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IN THE HIGH COURT OF DELHI

CWP No.5746/02 & CM 9769/02

Date of Decision: 10th October 2002

M/s.United Electrical Company P. Ltd.....Petitioner

through: Mr.M.S.Syali, Sr.Advocate
with Mr.Satyen Sethi and
Mr.Manu K.Giri, Advocates

Versus

The Commissioner of Income-Tax & Ors.....Respondents

through: Mr.R.D.Jolly, Sr.Standing
Counsel with Mr.Ajay Jha,
Advocate

CORAM:

THE HON'BLE MR.JUSTICE D.K.JAIN
THE HON'BLE MS.JUSTICE SHARDA AGGARWAL

1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ? Yes

3. Whether the judgment should be reported in the Digest ?

D.K.JAIN,J.

Rule D.B.

2. Since a very short point is involved, with the consent of counsel for the parties we take up the matter for final disposal.

3. Challenge in this writ petition under Article 226 of the Constitution of India is to the notice, dated 30 April 2002, issued under Section 148 of the Income-tax Act, 1961 (for short the Act) by the

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Income-tax Officer, respondent No.3 herein, seeking to re-open the assessment of the petitioner company for the assessment year 1996-97.

4. The petitioner company is engaged in the business of manufacturing of electrical goods. It filed its return of income for the assessment year 1996-97 on 30 November 1996, declaring an income of Rs.9,26,867/-. The return of income was accompanied by the statement of assessable income, various other documents and annexures, including the statutory tax audit report and the list of loans taken during the relevant previous year. One of the loans, for Rs.7,40,000/-, raised by the petitioner was from a concern M/s.Visa Fincap Limited, New Delhi. According to the petitioner, the loan was taken on two different dates through account payee cheques; the sum of Rs.33,860/- was paid/credited as interest on the said amount during the relevant period; tax was deducted at source on the said amount which was paid to the credit of the Central Government; and the loan was repaid in April 1997 by account payee cheque.

5. It seems that since notice under Section 143(2) of the Act was not received by the petitioner within 12 months from the date of filing of the return, it was taken that the return had been accepted. On 5 May 2002, the petitioner received the impugned notice under Section 148 of the Act. Pursuant thereto, the

petitioner filed its return declaring the same income which had been declared in the original return filed under Section 139(1) of the Act. Vide letter dated 18 June 2002, the petitioner requested the Assessing Officer to supply a copy of the reasons recorded for reopening the assessment, which was done. Since the entire controversy revolves around the reasons for re-opening the assessment, for the sake of ready reference, these are reproduced hereunder:

> "An intimation has been received from the Assessing Officer having jurisdiction over M/s. Visa Fincap Ltd A-1, Laxmi Kunj, Sector 13, Rohini, Delhi. It has been stated that M/s.Visa Fincap Ltd has given loan of Rs.7,40,000 to M/s.United Electric Company (Delhi) (P) Ltd. Shri Vijay Kumar Jain, the Director of M/s.Visa Fincap Ltd has admitted in his statement recorded on oath u/s 131 of the I.T.Act by the Assessing Officer, Ward 17(4) New Delhi that the loan transaction with the assessee coy i.e. M/s.United Electric Co.(Delhi) is not genuine. Shri Vijay Kumar Jain also admitted that the assessee Co. M/s.United Electric Co.(Delhi) had given cash to M/s.Visa Fincap Ltd and the same amount was deposited into the bank by it and thereafter a cheque of equal amount was issued to the assessee coy M/s.United Electric Co (Delhi) (P) Ltd and entry of loans were recorded in the account books. Similarly before liquidating the loans, the assessee company issued cheque in the name of M/s.Visa Fincap Ltd, which was deposited into the bank and thereafter the cash of equal amount was withdrawn from the bank and was given to the assessee company.
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> I have reason to believe that income chargeable to tax of Rs 7,40,000/- has escaped assessment within the meaning of section 147 explanation 2(b) of I.T.Act.

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Submitted to Addl. CIT, Range 18 with request to accord approval for issue of notice u/s 148 read with section 151(2) of I.T.Act.

