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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 692/2016

PRINCIPAL COMMISSIONER OF INCOME TAX-6 ...Appellant
Through: Mr. Rahul Chaudhary, Senior standing
counsel.

Versus

MEENAKSHI OVERSEAS PVT. LTD. Respondent
Through: Mr. Kapil Goel, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE CHANDER SHEKHAR

ORDER

26.05.2017

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Dr. S. Muralidhar, J.

1. This appeal under Section 260A of the Income Tax Act, 196 ('Act') by the Revenue is directed against the impugned order dated 22nd March, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3148/Del2013 for the Assessment Year ('AY') 2004-05.

2. Admit.

3. The following question of law is framed for consideration:

Whether the ITAT erred in law and on facts in quashing the assessment proceedings under Section 147/148 of the Act?

4. The facts in brief are that the Assessee, Meenakshi Overseas Private Limited, filed its return of income on 30th October, 2004 for the AY 2004-05 declaring its income as Rs. 2,050. The return was processed under Section 143(1) of the Act on 25th November, 2004.

5. It is stated that information was received from the Director of Income Tax (Investigation), New Delhi [‘DIT(I)’] that during the year under consideration, the Assessee had received accommodation entries. Notice under Section 148 of the Act was issued after taking approval from the Additional Commissioner of Income Tax (‘ACIT’) under Section 151(1) of the Act. Notice under Section 148 of the Act was thus issued on 23rd/24th March, 2011 after recording the reasons for re-opening of the assessment.

6. The said reasons as recorded by the Assessing Officer (‘AO’) read as under:

“Reasons for the belief that income has escaped assessment:

In this case, information has been received from the Director of Income Tax, (Investigation) New Delhi that the Assessee has received amount of Rs. 5,00,000/- as follows:

Beneficiary’s Name	Meenakshi Overseas P. Ltd.
Beneficiary Bank Name	State Bank of Hyderabad
Beneficiary Bank Branch	Karol Bagh
Value of entre taken	500,000
Instrument no. by which entry taken	8628
Date on which entry taken	31.03.2004
Name of A/c Holder of entry giving account	Shubham Electronic & Electric

Bank from which entry given SBH
Branch of entry given bank KB
A/c No. Entry giving account 50038

Information so received has been gone through. The above said instruments are in the nature of accommodation entry, which the Assessee has taken after paying unaccounted cash to the accommodation entry given, who is a known entry operator as per the report of the Investigation Wing. In view of these facts, the alleged transaction is not the bonafide one. Therefore, I have reason to believe that an income of Rs. 5,00,000 has escaped assessment in the AY 2004-05 due to failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment so far as this amount is concerned. Therefore, this case is fit for issuing notice under Section 148 of the Income Tax Act, 1961 . In this case the assessment was made under Section 143 (1) not under Section 143 (3) of the IT Act, 1961.

I am therefore, satisfied that the said income, on account of accommodation entry worth Rs. 5,00,000 received by the Assessee has escaped assessment and accordingly after recording the above said reasons as laid down under the provisions of Section 148 (2) of the Income Tax Act, 1961 under Section 148 is being issued.”

7. In response to the said notice served on it, the Assessee wrote a letter dated 25th April, 2011 stating that the original return of income under Section 139 of the Act be treated as return filed in compliance with the notice under Section 148 of the Act.

8. An assessment order was passed by the AO on 30th November 2011 under Section 143 (3) read with Section 147 of the Act treating the credit received from Shubham Electronics & Electricals Pvt Ltd. as unexplained income under Section 68 of the Act. Besides from the statement of the

Assessee's bank account it was found that there were other credit entries that “remained unverified, unsubstantiated and unexplained.” As a result, “an amount of Rs. 74,50,000 after including Rs. 5,00,000 in respect of Subham Electricals Pvt. Ltd.” was treated as unexplained credits under Section 68 of the Act and added to the total income of the Assessee as income from undisclosed sources.

