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

\+ **Writ Petition (Civil) No. 2155 of 2012**

Reserved on:18th May,2012

% **Date of Decision: 28th May, 2012**

Acorus Unitech Wireless Private Ltd. &Anr. ....Petitioners
Through Mr. C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate.

Versus

Deputy Commissioner of Income Tax, Circle-1(1) Delhi …Respondents
Through Mr. Sanjeev Rajpal, Senior Standing Counsel.

CORAM:
HON'BLEMR. JUSTICE SANJIVKHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIVKHANNA, J.

Acorus Unitech Wireless Pvt. Ltd. in this writ petition under Articles 226 and 227 of the Constitution of India impugns notice under Section 148 of the Income Tax Act, 1961 (Act, for short) dated 5th July, 2011 and the letter/order dated 10th April, 2012, dismissing their objections to initiation of proceedings under Section 147 of the Act. The writ petition pertains to the assessment year 2009-10.

2. The petitioner had filed return of income for the assessment year in question under Section 139(4) of the Act on 6th October, 2010. The contention of the petitioner is that the Assessing Officer could have initiated scrutiny assessment proceedings by issue of notice under Section 143(2) of the Act till 30th September, 2011. However, as per the

petitioner, the Assessing Officer wrongly issued notice for reassess under Section 147/148 of the Act on 5th July, 2011, and that on, before, or even after the said date, the Assessing Officer could have issued notice under Section 143(2). Accordingly, the notice under Section 147 is bad/invalid, as the return of the income could have been taken up for scrutiny by issue of notice under Section 143(2) of the Act. It is further submitted that if the Assessing Officer had issued notice under Section 143(2) on or before 30th September, 2011, the assessment would have become barred by limitation on 31st December, 2011 as per second proviso to Section 153(1). Thus, the proceedings that are now pending should be set aside/quashed.

3. In support of the contention that the Assessing Officer cannot issue reassessment notice under Section 147/148 of the Act during the period when the Assessing Officer could have issued notice under Section 143(2) of the Act, the petitioner has placed reliance on ***Commissioner of Income Tax, Bombay City II vs. Ranchhoddas Karnsondas*** (1959) 36 ITR 569 (SC), which relates to Income Tax Act, 1922. The petitioner further relies on ***Trustees of H.E.H. The Nizam's Supplemental Family Trust vs. CIT,*** (2000) 242 ITR 381 (SC) and ***KLM Royal Dutch Airlines vs. Assistant Director of Income Tax*** (2007) 292 ITR 49 (Delhi).

4. We agree that it is unusual for the Assessing Officer to record reasons to believe and issue notice under Section 148 of the Act, when

he had time and could have issued notice under Section 143(2) c Act. For issue a notice under Section 143(2), reasons to believe are not required to be recorded in writing and power of the Assessing Officer to take up the return for scrutiny is much wider and the jurisdictional pre-conditions stipulated under Section 147 are not required to be satisfied. The reasoning given by the Assessing Officer that the petitioner's case could not have been taken up for scrutiny in view of the Computer Assisted Selection Scrutiny (CASS, for short) does not have merit as approvals/permissions could have been taken.

5. However, it is not possible to accept the broad universal affirmative submission of the petitioner that notice under Section 147/148 of the Act cannot be issued when the Assessing Officer could have issue a notice under Section 143(2) of the Act. This will depend upon the facts. In the present case the original return was processed and an order under Section 143(1) was passed on 10thApril, 2011.

6. ***Ranchhoddas Karsondas*** (supra) is a decision under Income Tax Act, 1922. In the said case, the assessee had voluntarily filed a return which was a valid return and the same was pending consideration before the Assessing Officer. The Supreme Court struck down the notice under Section 34 of the said Act on the ground that it could not have been issued in view of the language of Sections 22 and 34 of the said Act. It was observed that nothing prevented the Income Tax Officer from taking

up the valid return and proceed with the assessment of inc Therefore, issue of notice under Section 34 was improper/ invalid because it was contrary to the jurisdictional requirements stipulated in the said Sections. There was no equivalent or a provision similar to Section 143(1) of the Act (i.e. Income Tax Act, 1961) in the Income Tax Act, 1922.

