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

Reserved on: *25th April, 2012*
% **Date of Decision**: *3rd May, 2012*

\+ **WP(C)NO. 14042/2009**

ADITYA KHANNA .....Petitioner
Through: Mr.B.N.Goswami, Advocate.

VERSUS

ASST.COMMISSIONER OF INCOME TAX ....Respondent
Through: Mr. A.S.Chandiok, ASG with Mr.Ritesh Kumar, Ms. Shweta Gupta and Mr.Piyus Sanghi, Advocates.

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 Section 226 of the Constitution has been filed by Aditya Khanna, who is a non-resident individual. The petitioner seeks the issue of a writ of certiorari or any other

order/writ /direction to quash the notice issued by the respondent, who is the Assistant Commissioner of Income Tax Central Circle-V, New Delhi, under Section 148 of the Income Tax Act (hereinafter referred to as 'the Act') on 17.2.2009. A prayer is also made for quashing the letter/order dated 20.11.2009 issued by the respondent rejecting the objections filed by the petitioner to the notice.

2. The following are the brief facts which have given rise to the present petition. For the assessment years 2002-03 the petitioner filed a return of income in the status of a non-resident and declared property income and interest income therein. It would appear that the return was accepted under Section 143(1) of the Act. On 17th February, 2009 the respondent issued a notice under Section 148, which is the impugned notice, calling upon the petitioner to deliver a return of income for the assessment year 2002-03 on the ground that income chargeable to tax had escaped assessment. In response to the notice the petitioner sent a reply pointing out that he is a non-resident and had no income chargeable to tax in India other than what was declared in the return filed earlier. The petitioner also requested the respondent to supply a copy of the reasons required to be recorded under Section 148(2) for reopening the assessment. The respondent complied with the request of the petitioner and by a letter dated 10th August, 2009, furnished the copy of the reasons recorded for

reopening the assessment. On receipt of the reasons, the petitioner wrote a letter on 24th August, 2009 to the respondent stating therein that he was a non-resident and this status has been accepted in the assessment made for the assessment years 2000-01, 2005-06 and 2006-07 and that any income earned by him outside India was being taxed there and that in these circumstances there was no question of any income chargeable to tax escaping assessment for the assessment years 2002-03. A request was, therefore made that the proceedings under Section 148 may be dropped.

3. On 20th November, 2009, the respondent passed an order on the objections filed by the petitioner. In this order, which may be examined in some detail later, the Assessing Officer took the view that the petitioner had earned income from a business which was controlled from Indian territory, that the company by name Indrus Trading Company Ltd., (hereinafter referred to as 'Indrus'), had business connection with the petitioner as a result of which commission income, arising out of certain contracts under the "Oil for Food Programme" had arisen to the petitioner in India and in these circumstances the petitioner ought to have declared the income in his return which he omitted to do and, therefore, income chargeable to tax had escaped assessment. In rejecting the objections of the petitioner, the respondent referred to several statements said to

have been made by the petitioner before the Enforcement Directorate as well as documents said to have been seized by the Enforcement Directorate from the premises of M/s Hamdaan Exports and one Andaleeb Sehgal of A-53, Ground Floor, Punchsheel Enclave, New Delhi which are alleged to be relating to Indrus. It was further pointed out by the respondent in the letter/order that the seized documents also established that the business operations of Indrus were managed from the premises of Andaleeb Sehgal and they thus establish the petitioner's business connection in India. On this basis, the respondent stated in the letter that commission monies were retained in the account of Indrus to the extent of US$ 146247 received by Indrus in its bank account in Channel Island, out of which US$ 18247 belonged to the petitioner. This amount, according to the respondent, had escaped assessment. The petitioner was therefore directed by the respondent to appear before him on 6th December, 2009 for further hearing.