(Underlined for emphasis)

Sd/-
(Sugan Chand Mittal)
ITO, Ward 18(1) New Delhi

Yes, I am satisfied that it is a fit case for issue of notice u/s 148 of the I.T.Act.

sd/-
(N.K.Sharma)
Addl.Commissioner of Income-tax,
Range 18, New Delhi"

6. Since the purported belief of the Assessing Officer was based on the statement of one Mr.V.K.Jain, the Assessing Officer was requested to supply a copy thereof, which was supplied to the petitioner.

7. Alleging that in his statement, recorded under Section 131 of the Act, the said V.K.Jain had nowhere stated that loan given to the petitioner was bogus, no adverse inference could be drawn against the petitioner towards the loan transaction and, therefore, no "reasons to believe" existed with the Assessing Officer to initiate proceedings under Section 147/148 of the Act, the present petition was filed for quashing of notice dated 30 April 2002.

8. We have head Mr.M.S.Syali, learned senior counsel for the petitioner and Mr.R.D.Jolly, learned senior standing counsel for the Revenue, who has put in appearance on advance notice. The record of the

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Assessing Officer has also been produced before us by Mr.Jolly and we have perused the same.

9. The main thrust of Mr.Syali's argument is that the foundation for the belief of the Assessing Officer that petitioner's income has escaped assessment is based on the statement of V.K.Jain, wherein he is alleged to have stated that loan given by M/s.Visa Fincap to the petitioner is bogus, whereas the copy of the statement of V.K.Jain, supplied to the petitioner by the Assessing officer, does not show any such confession. Learned counsel would submit that the Assessing Officer having solely relied on the said statement for his requisite belief, the entire proceedings for re-opening the assessment have no legal foundation. Mr.Jolly, learned counsel for the Revenue, on the other hand, has submitted that power of re-opening the assessment under the amended Section 147 being very wide, the Assessing Officer is justified in re-opening the assessment in order to investigate into the genuineness of the transaction between the petitioner and the said Visa Fincap.

10. Having considered the matter in the light of the material available on the record produced, we are of the view that the petition deserves to succeed.

11. Section 147 of the Act authorises the Assessing Officer to assess or re-assess income chargeable to tax, if he has reason to believe that the said income for any

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assessment year has escaped assessment. The power conferred under the said Section, particularly after 1 April 1989, is no doubt very wide but it cannot be said to be plenary. True, the amended provisions of Section 147 are contextually different from the pre-1989 provision, inasmuch as the cumulative conditions spelt out in clause (a) of old Section 147 namely, that income chargeable to tax had escaped assessment by reason of: (i) omission or failure on the part of the assessee to make a return of his income under Section 139 of the Act for any assessment year or (ii) failure to disclose fully and truly all material facts necessary for his assessment for that year, are not present in the new main Section but the crucial expression "reason to believe" still exists in the new provision. The amended Section 147 provides that where the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of Sections 148 to 153 and assess or re-assess the income which has escaped assessment. For the present purpose, only sections 148 and 151 are relevant. Sub-section (2) of Section 148 of the Act mandates that before issuing notice to the assessee under sub-section (1), for filing the return, the Assessing Officer shall record his reasons for doing so. Therefore, formation of reason to believe and recording of reasons are imperative before the Assessing Officer

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can re-open the completed assessment. Proviso to sub-section (1) of Section 151 of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under Section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-built safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment.

12. In Bawa Abhai Singh v. Deputy Commissioner of Income-tax (2002) 252 ITR 83, a Division Bench of this Court, speaking through Chief Justice Arijit Pasayat (as his Lordship then was), has said that the crucial expression "reason to believe" predicates that the Assessing Officer must hold a belief .....by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons, inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information.

13. In Ganga Saran & Sons P. Ltd v. Income Tax Officer & Ors. (1981) 130 ITR 1 SC, their Lordships of the Supreme Court, inter alia, observed that the expression "reason to believe" is stronger than the

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expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational or arbitrary. Alternatively put, it must be reasonable and must be based on reasons which are material.