7. Decision of the Supreme Court in ***Nizam's Supplemental Family Trust*** (supra), was on the aspect whether or not, the note made by the Assessing Officer on the return amounted to and had resulted in termination of the proceedings. It was held that "note" in question was ambiguous and inconclusive and that it did not terminate the proceedings. It was observed: -

> *"There is a difference between clauses (b) and (c) of sub-section (2) of section 249 of the Act.*
>
> *A return of income filed in the form prescribed along with an application for refund under section 237 of the Act is a valid return. There is no stopping the Income-tax Officer to complete the assessment on the basis of the return so filed. It may be that the Income-tax Officer may limit the scope of examination of the return to satisfy himself regarding the correct- ness of the amount claimed as refund. For that purpose, he will examine if the tax paid by the assessee exceeds the amount of tax with which he is chargeable. If it is found that the income was "nil", he will direct that refund be granted to the assessee of any amount of tax paid. That will certainly be assessment. The filing of a return in the form prescribed under section 139 of the Act along with the application for refund is not*

an empty formality. It assumes importance if such return had not been filed earlier. We have reproduced the note/order dated November 10, 1965, on the file pertaining to the assessment year 1963-64. In the file for the assessment year 1962-63 there is another note which is as under:

"Please see my note in 1963-64 file. Refund to be considered in the hands of the beneficiaries."

A mere glance at this note would show that it could not be said that the Income-tax Officer gave finality to the refund since no refund is granted either in the hands of the trust or in the hands of the beneficiaries. It is an inconclusive note where the Income-tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not communicated to the trustees. When we examine the note dated November 10, 1965, on the file of 1963-64 nothing flows from that as well. In any case if it is an order, it would be appealable under section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it is imperative that such an order be communicated to the assessee. Had the Income-tax Officer passed any final order, it would have been communicated to the assessee within a reasonable period. In any case, what we find is that the note dated November 10, 1965, is merely an internal endorsement on the file without there being an indication if the refund application has been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source is to be allowed, the Income-tax Officer cannot be said to have closed the proceedings finally. The decisions referred to by the Revenue are of no help in the present case. We are, thus, of the opinion that during the pendency of the return filed under section 139 of the Act along with the refund application under section 237 of the Act, action could not have been taken under section 147/148 of the Act. Our answer to the question, therefore, is in the negative, i.e., against the Revenue. The appeal is accordingly allowed with costs."

(emphasis supplied)

8. In the said decision, reference was made to High Court judgı in which it has been held that where a return is disposed of it would amount to termination of assessment proceedings, even if the order is not communicated.(Refer***M. Ct. Muthuraman versus CIT*** [1963] 50 ITR 656 (Mad.), ***V. S. Sivalingam Chettiar versus CIT*** [1966] 62 ITR 678 (Mad.) ***and Commissioner of Agricultural Income Tax versus K. H. Parameshwara Bhat*** [1954] 97 ITR 190 (Ker.)).

9. The Delhi High Court in ***KLM Royal Dutch Airlines*** (supra), has referred to and quoted from ***Nizam's Supplemental Family Trust's*** case (supra). In the said case, the Assessing Officer had issued notice under Section 143(2) and enquiries were initiated. It was accordingly held that it was mandatory that the notice should have culminated in an order under Section 143(3). We are not required to examine or apply the said ratio as notice under Section 143(2) in respect of the original return was never issued in the present case. Learned counsel for the Revenue has submitted that some observations may not be good and correct law in view of the decision of the Supreme Court in ***Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers (P) Ltd.*** (2007) 291 ITR 500 (SC), ***CIT vs. Kelvinator of India Ltd***. (2010) 2 SCC 723 and the full Bench decision of this Court in ***Kelvinator of India Ltd. v. CIT*** (2002) 256 ITR 1 (FB)(Del). We are not required to examine the said aspects in

this writ petition, as the Division Bench in ***KLM Royal Dutch Ai***

(supra) has held as under:-

> *"13. A 'clearance' or notice or intimation under Section 143(1) of the Act clearly falls beyond the parameters of this definition. In Punjab Tractors Ltd. v. Joint Commissioner of Income Tax [2002] 254 ITR 243 [P&H] it was opined that it is not necessary that assessment should have been finalised under Section 143(3) before it can be 'reopened' under Section 147, since an intimation under Section 143(1) operates an order of assessment unless the Assessing Officer proceeds to give notice under Section 143(2) and passes an Order under Section 143(3). This very understanding of the law has been articulated by the Division Bench of the Allahabad High Court in Pradeep Kumar Har Saran Lal v. Assessing Officer [1998] 229 ITR 46 which, in turn, followed the view of the Calcutta High Court in Jorawar Singh Baid v. CIT (Asstt.) [1992] 198 ITR 47 (Cal) wherein it has been observed that - "the power that can be exercised under Section 143(2) to correct the assessment made under Section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under Section 147 if the ingredients of Section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under Section 147, notwithstanding the fact that there are other remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under Section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under Section 143(1) by issuing a notice under Section 143(2) of the Act". However, in the present case since inquiries had been initiated under Section 143(2), it became mandatory that they should have culminated in an order under Section 143(3)."*

