* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 28th March, 2012.
% **Date of Decision** : 25th April, 2012.

\+ W.P.(C) 8031/2011

A.G.HOLDINGS PVT LTD ..... Petitioner
Through Mr. C S Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

versus

INCOME TAX OFFICER .... Respondent
Through Mr. Deepak Chopra, sr. standing counsel with Mr. Harpreet Singh Ajmani, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? yes
3. Whether the judgment should be reported in the Digest? yes

R.V. EASWAR, J.:

This writ petition under Article 226 has been filed by the petitioner A G Holdings Pvt. Ltd. for issue of a writ of certiorari or any other writ or order quashing the impugned notice issued under Section 148 of the Income Tax Act, 1961 ("Act", for short) on

15.3.2011 for the assessment year 2004-05 and the order dated 8.11.2011 passed by the respondent herein, who is the Assessing Officer, disposing of the objections filed by the petitioner to the initiation of proceedings under Section 147 of the Act.

2. The facts giving rise to the writ petition are as follows :-

The petitioner is a company. In respect of the assessment year 2004-05 it filed a return of income on 23.3.2005 declaring loss of ₹6,097/-, along with the audited accounts. The return of income was accepted under Section 143(1) of the Act. On 15.3.2011, a notice was issued by the respondent under Section 148 of the Act on the ground that income chargeable to tax had escaped assessment for the assessment year 2004-05. In response to the notice, the petitioner filed a return declaring loss of ₹6,100/-, which was the same as declared in the original return. Along with the return the petitioner also filed a letter dated 7.4.2011 in which a request was made to the respondent to supply the reasons recorded for reopening the assessment. The respondent supplied the reasons recorded for reopening the assessment to the petitioner on 30.8.2011. These were accompanied by a letter dated 25.8.2011, which was a covering letter and to this letter, the respondent also enclosed a notice under Section 143(2) calling upon the assessee to furnish certain details. The reasons recorded for reopening are as under :

"M/s. A G Holdings Pvt. Ltd. A.Y.-2004-05

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 expenses 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: -

S. No.	***BENIFICIARY'S NAME***	***VALUE OF ENTRY TAKEN***
1	*A G HOLDINGS PVT. LTD.*	*450000*
INSTRUMENT NO. BY WHICH ENTRY TAKEN	***PO/ DD NUMBER***	***DATE ON WHICH ENTRY TAKEN***

467321		*20-Jan-04*
NAME OF ACCOUNT HOLDER OF ENTRY GIVING ACCOUNT	***BANK FROM WHICH ENTRY GIVEN***	***BRANCH OF ENTRY GIVING BANK***
QUALITY SECURITY SERVICES	*BOI*	*KAROL BAGH*
A/C NO. ENTRY GIVING ACCOUNT		
11059 CD		

The transaction involving ₹4,50,000/-, 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 in its return filed.

On the basis of this new information, I have reason to believe that the income of ₹4,50,000/- has escaped assessment as defined by sec. 147 of the I.T. Act. Initiation of proceedings u/s 147 on the basis of information received from Directorate of Investigation, Jhandewalan, New Delhi has also been upheld by the Hon'ble Delhi High Court in the case of AGR Investment Ltd. v/s Addl. CIT & Another (2011) 9 taxman.com 62.

Therefore this is a fit case for the issuance of notice u/s 148.

Submitted for perusal and necessary sanction, as per Section 151 (2), for issuance of notice u/s 148.

