a slight catch - the payment for



the software was on a year on year basis and thus every year the manufacturing company paid Zeon the agreed sum of INR 35,00,000. No TDS was deducted by the manufacturing company at the time of making payments.

Some key terms of the Agreement were as follows:

*“LICENCE AGREEMENT between Zeon (licensor) and Cheetah & Chetak Private Limited (licensee).*

## *2. GRANT, SUPPLY AND USE OF LICENCE*

*a) Zeon grants Licensee a non-exclusive, non-transferable licence to use the software in accordance with this Agreement. The licence is perpetual in nature.*

*b) Any third party software incorporated in the software is licensed only for use with the software.*

*c) Zeon will supply one copy of the software for each site and, when applicable, one set of support information to the Licensee. Licensee shall pay Zeon a fee for additional copies of any printed support information supplied by Zeon.*

*d) Licensee may make one copy of the software and associated support information for backup purposes, provided that the copy shall include Zeon's copyright and other proprietary notices. All copies of the Software shall be the exclusive property of Zeon.*

*f) The Software shall be used only for Licensee's own business and shall not, without prior written consent from Zeon:*

*(i) be loaned, rented, sold, sublicensed or transferred to any third party*

*(ii) used by any parent, subsidiary or affiliated entity of Licensee*

*(iii) Used for the operation of a service bureau or for data processing.*

*g) Licensee is also granted an educational licence, and thus the Software may only be used for instruction or research purposes and not for any commercial purposes.*

*h) Licensee may not copy, decompile, disassemble or reverse-engineer the Software without Zeon's written consent. The Licensee's rights shall not be restricted by this Clause 2(h) to the extent that local law grants Licensee a right to do so for the purpose of achieving interoperability with other software and in addition thereto Zeon undertakes to make information relating to interoperability available to Licensee subject to such reasonable conditions as Zeon may from time to time impose including a reasonable fee for doing so. To ensure Licensee receives the appropriate information, Licensee must first give Zeon*



*sufficient details of its objectives and the other software concerned. Requests for the appropriate information should be directed to the Vice president Technical of Zeon.*

### **3. LICENCE FEES, PAYMENT AND TAXES**

*a) Licensee shall pay Zeon a fee for the use of the Software as agreed in the order.*

*b) All licence fees are exclusive of and net of any taxes, duties or other such additional sums including, but without prejudice to the foregoing generality, value added/purchase tax, excise tax (tax on sales, property or use), import or other duties and whether levied in respect of this Agreement, the Software its use or otherwise. All such taxes shall be the responsibility of the Licensee and shall be payable in addition to the licence fee.*

### **4. OWNERSHIP, INTELLECTUAL PROPERTY AND INDEMNITY**

*a) All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Zeon. Zeon warrants that it has the power to grant the licence rights contained in this Agreement.”*

The manufacturing company filed its income tax return regularly without delays. For AY 03-04 and 04-05 assessment order under Section 143(3) of the Income Tax Act, 1961 was passed. For AY 2005-06, assessment was completed under Section 143(1) and for the AYs 2006-07, 2007-08, 2008-09 it was completed under 143(3). The assessing officer had accepted the returns and the transaction with Zeon in all these years. However, on July 4, 2014, the assessing officer sent a notice under Section 148 to Cheetah & Chetak Private Limited. The assessing officer disallowed the deduction claimed for payments made for these AYs and sort to recover Rs. 50 lacs from the assessee. The reason cited by the assessing officer for all these years was that payments made by the Indian manufacturer constituted ‘royalty’ under section 9 of the Income tax Act, 1961, and thus tax should have been withheld at the rate of 25% for all these years, while making payment to Zeon for the software. The manufacturing company was also being charged under the ITA as an ‘assessee-in-default’. Aggrieved by all that was happening, the assessee decided to file a writ petition in the High Court of Bombay for all the AYs for which it had received a 148 notice. The main contention of the assessee was that the re-opening was bad in law.



Some points to be kept in mind:

- At the time when the assessments for the earlier AYs were taking place, the assessee co-operated with the tax department and provided it with all documents as and when the assessing officer asked.
- Since the matter in hand was the same for all years, a single writ petition was filed for all the AYs.

**TEAMS ARE ALLOWED TO FRAME THEIR OWN ISSUES ON THE BASIS OF THE  
MOOT PROBLEM**