(emphasis supplied)

10. We need not delve deeper and state further, in view of what had transpired in the hearing on 20th April, 2012, the affidavit filed by the

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respondents thereafter and the statement made by Mr. Sanjeev R[illegible] Sr. Standing Counsel for the Revenue, in the Court on 18thMay, 2012. On 20th April, 2012, the following order was passed:-

> *"The contention of Mr. C S Aggarwal, senior advocate is that notice under Section 148 dated 5th July, 2011 was issued when the time limit of issue of notice under Section 143(2) pursuant to return filed on 6th October, 2010 had not expired. He accordingly, submits that the notice under Section 148 is illegal and void. He submits that notice under Section 148 cannot be issued, if a return of income can be made subject matter of scrutiny and regular assessment by issue of notice under Section 143(2). Ld. counsel for the Revenue disputes the legal proposition raised by Mr. C S Aggarwal, but states that to put the controversy to an end and to avoid any legal dispute, he will file a short affidavit stating that the Assessing Officer will drop the proceedings pursuant to notice under Section 148 dated 5th July, 2011 and after recording fresh reasons will issue notice under Section 148.*
>
> *2. Ld. senior counsel for the petitioner submits that he would have no objection but fresh notice can be issued only if it is permissible in law.*
>
> *3. Let the respondents file an affidavit within 10 days. Liberty is granted to the petitioner to file response within 3 days thereafter.*
>
> *4. Till the next date of hearing assessment proceedings can go on but final order will not be passed.*
>
> *List on 18thMay, 2012. Dasti."*

11. In terms of the said order, the respondents have filed an affidavit of Dr. Prashant Khambra, Deputy Commissioner of Income Tax,

Circle1(1), who is the Assessing Officer. He has stated that the case taken up for scrutiny pursuant to the information received from the Director of Income Tax (Investigation) in relation to 2G spectrum cases. It is stated that the case could not be taken up for scrutiny under Section 143(2) for the reasons stated in the order dated 10th April, 2012 i.e. this case was not selected for scrutiny under CASS. In paragraph 7 of the affidavit, it is stated as under:-

> *"7. That the deponent is filing the present affidavit in compliance of the order dated 20.04.2012 passed in the present petition based on the submissions of Counsel for the revenue made during the course of the hearing before this Hon'ble Court for disposal of the present writ petition, recorded in the said order with liberty to issue fresh notice under section 148 of the Act, after recorded the reasons afresh."*

12. Learned counsel for the petitioner has submitted that the aforesaid paragraph is not clear and affirmative. Learned counsel for the Revenue during the course of hearing before us on 18th May, 2012 had stated that this was not the purport of paragraph 7 and that he had clear instructions to state that the Revenue was ready to withdraw the notice under Section 148 of the Act, dated 5th July, 2011 and record fresh reasons and issue notice. However, the fear and apprehension of the Revenue was that the petitioner would challenge and question the said reassessment proceedings on the same grounds that have been raised in the present writ petition i.e. in spite of information in the form of report of Director

of Income Tax (Investigation), assessment proceedings under Se 143(2) of the Act were not initiated and the reasons to believe were recorded before issue notice dated 5th July, 2011 and thereafter similar reasons have been recorded for issue of new notice. It was submitted that the entire issue in question would, therefore be agitated again. This was/is the apprehension and fear of the Revenue. It was the contention of the Revenue that the petitioner wants the Revenue to get involved in a web of technicalities and the proceedings on merits should be stalled.