Sd/-
ITO, W-1 (2), New Delhi

Addl. CT, R-1, New Delhi"

3. On receipt of the aforesaid letter and the reasons recorded for reopening the assessment, the petitioner wrote a letter to the respondent on 6.9.2011 seeking an adjournment. Thereafter, on 8.11.2011, the petitioner filed its objections to the validity of the initiation of reassessment proceedings, in terms of the judgment of the Supreme Court in the case of ***GKN Driveshafts (India) Ltd. Vs. ITO*** (2003) 259 ITR 19. In these objections the petitioner took strong objection to the reasons recorded for reopening reassessment and contended that it had not received any accommodation entries from M/s Quality Security Services (P) Ltd., that the amount of ₹4,50,000/- received from the said company represented share application money for acquiring shares in the petitioner company, that these details were duly disclosed in the audited accounts filed along with the return of income on 23.3.2005, that the copy of the certificate of incorporation, board resolution and share application

form were all being filed along with the letter and in these circumstances no income chargeable to tax had escaped assessment. It was further pointed out that the company which subscribed to the shares in the petitioner company is a legal entity incorporated under the Companies Act, 1956 on 1.2.1995, that it was also being regularly assessed to tax, that the payment for the shares was received through banking channels, that the said company had confirmed the investment by an affidavit and that these facts also supported the claim of the petitioner that the share capital was genuine and there was no reason to hold that it represented the assessee's own monies. It was contended in the objections on the basis of several authorities that the reasons recorded are vague and do not disclose the basis upon which the Director of Income Tax (Investigation) had expressed the view that the share capital was bogus. It was in this tone and tenor that the petitioner raised several objections to the reasons recorded for reopening the assessment and the issue of the notice under Section 148.

4. The respondent disposed of the objections of the petitioner by order dated 8.11.2011. It may be noted that the petitioner's objections were filed with the respondent on 8.11.2011 and it appears that these objections were examined and disposed of by the respondent on the very same day. The respondent drew the attention

of the petitioner to the report of the Directorate of Income Tax (Investigation), New Delhi in which the modus operandi followed by persons, who were engaged in the business of providing accommodation entries through the means of share application monies, gifts, loans, inflation of expenses etc. was elaborately recorded as also to the fact that the report mentioned the assessee by name as a beneficiary of such activities. He observed that the mere fact that the monies were received by the assessee through account payee cheques cannot preclude or preempt the conclusion that the monies represented unaccounted monies of the petitioner. It was further stated by the respondent that he had independently considered the information received from the investigation wing and had applied his mind before issuing the notice. It was pointed out that the return filed in March, 2005 had not been scrutinized under Section 143(3) but had only been processed under Section 143(1). It was reiterated that the reasons recorded had a live link or nexus to the prima facie belief that income chargeable to tax had escaped assessment. Several authorities were relied upon by the respondent in this letter.

5. The petitioner had moved this Court by filing the present writ petition as soon the letter written by the respondent rejecting the objections was received by it. On 29.11.2011, this Court issued notice to the standing counsel and directed him to file a counter

affidavit and directed the petitioner to file a rejoinder-affidavit. It was directed that in the meantime the proceedings of re-assessment may continue but no final assessment order would be passed. On 23.3.2012 when the matter was called again, directions were issued to the ld. standing counsel to produce the record, which was available before the Assessing Officer when he recorded the reasons to believe. On 28.3.2012, the standing counsel produced the record before us and we have examined the same.

6. The assessment year concerned is 2004-05. The notice under Section 148 has been issued on 15.3.2011, which is beyond the period of 4 years from the end of the assessment year. Therefore this is a case to which the first proviso to Section 147 applies. Therefore, the assessment can be reopened only if there has been a failure on the part of the assessee to file a return under Section 139 or Section 142(1) or Section 148 or to disclose fully and truly all material facts necessary for his assessment. We are not concerned with a case of failure to file the return since the petitioner has filed its return of income on 23.3.2005. It is therefore, necessary to examine whether there was, on the part of the assessee, a failure to disclose fully and truly all material facts necessary for its assessment. The contention of the petitioner is that it has furnished all the relevant and the primary facts along with the return of income, including audited

accounts in which the receipt of share capital from M/s Quality Security Services (P) Ltd. was duly disclosed. It was also submitted that the share capital was received through banking channels by means of account payee cheques. The shares were also allotted to the said company and this was supported by the annual returns filed by the petitioner with the Registrar of Companies, Delhi and Haryana on 29.3.2005. It was also submitted that the said company has duly confirmed by affidavit that it had deposited the share application money of ₹4,50,000/- with the petitioner and was also allotted shares. It is thus contended that full and true particulars relating to the share application money received from M/s Quality Security Services (P) Ltd. had been submitted with the return filed on 23.3.2005 and in the absence of any finding in the reasons recorded for reopening the assessment to the effect that the petitioner did not furnish full and true particulars at the time of the original assessment, the notice issued under Section 148 should be struck down as being without jurisdiction.