9. The Assessee then appealed before the Commissioner of Income Tax (Appeals) [‘CIT(A)’] which appeal was dismissed by an order dated 12th February, 2013.

10. Thereafter, the Assessee filed an appeal before the ITAT. In the first round, the ITAT by an order dated 18th March, 2015 held that the requisite sanction had not been obtained by the AO from the Competent Authority under Section 151 of the Act and, therefore, invalidated the re-opening of the assessment under Section 147/148 of the Act. The Revenue’s appeal against the said order of the ITAT was allowed by this Court. The appeal of the Assessee was restored to the file of the ITAT to consider the other grounds relating to the validity viz., ground Nos. 1(a) to 1(d).

11. Therefore, in the impugned order dated 22nd March 2016, only those grounds were considered by the ITAT.

12. Perusing the reasons for re-opening of the assessment in the present case, the ITAT came to the conclusion that it was apparent that the AO proceeded to send a notice under Section 147/148 of the Act “solely on the basis of information received from the DIT(I).” After writing about

information received, the AO “jumped to the conclusion that said tabulated instrument are in the nature of accommodation entry.” This was done without further verification, examination or any other exercise. The ITAT also noted that the AO “has not mentioned nature of transaction which was effected for alleged accommodation entry and even without mentioning the date of recording of reasons.” Following the decision of this Court in ***Commissioner of Income Tax v. G&G Pharma (2015) 384 ITR 147 (Del.)***, the ITAT held that the AO had not applied his mind at the time of initiating the proceedings of reassessment under Section 147 of the Act. The ground Nos. 1(a) to 1(d) of the Assessee’s appeal were, accordingly, allowed.

13. Mr. Rahul Chaudhary, learned Senior standing counsel appearing for the Revenue submitted that as the original return was processed under Section 143(1) of the Act, the Revenue was only to demonstrate the existence of tangible material which formed the basis of formation of a belief by the AO that the income had escaped assessment. This tangible material was in the form of an investigation report of the DIT(I) which was mentioned in the reasons for re-opening the assessment. Relying on the decisions in ***Signature Hotels Pvt. Ltd. v. Income Tax Officer (2011) 338 ITR 51 (Del)***, ***AGR Investment Ltd. v. Additional Commissioner of Income Tax (2011) 336 ITR 146 (Del.)***, ***AG Holding v. Income Tax Officer (2013) 352 ITR 364 (Del)***, Mr. Chaudhary submitted that the adequacy or sufficiency of the material of the basis on which the belief was formed by the AO for re-opening of the assessment could not be enquired into at this stage.

14. Mr Chaudhary referred to the fact that it became apparent in the assessment proceedings that credible information was received in the case of one Mr. Mahesh Garg, accommodation entry provider. Statements were made during investigation by former directors who admitted that Mr Garg was providing accommodation entries to various persons including the Assessee. This itself shows the formation of belief by the AO that the escaped assessment was justified.

15. Countering the above submissions, Mr. Kapil Goel, learned counsel for the Respondent/Assessee first pointed out that the Court is not obliged to examine the reasons with reference of any material that may be disclosed subsequently by the Revenue either at the stage of considering the objections by the Assessee to the reopening or during the re-assessment proceedings. The reasons for the reopening as penned by the AO had to speak for themselves. Secondly, it is submitted that the reasons recorded by the AO in the present case were based on a 'borrowed satisfaction' and on the directions of the Investigation Wing without any independent application of mind. The crucial link between the material and the formation of the belief was missing. Thirdly, it is submitted that in **G&G Pharma** (*supra*) this Court dealt with a similar instance of reopening of an assessment by the AO on the basis of the report of the DIT(I) without making any effort to discuss the material on the basis of which such belief was formed. The reopening was invalidated by this Court and its decision was accepted by the Revenue since no Special Leave Petition was filed by it.