13. This aspect was put to the learned counsel for the petitioner to solicit his response/reply and clarity. Learned counsel for the petitioner stated that yes, the petitioner would raise the said objections and had relied upon the decision of this Court in ***Commissioner of Income Tax vs. Ved & Co.,*** (2008) 302 ITR 328 (Delhi), wherein the following observations have been made:-

> *"10. We are of the opinion that in view of the decisions that we have mentioned above, for the purpose of initiating reassessment proceedings, the Assessing Officer could not have made up his mind that the income of the assessee has escaped assessment while a valid return was still pending before him. If the Assessing Officer had allowed the time to elapse for taking action under section 143(2) of the Act, it was entirely his own doing. What the Assessing Officer is now trying to do in an indirect (and incorrect) manner is what he could not have done directly.*
>
> *11. The further contention raised on behalf of the Revenue is that even if no assessment order was*

> *framed, the Assessing Officer could issue a notice for reassessment. We are of the view that if no assessment had been made, there was no occasion for the Assessing Officer to conclude that income had already escaped assessment."*

We have examined the said contention of the petitioner but do not find any merit in the same.

14. In the case of ***Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers (P) Ltd.,*** (2008) 14 SCC 208, it has been held as under:-

> "***19.*** *Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.*
>
> ***20.*** *As observed by the Delhi High Court (sic the Supreme Court) in Central Provinces Manganese Ore Co. Ltd. v. ITO for initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is*

within the realm of subjective satisfaction [see ITO v. Selected Dalurband Coal Co. (P) Ltd.; Raymond Woollen Mills Ltd. v. ITO].

***21.** The scope and effect of Section 147 as substituted with effect from 1-4-1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(a) two conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under Section 148 read with Section 147(a) but under the substituted Section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso."*

15. A Division Bench of the Delhi High Court in ***Mahanagar Telephone Nigam Ltd. Vs. Chairman, Central Board of Direct Taxes and Another***(2000) 246 ITR 173 had specifically examined the question whether an Assessing Officer can initiate re-assessment action even when the Assessing Officer has not exercised option to issue scrutiny notice under Section 143(2) within the time limit prescribed. The said

contention was rejected holding that as long as the ingredients of Se 147 are fulfilled, the Assessing Officer is free to take action under the said provision and failure to take steps or issue notice under Section 143(2) would not render the Assessing Officer powerless to initiate proceedings, even when intimation under Section 143(1) has been issued.

16. Further the facts of the present case are clearly distinguishable from the factual disposition in ***Ved & Co.*** (supra). In the present case, the Assessing Officer has not issued notice pursuant to the return of income, but under Section 147/148 of the Act. This notice has been issued when the Assessing Officer could have also initiated the proceedings under Section 143(2) of the Act. The Assessing Officer is not trying to do anything indirectly which could not have been done directly.

17. The argument that in case the notice under Section 143(2) was issued, then the Assessment order should have been passed on or before 31st December, 2011 is too specious and has to be also rejected for several reasons which are noticed below. As recorded above, the Assessing Officer has proceeded on the basis that he has initiated assessment proceedings under Section 147 of the Act and time for completion of assessment should be calculated/computed accordingly. We may now notice some interesting facts which are apparent and clear

from the original records and the averments made in the writ pet

The petitioner accepts that notice under Section 147 dated 5th July, 2011, was served on them. Date of service is not indicated or disclosed. However, the assessment records reveal that the notice was served as per the stamp of the petitioner company, on 6th July, 2011. Thereafter, two notices both dated 23rd August, 2011, under Sections 142(1) and 143(2) were issued to the petitioner to appear in connection with the proceedings for the assessment year 2009-10. The petitioner appeared and filed several documents and details which were sought for by the Assessing Officer vide various letters. The petitioner has also answered various queries in terms of the questionnaire dated 7th October, 2011, issued by the Assessing Officer under Section 142(1) of the Act. The assessment proceedings have continued in this manner. An order under Section 281B for provisional attachment of assets was passed on 3rd January, 2012. As noted above, on 10th April, 2011, an order under Section 143(1) of the Act was earlier passed.

18. The petitioner claims that on 30th March, 2012, they were for the first time served with the reasons to believe recorded by the Assessing Officer before issuing notice dated 5th July, 2011 under Section 147. It appears that the petitioner had earlier on 9th August, 2011, written to the Income Tax Officer, Ward 1(1) to furnish copy of the reasons to believe. In the writ petition, it is stated that the petitioner had submitted that

return of income filed on 6th October, 2010, may be treated as r filed in response to the notice under Section 148. This is not stated in the letter dated 9th August, 2011. Learned counsel for the petitioner has stated that this submission was made orally. We may note that there is no such written averment or statement in any letter/communication by the petitioner which has been brought to our notice. Reasons to believe are to be supplied only after the return of income is filed or statement is made that the return filed earlier may be treated as a return in response to the notice under Section 148. We may record that the petitioner during this period from 9th August, 2011 till 30th March, 2012, did not ask for furnishing a copy of reasons to believe or object to the reassessment proceedings. He did not protest or submit that the reassessment proceedings were bad for want of jurisdiction as notice could have been issued under Section 143(2) on the date when the notice dated 5th July, 2011 under Section 148 was issued by the Assessing Officer. The petitioner deliberately and intentionally kept the matter pending and continued to appear and neither protested nor objected till 30th March, 2012. It is only after 30th March, 2012, that the petitioner objected to the reassessment proceedings raising the aforesaid ground and issue.