7. On behalf of the Revenue the argument put forward was that the petitioner had failed to furnish full and true particulars relating to the receipt of the share capital along with the return submitted on 23.3.2005, that even if it is assumed that those particulars were furnished, they stood belied by the report of the investigation wing

on the basis of which the notice of reopening has been issued, that the contents of the report throw considerable doubt on the veracity and truth of the particulars allegedly submitted by the petitioner along with the return, that the name of the petitioner-company has been specifically mentioned in the investigation report with particulars such as the name of the entry provider, account number of the entry provider, the bank from which entry was given, the date on which entry was given, the instrument number by which the entry number was taken and so on. It is submitted that in the light of such specific particulars submitted by the investigation wing on the basis of which the respondent had recorded reasons for reopening the assessment, it was open and legally permissible for the respondent to arrive at a prima facie belief that income chargeable to tax had escaped assessment.

8. On a careful consideration of the matter in the light of the rival contentions it appears to us that the contentions of the ld. standing counsel of the Revenue should prevail. Firstly there is nothing in the affidavit filed by the petitioner to show what were the primary and material facts filed along with the return filed on 23.3.2005 with respect to the share capital of ₹4,50,000/- received from M/s Quality Security Services (P) Ltd. There is only a blank statement that the audited accounts were filed along with the return. We have also seen

the affidavit and Annexure 3 thereto. The Annexure consists of the return of income filed by the petitioner on 23.3.2005 along with the Annexures. The documents attached to the return of income are only the statutory auditor's report and the final accounts namely, the income and expenditure account, the balance sheet and the notes forming part of the accounts. There is nothing in these papers disclosing specifically the receipt of share capital from M/s Quality Security Services (P) Ltd. It has only been stated in paragraph 6 of the petitioner's objections filed to the notice issued under Section 148 that the sum received as share capital from M/s Quality Security Services (P) Ltd. was duly disclosed in the audited accounts filed along with the return of income. Thereafter, it has been stated that the copy of the certificate of incorporation of the said company, the board resolution passed for investing in equity shares of the petitioner-company and the copy of the share application form are being submitted along with the objections as annexures A, B and C respectively. There is no averment in the affidavit or in the objections dated 8.11.20111 to the effect that these three documents had been submitted with the return of income. The annual return filed by the petitioner-company with the Registrar of Companies, the balance sheet as on 31.3.2004 of M/s Quality Security Services (P) Ltd. containing details of investments in which the investment in the

petitioner company has been disclosed etc. have been filed as annexure D and E respectively to the objections dated 8.11.2011. There is no averment in the affidavit of the petitioner to the effect that these documents had been filed along with the return of income. In fact, in para 3 and 3.1 of the affidavit of the petitioner, all these documents have been marked as annexures to the writ petition without any averment that they had also been filed along with the original return of income. In these circumstances, it is difficult to accept the contention of the petitioner that full and true particulars relating to the receipt of the share capital of ₹4,50,000/- from M/s Quality Security Services (P) Ltd. had been furnished along with the return of income.