14. Thus, existence of tangible material, for the formation of opinion is a pre-requisite for initiation of action under Section 147 of the Act. Therefore, what Section 147 of the Act postulates is that the Assessing Officer must have reason to believe that income has escaped assessment. There should be facts before him that reasonably give rise to the belief, but the facts on the basis of which he entertains the belief need not at this stage be rebuttably conclusive to support his tentative conclusion. In case of challenge, it is open to the Court to examine whether there was material before the Assessing Officer, having rational connection or relevant bearing to the formation of the belief that is claimed to have been held at the time when he issued the notice. But the Court cannot for the purpose of ascertaining validity of the notice examine the sufficiency of the reasons for the belief (See: (S.Narayanappa & Ors. v. Commissioner of Income-tax, Bangalore (1967) 63 ITR 219).

15. Explaining the scope of the expression "information", in the background of Section 132 of the Act, which logic is equally applicable to a case under Section 147 of the Act, in L.R.Gupta & Ors. v. Union

of India & Ors. (1992) 194 ITR 32, a Division Bench of this Court observed thus:

> "The expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorising officer can have reason to believe that action under Section 132 is called for for any of the reasons mentioned in clauses (a), (b) or (c). When the action of issuance of an authorisation under Section 132 is challenged in a court, it will be open to the petitioner to contend that on the facts or information disclosed, no reasonable person could have come to the conclusion that action under section 132 was called for. The opinion which has to be formed is subjective and, therefore, the jurisdiction of the Court to interfere is very limited. A court will not act as an appellate authority and examine meticulously the information in order to decide for itself as to whether action under section 132 is called for. But the court would be acting within its jurisdiction in seeing whether the act of issuance of an authorisation under Section 132 is arbitrary or mala fide or whether the satisfaction which is recorded is such which shows lack of application of mind of the appropriate authority. The reason to believe must be tangible in law and if the information or the reason has no nexus with the belief or there is no material or tangible information for the formation of the belief, then, in such a case, action taken under section 132 would be regarded as bad in law."
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> (emphasis supplied)

16. It is, thus, trite, that when a challenge is made to the action under Section 147 of the Act what the court is required to examine is whether some material exists on record for the Assessing Officer to form the

requisite belief and the reasons for the belief have a rational nexus or a relevant bearing to the formation of such belief and are not extraneous or irrelevant for the purpose of the said Section. But the sufficiency of the grounds, which induced the Assessing Officer to act under the said section is not a justiciable issue.

17. In the instant case, as noticed above, the respondents have produced before us the original file containing the satisfaction note of the Assessing Officer as also a copy of the statement of V.K.Jain. Copy of the statement supplied to the petitioner is the same as is available on the file of the Assessing Officer. On a careful perusal of the statement, we find that, the facts mentioned in the "reasons" are de hors the facts available on record. The relevant portion of the statement of V.K.Jain, dated 18 February 2002, reads as under:

> "Q.5 Can you give the names & addresses of the above persons from whom you were receiving cash & giving entries thereafter ?
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> Ans. The names & addresses of the person concerned are the same as shown as loan creditors in the balance sheet filed during the assessment year 1995-96. At present the list along with addresses is not available with me. It will be provided on the next date of hearing. To reconcile the above amount sometimes my along with the name of my wife were also used."

18. Evidently, the statement is too general. It does not mention any name much less the name of the

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petitioner. It is not the stand of the respondents that a list of the creditors, which included the name of the petitioner, was furnished by V.K.Jain subsequently and the same was forwarded to the Assessing Officer of the petitioner. Applying the aforenoted settled principles, governing an action under Section 147 of the Act, we have no hesitation in holding that there was no information on record, which could provide foundation for the Assessing Officer's belief that petitioner's transaction with M/s.Visa Fincap Limited was not genuine and its income had escaped assessment on that account. Therefore, the impugned action of the Assessing Officer cannot be sustained.

19. What disturbs us more is that even the Additional Commissioner has accorded his approval for action under Section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of said V.K.Jain, perhaps he would not have granted his approval, which was mandatory in terms of proviso to sub-section 1 of Section 151 of the Act as the action under Section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. As highlighted above, the Legislature has provided certain safeguards to prevent arbitrary exercise of powers by an Assessing Officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to

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grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval.

20. For the foregoing reasons, we allow the petition and quash the impugned notice dated 30 April 2002. The Rule is made absolute with no order as to costs.

D.K.JAIN,J.

16 October, 2002
"v"

SHARDA AGGARWAL,J.