4. The petitioner wrote another letter to the respondent on 10th December, 2009 again reiterating his earlier contentions which were basically that he was a non-resident and therefore was not assessable in respect of any income unless it was deemed to have accrued or arisen in India and that there was no justification for taking any view different from the view taken in his earlier assessments. A request

was made to permit the petitioner to file further reply in regard to the notice issued under Section 148.

5. The present writ petition has been filed challenging the assumption of jurisdiction to reopen the assessment under Section 147/148 of the Act and for quashing the notice issued under Section 148 and the letter/order of the respondent rejecting the objections filed by the petitioner.

6. At the stage of issue of notice under Section 148 of the Act to reopen the assessment on the ground of income escaping assessment, the Assessing Officer is not expected to make out a fool proof case or reach a firm conclusion for including the income. At that stage, the law only expects him to record a prima facie or tentative belief that income chargeable to tax had escaped assessment. There must be materials before him justifying the belief and the belief must have a rational nexus or live link to the material. The sufficiency of the material or evidence before the Assessing Officer on the basis of which he formed the belief is not justiciable; however, the relevance is. These principles are well settled and therefore there is no need to cite any authority for the same.

7. Bearing in mind the aforesaid principles, we proceed to examine the reasons recorded by the Assessing Officer on 17.2.2009 under Section 148(2). They are as below:-

> "*After the humanitarian crises triggered by UN embargo on Iraq after the first Iraq War (Operation Desert Storm) in 1991, the United Nations approved a relief programme under its aegis in 1996. This relief programme came to be known as UN Oil-for-food Programme. This programme involved opening of an UN controlled escrow account wherein the sales receipt of oil by State Oil Marketing Organization (SOMO)- a govt. agency of Iraq were to be deposited and from this account payments for civil supplies in Iraq were to be released. The SOMO was, however, free to allocate oil to whom it wanted. Soon allegations emerged that these Oil Coupons were distributed by SOMO against payments of premium in the Iraqi regime designated bank accounts in Jordan. There were charges of corruption and maladministration and subsequently the UN Secretary General appointed an independent three members inquiry committee known as Volcker committee. After submission of the Volcker Committee report the Indian Government appointed Justice R. S. Pathak Inquiry Authority to look into the case of corruptions pertaining to Indian entities. Subsequently, investigations have been carried out by the Enforcement Directorate and the Investigation Wing.*
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> *Information has been received from Enforcement Directorate and Investigation Wing, about transfer of commission money from Masefield to beneficiaries in*

lieu of the two Oil Contracts – M/09/54 and M/10/57 awarded by State Oil Marketing Organization, Iraq. It has been observed that Shri Aditya Khanna has earned income from business which was being controlled from Indian Territory. It has been further observed that his role in the two oil contracts was that of providing services of Shri George Curmi, consultant who in turn got the buyer M/s Masefield as also providing the bank account of M/s Indrus for channelizing the commission money. The commission money retained in Indrus was his share of Booty @ 1 cent per barrel as agreed upon between him and Shri Andaleeb Sehgal.

A sum of USD 146247.23 has been received in A/c no. 73427968 of M/s Indrus Trading Company Ltd., Jersey, Channel Island. Out of this sum USD 18247.23 retained in the account of Indrus is the commission of Shri Aditya Khanna.

The assessee has failed to show the above income in its return of Income. Accordingly, I have reasons to believe that the assessee has not declared true and full particulars of his income, as discussed above which has escaped assessment. If approved, notice u/s 148 may be issued.

(MAZHAR AKRAM)
Asstt. Commissioner of Income Tax
Central Circle-5, New Delhi."