9. Be that as it may, even if it is assumed for the sake of argument that those particulars were furnished along with the original return of income filed on 23.3.2005, they cannot be said to be full and true, having regard to the report of the investigation wing on the basis of which the assessment has been reopened. We have already seen that in the report there is specific information that the petitioner company had received an amount of ₹4,50,000/- from M/s Quality Security Services (P) Ltd. The report also mentions that this is an accommodation entry given by the said company to the petitioner company. The relevant bank account particulars, instrument number,

etc. have all been reported. In the light of these particulars it is not possible to accept the claim that the particulars allegedly filed by the petitioner along with the return of income are full and true. The investigation report is a pointer and costs grave doubts on basis of evidence/material on the genuineness of the share contribution. We have no doubt that for the purpose of enabling the respondent to reach a prima facie belief that income chargeable to tax had escaped assessment, the details given in the investigation report are relevant. We are aware of the distinction between the relevancy and the sufficiency of the materials on the basis of which reasons are recorded for reopening the assessment. We are also aware of the settled legal position that whereas the relevancy of the materials leading to the belief are justiciable, the sufficiency of those material is not. Even on an objective analysis, it cannot be said that the materials on the basis of which the respondent formed the belief were irrelevant. We are alive to the legal position that at the time of issuing the notice to reopen the assessment, the Assessing Officer is only expected to form a prima facie or tentative belief that income chargeable to tax had escaped assessment. Whether the addition has to be made or not is a matter to be decided on merits in the course of the reassessment proceedings. We are only concerned with the preliminary stage of recording reasons and issuing notice to reopen

the assessment. In our opinion the materials available before the Assessing Officer, the respondent herein, were wholly relevant for the formation of the belief that income chargeable to tax had escaped assessment on account of the failure of the petitioner-company to furnish full and true particulars regarding the receipt of share capital from M/s Quality Security Services (P) Ltd.

10. It was however contended on behalf of the petitioner, on the basis of the judgment of this Court in ***Haryana Acrylic Manufacturing Co. vs. CIT and Anr*** (2009) 308 ITR 38, that the reasons for reopening the assessment having been supplied to the petitioner beyond the period of 4 years from the end of the relevant assessment year, the entire reassessment proceedings were invalid. It is contended-this contention is referred to in para 12 of the rejoinder affidavit of the petitioner-that if reasons recorded for reopening the assessment have not been furnished within the period prescribed in Section 149(1), the proceedings pursuant to the notice would be hit by the bar of limitation. It is pointed out that in the present case, though the notice under Section 148 was issued on 15.3.2011, the reasons recorded for the same were given to the petitioner only on 30.8.2011, which was beyond the period of 6 years from the end of the relevant assessment year and therefore the entire reassessment proceedings are invalid. It is necessary to reproduce Section 149(1):

> "(1) No notice under section 148 shall be issued for the relevant assessment year, -
>
> (a) If four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);
>
> (b) If four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.
>
> *Explanation*. – In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of *Explanation* 2 of section 147 shall apply as they apply for the purposes of that section."

The objection of the petitioner, as we understand the same, is not that the notice under Section 148 was issued after the expiry of the period of 6 years from the end of the relevant assessment year. The objection is only that the reasons recorded were provided by the respondent after a period of 6 years from the end of the relevant assessment year. The contention is that in such a case the reassessment proceedings are barred by limitation on the basis of the judgment of this Court cited supra. We are unable to accept the contention. The record produced before us by the ld. standing

counsel shows that sanction for the proposal to reopen the assessment was accorded by the Additional Commissioner of Income Tax on 9.3.2011. The notice to reopen the assessment was issued on 15.3.2011. The reasons for reopening the assessment had been recorded on 9.3.2011. These were however supplied to the petitioner only on 30.8.2011. There is no requirement in Section 147 or Section 148 or Section 149 that the reasons recorded should also accompany the notice issued under Section 148. The requirement in Section 149(1) is only that the notice under Section 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in Section 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The requirement, which is mandatory, is only that before issuing the notice to reopen the assessment the Assessing Officer shall record his reasons for doing so. After the decision of the Supreme Court in GKN Driveshafts (India) Ltd. (supra) the Assessing Officer is duty bound to supply the reasons recorded for reopening the assessment to the assessee, after the assessee files the return in response to the notice issued under Section 148 and on his making a request to the Assessing Officer to that effect. What happened in the case relied upon by the petitioner is that the reasons supplied to the assessee in that case by the