16. Relying on the decision in ***Union of India v. Kaumudini Narayan Dalal (2001) 10 SCC 231***, ***Commissioner of Income Tax v. Narendra Doshi (2004) 2 SCC 81***, ***Berger Paints India Limited v. Commissioner of Income Tax, Calcutta (2004) 12 SCC 42*** and ***Commissioner of Income Tax v. Shivsagar Estate (2004) 9 SCC 420*** Mr Goel submitted that once the Revenue did not challenge the correctness of the law laid down by the High Court and accepted it in case of one Assessee, it was not open to the Revenue to challenge its correctness in the case of another Assessee “without just cause.”

17. In support of his contention that the information received from the Investigation Wing cannot constitute tangible material for re-opening the assessment without the Assessee being informed what in the report of the investigation wing constituted tangible material for forming a belief, Mr Goel placed reliance on the decisions in ***CIT v. SFIL Stock Broking Limited (2010) 325 ITR 285 (Del.)***, ***Sarthak Securities Co. Pvt. Ltd. v. ITO (2010) 329 ITR 110 (Del.)***, ***Signature Hotels Pvt Ltd v. ITO (supra)***, ***CIT v. Insecticides (India) Limited (2013) 357 ITR 330 (Del.)*** and ***Krown Agro Foods (P) Ltd v. Assistant Commissioner of Income Tax, Circle 5(1) (2015) 375 ITR 460 (Del.)***. Reliance was also placed on the decision of this Court dated 19th November, 2015 in ITA No. 108 of 2013 (***Commissioner of Income Tax-IV v. Independent Media P. Limited***), ***Oriental Insurance Company Limited v. Commissioner of Income Tax (2015) 378 ITR 421 (Del.)***, ***Rustagi Engineering Udyog (P.) Limited v. DCIT (2016) 382 ITR 443 (Del.)***, ***Agya Ram v. CIT (2016) 386 ITR 545 (Del.)*** and ***Rajiv Agarwal***

v. ACIT (decision dated 16th March, 2016 in Writ Petition (Civil) No. 9659 of 2015).

18. It must be noted at the outset that by an order dated 4th November, 2016, this Court had directed that “the file by which reasons to believe for the escapement of income was recorded by the AO for the purpose of reassessment shall be produced for consideration by the Court.” The said file has been produced today by Mr. Chaudhary, learned counsel for the Revenue. It is seen that the reasons recorded by the AO for re-opening the assessment has been extracted verbatim by the ITAT in para 2 of the impugned order.

19. A perusal of the reasons as recorded by the AO reveals that there are three parts to it. In the first part, the AO has reproduced the precise information he has received from the Investigation Wing of the Revenue. This information is in the form of details of the amount of credit received, the payer, the payee, their respective banks, and the cheque number. This information by itself cannot be said to be tangible material.

20. Coming to the second part, this tells us what the AO did with the information so received. He says: “The information so received has been gone through.” One would have expected him to point out what he found when he went through the information. In other words, what in such information led him to form the belief that income escaped assessment. But this is absent. He straightaway records the conclusion that “the abovesaid instruments are in the nature of accommodation entry which the Assessee had taken after paying unaccounted cash to the accommodation entry given

(sic giver)". The AO adds that the said accommodation was "a known entry operator" the source being "the report of the Investigation Wing".

21. The third and last part contains the conclusion drawn by the AO that in view of these facts, "the alleged transaction is not the *bonafide* one. Therefore, I have reason to believe that an income of Rs. 5,00,000 has escaped assessment in the AY 2004-05 due to the failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment..."

22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.

23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a

reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

25. At this stage it requires to be noted that since the original assessment was processed under Section 143 (1) of the Act, and not Section 143 (3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.

26. The first part of Section 147 (1) of the Act requires the AO to have “reasons to believe” that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a *quasi* judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the

report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre-condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment.

27. Each case obviously turns on its own facts and no two cases are identical. However, there have been a large number of cases explaining the legal requirement that requires to be satisfied by the AO for a valid assumption of jurisdiction under Section 147 of the Act to reopen a past assessment.