19. In these circumstances, we do not think that the Assessing Officer is prevented and barred from recording reasons in writing and issuing

fresh notice under Section 148 of the Act in view of the objections r by the petitioner to the present proceedings or in view of the decision of this Court in ***Ved & Co.*** (supra). Of course, the petitioner will be entitled to question the reassessment proceedings if initiated on other grounds or reasons as per law.

20. We may now notice another objection raised by the petitioner that the reasons to believe recorded by the Assessing Officer are factually incorrect. The reasons to believe read as under:-

> *"Certain investigations were carried out by the Director of Income Tax (Inv.-1) Jhandewala Extn. New Delhi in respect of 2G Spectrum cases out of which M/s Acorus Unitech Wireless (P) Ltd. where PAN lines and with ITO ward – 1(1) New Delhi.*
>
> *On scrutiny of the I.T. return filed by the assessment company M/s Acorus Unitech Wireless Pvt. Ltd. on 6.10.2010 for Assessment year 2009-10 reveals that assessee has made investment in equity share of Rs.45,65,38,500/- and no income under any head has been declared by the assessee in its return.*
>
> *As per letter from DIT(Inv.-1), New Delhi vide letter F. No. DIT(Inv)I/Unitech/2G case/2011-12/62 dt. 23.6.2011 as per agreement finalized on October 2008 the M/s Acorus Unitech Wireless Pvt. Ltd. has sold the equity share of FV Rs.10/- for Rs.159/- per share. The assessee company has not shown any income under the short term capital arises on the transfer of equity share.*
>
> *On the basis of the above information, I have reason to believe that it is fit case of the issue of notice u/s 148."*

21. It is submitted and argued by the counsel for the petitioner tl the reasons to believe, it has been incorrectly and falsely stated that vide agreement finalized in October, 2008, the petitioner had sold equity shares of "F.V." of Rs.10/- each for Rs.159/- per share and had failed to show any income as short term capital gains on transfer of the equity shares. It was stated by the counsel for the petitioner that this is factually incorrect and false and this aspect was highlighted in the objections filed before the Assessing Officer dated 9th April, 2012 and has also been accepted by the Assessing Officer in the reasoned order dated 10th April, 2012. In the reasoned order, the Assessing Officer has referred to the first paragraph of the reasons to believe and has recorded that the assessee had invested Rs.45,65,38,500/- in equity shares but no income had been declared by the assessee. The Assessing Officer, it is pointed out, has not dealt with the objections raised to the second paragraph of the reasons to believe. With regard to the first paragraph, it is stated that it is merely a conjecture or suspicion and not a valid and good satisfaction. It is further stated that in the order dated 10th April, 2012, it is stated that the source of funds from which the investment was made was required to be verified but this fact or allegation is not made the basis/ground in the reasons to believe. It is not stated in the reasons to believe that the source of Rs.45,65,38,500/- prima facie represented undisclosed income and therefore proceedings were justified. It is stated

that the reasons are mere surmises/conjectures, a mere suspicion therefore invalid.

22. We need not examine these contentions and issues in view of the statement made by the Revenue that they shall withdraw the present notice with liberty and right to issue fresh notice under Section 147/148 of the Act.

23. The writ petition is accordingly disposed of recording that the respondents have agreed to and will be bound by the statement to withdraw notice under Section 147/148 dated 5th July, 2011, but will have liberty and right to issue fresh notice under Section 147/148, after recording reasons to believe. The said notice will not be barred because the respondents had not initiated proceedings by issue of notice under Section 143(2) of the Act or they had earlier issued notice under Sections 147/148 dated 5th July, 2011. With the aforesaid findings and observations writ petition is disposed of. In the facts of the case, there will be no orders as to costs.

(SANJIVKHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

May 28th , 2012
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