From the reasons recorded by the Assessing Officer, what is clear to us is that thay are mainly based on information received from the

Enforcement Directorate and the Investigation Wing about transfer of commission monies from the company called Masefield to certain beneficiaries for services rendered in connection with two oil contracts under "Oil for Food Programme" devised by the UN. From this information, the Assessing Officer has formed the belief that the petitioner-assessee has earned income from business which was being controlled from Indian territory. He has further stated that the role of the petitioner under the oil contracts was that of providing services to one George Curmi, consultant, who in turn procured the buyer, M/s Masefield. The petitioner has also stated to have provided the bank account of Indrus for channelising the commission money. The commission money retained in the account of Indrus was the petitioner's share of the income at 1 cent per barrel as agreed upon between him and Andaleeb Sehgal. In the reasons recorded, the Assessing Officer has also made a reference to the credit of the US$ 146247 which was received by Indrus into its bank account. Out of this amount, US$ 18247 is stated to be retained in the account of Indrus, representing the commission payable to the petitioner.

8. In order to examine the question as to what materials were available to the Assessing Officer before he recorded the aforesaid reasons and whether these materials could afford a rational nexus or live link to the formation of the belief that income chargeable to tax

had escaped assessment, we requested the learned Addl. Solicitor General, who appeared for the respondent, to produce the relevant record for perusal. He has accordingly produced the same and we have gone through them. On 25th and 28th April, 2006 and 18th May, 2006, the petitioner had given statements before the Special Director, Enforcement Directorate. In the statement given on 28th April, 2006 the petitioner stated how much was his share for introducing Masefield to Andaleeb Sehgal. In the statement given on 18th May, 2006, the petitioner stated that he was offered the proposal by Andaleeb Sehgal (referred to in the statement as Andy) to utilise the opportunity to get some crude oil allocation from Iraq which can be bought by some company interested in the same. The petitioner apparently acted on the proposal and contacted George Curmi, who was able to find M/s Masefiled who was interested in getting the oil. George Curmi introduced the petitioner and Andaleeb Sehgal to M/s Masefield. Indrus was a company in which Andaleeb Sehgal was interested. However, in the statement the petitioner had admitted his role under the oil allocations as an introducer. He denied that he gave any instructions for the contract and stated that all this work was done only by Andaleeb Sehgal. The petitioner had also stated before the Enforcement Directorate that he had discussed this with Andaleeb Sehgal in India recently. The petitioner also indicated

some of his discussions with Andaleeb Sehgal. The two statements made by the petitioner before the Enforcement Directorate were before the Assessing Officer when he recorded the reasons.

9. Andaleeb Sehgal had also given a statement before the Enforcement Directorate on 28th April, 2006. This statement was also before the Assessing Officer when he recorded the reasons. In this statement, Andaleeb Sehgal had referred to the arguments which he had with the petitioner regarding Indrus not receiving any remuneration from the second oil contract. Ultimately some money appears to have been received by Indrus from Masefield as commission. Andaleeb Sehgal had asked George Curmi to transfer his share of US$ 17500 to Hamdaan India. In addition to this statement, the petitioner has also made a statement on 25th April, 2006 before the Enforcement Directorate in which he confirmed receipt of US$ 146247 by Indrus. He also stated that the money was received as 5% profit for 30 lacs barrels of oil contracted with Masefield under the "Oil for Food Programme". The petitioner clarified in the statement that he did not do any business with Indrus outside the "Oil for Food Programme".

10. In addition to the statements made by the petitioner and Andaleeb Sehgal before the Enforcement Directorate, the documents seized by the Enforcement Directorate from the premises of Andaleeb Sehgal and Hamdaan Exports were also before the Assessing Officer when he recorded the reasons. The seized documents included facsimile transmission of messages with respect to different business transactions entered into by Indrus. Some of the documents were found to have been addressed to the petitioner and Andaleeb Sehgal which according to the Assessing Officer indicated that the petitioner, while being present in India, took strategic decisions from the Indian soil and rendered services on behalf of Indrus. According to the respondent, these documents established that the operations of Indrus were managed from the premises of Andaleeb Sehgal in India and since certain messages were addressed to the petitioner at the address of Andaleeb Sehgal, the business connection between the petitioner and Indrus was established. In this regard, the Assessing Officer has referred to Annexure 11 which are communications addressed to the petitioner and Andaleeb Sehgal in India.