28.1 In ***Signature Hotels Pvt. Ltd. v. Income Tax Officer*** (*supra*), the reasons for reopening as recorded by the AO in a proforma and placed before the CIT for approval read thus:

"11. Reasons for the belief that income has escaped assessment.- Information is received from the DIT (Inv.-1), New Delhi that the assessee has introduced money amounting to Rs. 5 lakh during the F.Y. 2002-03 relating to A.Y. 2003-04. Details are contained in Annexure. As per information amount received is nothing but accommodation entry and assessee is a beneficiary."

28.2 The Annexure to the said proforma gave the Name of the Beneficiary, the value of entry taken, the number of the instrument by which entry was taken, the date on which the entry was taken, Name of the account holder of the bank from which the cheque was issued, the account number and so on.

28.3 Analysing the above reasons together with the annexure, the Court observed:

"14. The first sentence of the reasons states that information had been received from Director of Income-Tax (Investigation) that the petitioner had introduced money amounting to Rs. 5 lacs during financial year 2002-03 as per the details given in Annexure. The said Annexure, reproduced above, relates to a cheque received by the petitioner on 9th October, 2002 from Swetu Stone PV from the bank and the account number mentioned therein. The last sentence records that as per the information, the amount received was nothing but an accommodation entry and the assessee was the beneficiary.

15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information received from the Director of Income-Tax (Investigation) and arrive at a belief whether or not any income had escaped assessment."

28.4 The Court in ***Signature Hotels Pvt. Ltd. v. Income Tax Officer*** (*supra*) quashed the proceedings under Section 148 of the Act. The facts in the present case are more or less similar. The present case is therefore covered against the Revenue by the aforementioned decision.

29.1 The above decision can be contrasted with the decision in ***AGR Investment v. Additional Commissioner of Income Tax*** (*supra*), where the 'reasons to believe' read as under:

"Certain investigations were carried out by the Directorate of Investigation, Jhandewalan, New Delhi in respect of the bogus/accommodation entries provided by certain individuals/companies. The name of the assessee figures as one of the beneficiaries of these alleged bogus transactions given by the Directorate after making the necessary enquiries. In the said information, it has been inter-alia reported as under:

"Entries are broadly taken for two purposes:

1. To plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc., in the form of gifts, share application money, loans etc.
2. To inflate expense in the trading and profit and loss account so as to reduce the real profits and thereby pay less taxes.

It has been revealed that the following entries have been received by the assessee:...."

29.2 The details of six entries were then set out in the above 'reasons'. These included name of the beneficiary, the beneficiary's bank, value of the entry taken, instrument number, date, name of the account in which entry was taken and the account from where the entry was given the details of those banks. The reasons then recorded:

"The transactions involving Rs. 27,00,000/-, mentioned in the manner above, constitutes fresh information in respect of the assessee as a beneficiary of bogus accommodation entries provided to it and represents the undisclosed income/income from other sources of the

assessee company, which has not been offered to tax by the assessee till its return filed.

On the basis of this new information, I have reason to believe that the income of Rs. 27,00,000/- has escaped assessment as defined by section 147 of the Income Tax Act. Therefore, this is a fit case for the issuance of the notice under section 148."

29.3 The Court was not inclined to interfere in the above circumstances in exercise of its writ jurisdiction to quash the proceedings. A careful perusal of the above reasons reveals that the AO does not merely reproduce the information but takes the effort of revealing what is contained in the investigation report specific to the Assessee. Importantly he notes that the information obtained was 'fresh' and had not been offered by the Assessee till its return pursuant to the notice issued to it was filed. This is a crucial factor that went into the formation of the belief. In the present case, however, the AO has made no effort to set out the portion of the investigation report which contains the information specific to the Assessee. He does not also examine the return already filed to ascertain if the entry has been disclosed therein.