Assessing Officer were different from the reasons purportedly recorded in the form attached to the counter-affidavit filed by the Revenue before the High Court. The assessee in that case had taken a specific plea that in the absence of any allegation that he had failed to disclose fully and truly all material facts necessary for assessment, the Assessing Officer had no jurisdiction to issue the notice after 4 years from the end of the relevant assessment year. It was apparently to overcome this objection that the reasons attached to the counter affidavit had contained a statement to the effect that the assessee had failed to furnish full and true particulars at the time of the assessment. These reasons had never been communicated to the assessee and it was only for the first time in the course of hearing of the writ petition that they had surfaced. This court held that if the date of filing of the counter affidavit was taken as the date of communication of the reasons, then there was an unreasonable delay of more than 3 years between the date on which the assessee in that case made a request for supply of the reasons and the date on which the counter affidavit was filed. It is noteworthy that the assessee had made a request to the Assessing Officer on 11th May, 2004, whereas the counter affidavit was filed on 5th November, 2007. It was on this basis that the Division Bench of this Court held that the notice under Section 148 could not have been issued beyond a period of 6 years

from the end of the assessment year which in that case was 1998-99. The last date for issue of notice was 31.3.2005. It may thus be noted that the judgment of this Court in Haryana Acrylic Manufacturing Co. (supra) turned on the peculiar facts of that case, where two sets of reasons had been recorded, by the Assessing Officer. In the first set of reasons there was no allegation of non-disclosure of primary facts by the assessee. It was only in the second set of reasons recorded which surfaced for the first time in the counter affidavit filed by the Revenue before the High Court, that the omission on the part of the assessee to furnish full and true particulars had been specifically mentioned. The counter affidavit had been filed way beyond the expiry of a period of 6 years from the end of the assessment year. It was on these facts that it was held that the reassessment proceedings were invalid. It is significant to note that the recording of the reasons under Section 148(2) shall precede the issue of notice under Section 148(1) as indicated clearly by the words "before issuing any notice under this section". The recording of proper reasons in the cited judgment was taken as 5.11.2007, the date on which the counter affidavit was filed. That day itself was after the expiry of 6 years from the end of the assessment year 1998-99. If a notice on the basis of those recorded reasons were to be issued in the cited case under Section 148(1), that would have been

possible only either on 5.11.2007 or later, because the issue of notice cannot precede the recording of the reasons. Therefore, the real ratio of the judgment, as we understand it, is that the reassessment was invalid because the notice under Section 148(1), had it been issued on the basis of the reasons recorded on 5.11.2007, would have been hopelessly time barred. In our opinion, this is the basis upon which the judgment of Haryana Acrylic Manufacturing Co. (supra) was rendered by this Court.

11. The factual situation in the case before us is however different. There are no two sets of reasons recorded by the respondent in the present case. The reasons were recorded on 9.3.2011. It was on the basis of these reasons that the approval of the Additional Commissioner of Income Tax was obtained and thereafter notice under Section 148 was issued on 15.3.2011. There is no dispute that the notice was served on the petitioner. There is also no dispute that the reasons recorded by the respondent on 9.3.2011 were supplied to the petitioner on 30.8.2011. These reasons undisputedly were the same as were recorded by the Assessing Officer on 9.3.2011. The only feature in the present case is that there was a delay of 4 ½ months in supplying the reasons recorded by the Assessing Officer to the petitioner. This by itself cannot invalidate the reassessment proceedings. The factual situation in the present case is entirely

different from the facts of the case before Division Bench of this Court in Haryana Acrylic Manufacturing Co. (supra). The ratio laid down in that case can therefore hardly have any application to this case. Accordingly, the contention of the petitioner is rejected.

12. In the result the writ petition is dismissed. All interim orders are vacated. There will be no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

APRIL 25, 2012
vld