11. In the light of the aforesaid facts, and bearing in mind that at the stage of recording reasons and issue of notice for reopening the assessment the Assessing Officer is only required to form a prima

facie belief regarding escapement of income, it is difficult to accept the contention of the learned counsel for the petitioner that the notice issued under Section 148 was without jurisdiction. We are concerned with the assessment year 2002-03 in respect of which the original assessment was completed under Section 143(1) without any enquiry. The notice under Section 148 was issued on 17th February, 2009, after a period of four years but before the period of six years from the end of the assessment year. This is a case to which the first proviso to Section 147 will not apply as there is no previous assessment under Section 143(3) or 147 of the Act. It is not necessary for the respondent to show that the petitioner had not made a full and true disclosure of the primary facts at the time of the original assessment. Even otherwise, since there was no scrutiny of the return, it is only the documents which were filed with the return of income that can show whether the petitioner had furnished full and true particulars along with the return of income. These are not available for our perusal. However, the petitioner had admittedly included only the interest income and property income in the return. The commission income of US$ 18247.23 was not disclosed in the return, nor is there any evidence to show that any particulars relating to the commission income were submitted along with return of income.

12. The learned counsel for the petitioner would, however, argue that since the petitioner is a non-resident, he is not bound to disclose the commission income earned by him outside India, in respect of services rendered outside India and for which the payment was also made outside India into the account of Indrus in Channel Island. This argument, however, overlooks the fact that the stand of the revenue is that the business of procuring oil contracts under the "Oil for Food Programme" and payment of commission for services rendered by the petitioner were all controlled from India and, therefore, the petitioner is answerable to the income on the basis of Section 9(1)(i) as income accruing or arising, whether directly or indirectly, through or from any business connection in India. As pointed out by the learned Addl. Solicitor General, the reasons recorded for reopening the assessment and the material before the Assessing Officer on the basis of which such reasons were recorded, show that this is the case made out by the respondent. Efforts, therefore, must be made to examine whether the material before the Assessing Officer was relevant for the formation of such a belief.

13. We have examined the question carefully. There is no dispute that the petitioner is a non-resident. Under Section 5(2) of the Act, the total income of any previous year of a person who is a non-resident includes all income from whatever sources derived which

(a) is received or is deemed to be received in India in such year by or on behalf of such person or (b) accrues or arises or is deemed to accrue or arise to him in India during such year. The commission of US$ 18247.23 not having been received in India in the previous year ended 31.03.2002, the first part of Section 5 is not attracted. As regards the applicability of the second part of the Section, which provides for accrual or deemed accrual in India of the income, the same has to be read with Section 9 which makes provision for "income deemed to accrue or arise in India". Clause (i) of sub-section (1) of Section 9 says that all income accruing or arising, whether directly or indirectly, through or from any business connection in India shall be deemed to accrue or arise in India. Mr. Goswami, the learned counsel for the petitioner strongly relied on the judgment of the Supreme Court in ***Commissioner of Income-tax. v. R.D. Aggarwal and Co. (1965) 56 ITR 20***. On the basis of the judgment, he contended that the expression "business connection" postulates a real and intimate relation between the business carried on by a non-resident which yields profits and gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains.

14. The contention of the learned counsel for the petitioner, which is put forth with considerable vehemence before us, touches upon the