30.1 In ***Commissioner of Income Tax, New Delhi v. Highgain Finvest (P) Limited (2007) 164 Taxman 142 (Del)*** relied upon by Mr. Chaudhary, the reasons to believe read as under:

"It has been informed by the Additional Director of Income Tax (Investigation), Unit VII, New Delhi vide letter No. 138 dated 8th April 2003 that this company was involved in the giving and taking bogus entries/ transactions during the financial year 1996-97, as per the deposition made before them by Shri Sanjay Rastogi, CA during a survey operation conducted at his office premises by the Investigation

Wing. The particulars of some of the transaction of this nature are as under:

Date	Particulars of cheque	Debit Amt.	Credit Amt
18.11.96	305002	5,00,000	

Through the Bank Account No. CA 4266 of M/s. Mehram Exports Pvt. Ltd. in the PNB, New Rohtak Road, New Delhi.

Note: It is noted that there might be more such entries apart from the above.

The return of income for the assessment year 1997-98 was filed by the Assessee on 4th March 1998 which was accepted under Section 143 (1) at the declared income of Rs. 4,200. In view of these facts, I have reason to believe that the amount of such transactions particularly that of Rs. 5,00,000 (as mentioned above) has escaped the assessment within the meaning of the proviso to Section 147 and clause (b) to the Explanation 2 of this section.

Submitted to the Additional CIT, Range -12, New Delhi for approval to issue notice under Section 148 for the assessment year 1997-98, if approved.”

30.2 The AO was not merely reproducing the information received from the investigation but took the effort of referring to the deposition made during the survey by the Chartered Accountant that the Assessee company was involved in the giving and taking of bogus entries. The AO thus indicated what the tangible material was which enabled him to form the reasons to believe that income has escaped assessment. It was in those circumstances that in the case, the Court came to the conclusion that there was *prima facie* material for the AO to come to the conclusion that the Assessee had not made a full and true disclosure of all the material facts relevant for the assessment.

31. In ***Commissioner of Income Tax v. G&G Pharma*** (*supra*) there was a similar instance of reopening of assessment by the AO based on the information received from the DIT (I). There again the details of the entry provided were set out in the 'reasons to believe'. However, the Court found that the AO had not made any effort to discuss the material on the basis of which he formed *prima facie* view that income had escaped assessment. The Court held that the basic requirement of Section 147 of the Act that the AO should apply his mind in order to form reasons to believe that income had escaped assessment had not been fulfilled. Likewise in ***CIT-4 v. Independent Media P. Limited*** (*supra*) the Court in similar circumstances invalidated the initiation of the proceedings to reopen the assessment under Section 147 of the Act.

32. In ***Oriental Insurance Company Limited v. Commissioner of Income Tax*** 378 ITR 421 (Del) it was held that “therefore, even if it is assumed that, in fact, the Assessee’s income has escaped assessment, the AO would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under Section 147 of the Act would not arise.”

33. In ***Rustagi Engineering Udyog (P) Limited*** (*supra*), it was held that “...the impugned notices must also be set aside as the AO had no reason to believe that the income of the Assessee for the relevant assessment years had escaped assessment. Concededly, the AO had no tangible material in regard to any of the transactions pertaining to the relevant assessment years.

Although the AO may have entertained a suspicion that the Assessee's income has escaped assessment, such suspicion could not form the basis of initiating proceedings under Section 147 of the Act. A reason to believe – not reason to suspect – is the precondition for exercise of jurisdiction under Section 147 of the Act. “

34. Recently in **Agya Ram v. CIT** (*supra*), it was emphasized that the reasons to believe "should have a link with an objective fact in the form of information or materials on record..." It was further emphasized that “mere allegation in reasons cannot be treated equivalent to material in eyes of law. Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessments.”

35. In the decision of this Court dated 16th March 2016 in W.P. (C) No. 9659 of 2015 (**Rajiv Agarwal v. CIT**) it was emphasized that “even in cases where the AO comes across certain unverified information, it is necessary for him to take further steps, make inquiries and garner further material and if such material indicates that income of an Assessee has escaped assessment, form a belief that income of the Assessee has escaped assessment.”

36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'.

The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law.

38. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue. The appeal is, accordingly, dismissed but with no orders as to costs.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 26, 2017/Rm