merits of the matter. As we have already noted, at the stage of issuing notice to reopen the assessment, the merits of the matter are not to be decided. What is required to be examined is only whether there was material before the Assessing Officer on the basis of which he could come to the prima facie belief about escapement of income. The question whether the petitioner had a business connection in India on the lines indicated in the judgment cited above is a matter for further investigation and examination in the light of the entire evidence and this can take place only in the course of the reassessment proceedings. We are not concerned with that stage now. At the stage when the Assessing Officer issues notice to reopen the assessment, only a tentative or prima facie belief regarding business connection was required to be reached. The question before us is whether it can be said that there was material before him enabling him to reach such a prima facie or tentative belief. The answer in our opinion is in the affirmative. Neither Andaleeb Sehgal nor the petitioners were directors of Indrus. But they have some connection with Indrus and this much is clear from the fact that there is evidence/ material clearly indicating that the commission payable to the petitioner was received and credited in the bank account of Indrus in Channel Island. It is not a matter of dispute that the amount of commission payable to the petitioner was

part of the amount of US$ 146247 which was received into the bank account of Indrus in Channel Island. Even as per the petitioner, in his statement made before the Enforcement Directorate on 25th April, 2006, all this money was received as 5% profit for the barrels of oil contracted with Masefield through Indrus in the "Oil for Food Programme". The petitioner had undisputedly rendered services in connection with the finding of a buyer for the oil under the "Oil for Food Programme". Andaleeb Sehgal had contacted the petitioner and requested him to render services in connection with finding a buyer for the oil. The petitioner contacted Geoerge Curmi, according to the petitioner's statement on 28th April, 2006 before the Enforcement Directorate, who had the authority to deal with the bank and Masefield on behalf of Indrus. It is significant to note that in the statement, the petitioner himself has stated thus:- *"my role was limited to this. Andaleeb Sehgal gave George all the instructions for the contract etc. and also the instructions to the banks etc. to do any transfers…. George had the authority to deal with the bank & Masefield on behalf of Indrus (Andy & I)".* This statement prima facie shows that the petitioner identifies himself and Andaleeb Sehgal with Indrus. The money had come into the bank account of Indrus. There is also evidence to show that certain communications had been addressed to the petitioner in India. The Indian fax number

of the petitioner was given in some of the letters addressed to the petitioner which indicated his presence in India. Several documents which were found by the Enforcement Directorate in the premises of Hamdaan Exports/Andaleeb Sehgal in Punchsheel Enclave, New Delhi were found to have been addressed to the petitioner which, according to the respondent, indicated that the petitioner was present in India. Thus, there is prima facie material on the basis of which the Assessing Officer could have reasonably formed the belief that the affairs of Indrus were being controlled from India and had a business connection in India. Petitioner's money was kept and retained in the bank account of Indrus as per directions/ instructions issued from India and, therefore, despite the petitioner's status as non-resident, he was assessable in respect of the commission income received by him outside India for services also rendered by him outside India. The finer or nicer questions, which may be both of facts and law, as to whether the activities stated to have been controlled from India by an incorporated company such as Indrus, can be attributed to the petitioner on the ground that the commission monies due to him were to be paid out of the monies credited to the bank account of Indrus outside India and whether on account of these circumstances the petitioner can be said to have a business connection in India, are questions which are not required to be examined at this stage. They

will have to be necessarily examined only during the reassessment proceedings, when the merits will be gone into.

15. On 27th March, 2012, we had directed the respondent to file an affidavit as to the documents/papers which were available before him and which were considered by him before recording the reasons to reopen the assessment. In compliance with our directions, the respondent has filed the affidavit in which he has affirmed that he had initiated proceedings for reassessment on the basis of precise information received from the Enforcement Directorate vide its letter dated 19th December, 2007 received by him on 20th December, 2007 and that in the said letter the relevant documents were forwarded to the Range Head and subsequently endorsed to the Assessing Officer by his superior. It has been further averred in the affidavit that all the facts contained in the reasons were available within the jurisdiction of the respondent and were in his knowledge.

16. For the above reasons, we see no merit in the writ petition. Accordingly, we uphold the jurisdiction of the respondent to issue notice under Section 148 of the Act on 17th February, 2009 reopening the assessment of the petitioner on the ground that income chargeable to tax had escaped assessment. All interim orders passed

by us are vacated. The writ petition is dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

MAY 03, 2012
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