THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.04.2010

\+ **ITA 1056/2009**

THE COMMISSIONER OF INCOME TAX III ..... Appellant

- versus –

SFIL STOCK BROKING LTD ..... Respondents

Advocates who appeared in this case:-
For the Appellant : Mr Mr Sanjeev Sabharwal
For the Respondent : Mr Ajay Vohra with Ms Kavita Jha and Mr Sriram Krishna

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

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

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the order dated 17.12.2008 passed in ITA No. 4991/Del/2004 by the Income Tax Appellate Tribunal in respect of the assessment year 1998-1999.

2. The only issue before us is with regard to the validity of the proceedings under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). The facts are that the assessee in his original return of income filed on 30.11.1998 had shown a long term capital gain of

22.03.2002. Subsequently, by a letter dated 17.03.2003, the Deputy Director of Income Tax (Investigation) informed the Assessing Officer of the assessee that during the course of investigation Shri Satish Goel, proprietor of M/s R. K. Aggarwal and Company has stated on oath that the transactions through bank account No. 003097 of Corporation Bank were only paper transactions in which the party was intending to take bills paid in cash and issue cheques/ drafts showing the said amounts as sale of shares. It was further informed that the assessee was neither a share broker nor a member of any stock exchange and that he was doing the work of giving entries. Further information was given that the entry of Rs 20,70,000/- in account No. 003097 dated 28.02.98 and 01.03.1998 was nothing but entry taken by paying cash. Thereafter, on the basis of the aforesaid information, a notice under Section 148 of the said Act was issued by the Assessing Officer to the assessee, which was allegedly the beneficiary of the bogus claim of long term capital gain shown on sale/ purchase of shares.

3. Subsequently, the reasons for issuance of the notice under Section 148 were provided to the assessee and the said reasons, as recorded, were as under:-

> "Information received from Deputy Director of Income Tax (Inv) 107, Sushant Lok, Gurgaon vide his letter No. DDIT (INV)/GGN/02-03/271 dated 17.03.2003 received in my office on 25.03.2003, that one of my assessee M/s SFIL Stock Broking Limited had made bogus claim of long term capital gains shown as earned on account of sale/ purchase of

> name of R. K. Aggarwal & Company by obtaining entries for Rs 6,00,000/-, Rs 7,00,000/- and Rs7,70,000/- on 28.02.98, 28.02.98 and 01.03.98 respectively. He has directed the A.O. to get notices issued u/S 148. Subsequently, I have been directed by the Addl. CIT-R8, New Delhi vide his letter No. addl. CIT R-8/2002-03/572 dated 26.08.2003 to initiate proceedings u/s 148 in respect of cases pertaining to this ward.
>
> Thus, I have sufficient information in my possession to issue notice u/s 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of reasons recorded as above."

4. Thereafter, during the re-assessment proceedings, the Assessing Officer made an addition of Rs 20,70,000/- by holding that the assessee could not explain the source of the entries. Being aggrieved by the assessment order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who confirmed the order passed by the Assessing Officer. Thereafter, the appellant preferred a second appeal before the Income Tax Appellate Tribunal in which an additional ground with regard to the assumption of jurisdiction on the part of the Assessing Officer under Section 147/148 of the said Act was taken. It is on this additional ground that the Income Tax Appellate Tribunal has agreed with the assessee's submission and quashed the entire re-assessment proceeding.

5. The Tribunal, following the decision of this Court in the case of ***CIT v. Atul Jain*: 299 ITR 383 (Del)**, held that the facts of the present case were virtually identical to those of ***Atul Jain*** *(supra)* and that, because the

under Section 147/148, the present proceedings were also liable to be quashed.

6. The learned counsel for the appellant/ revenue contended that the Tribunal had erred in following the decision in the case of ***Atul Jain*** *(supra)* inasmuch as the reasons recorded in ***Atul Jain*** *(supra)* were different from the reasons recorded in the present case. He submitted that the so-called reasons recorded in ***Atul Jain*** *(supra)* were clearly held by this Court to be vague and scanty and not to be any reasons at all. However, in the present case, there was clear information which was available with the Assessing Officer on this basis of which he could form a belief and it is also submitted by the learned counsel for the appellant that the Assessing Officer did form a belief and, therefore, invoking the decision of the Supreme Court in the case of ***ACIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd*** ***: (2007) 291 ITR 500 (SC)***, he submitted that the Tribunal had erred. He submitted that a substantial question did arise for the consideration of this Court. In particular, the learned counsel for the appellant / revenue relied upon the following portion of the Supreme Court decision in ***Rajesh Jhaveri*** *(supra)*:-

> "16. 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

> 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. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO*: [1991] 191 ITR 662, 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. Pvt. Ltd.*: [1996] 217 ITR 597 (SC); *Raymond Woollen Mills Ltd. v. ITO*: [1999] 236 ITR 34 (SC)."

7. On the other hand, the learned counsel for the respondent/ assessee placed reliance on the decision of this Court in the case of ***Atul Jain*** *(supra)* as also on several other decisions of this Court including that in the case of ***Jay Bharat Maruti Ltd. v. CIT: 223 CTR 269 (Del)*** and ***CIT v. Batra Bhatta Company: 174 Taxman 444 (Del)***. The learned counsel for the assessee/ respondent also submitted that the decision of the Supreme Court in the case of ***Rajesh Jhaveri*** *(supra)* was also clear in stating that there must be a belief which must be arrived at by the Assessing Officer and that there must be some material before the Assessing Officer so as to arrive at such a belief in order that the expression "reason to believe" is triggered. He submitted that in the present case, if one were to examine the reasons recorded prior to issuance of the notice under Section 148, there is only an

of Income Tax (Investigation) followed by a direction given by the same Deputy Director to proceed under Section 148 and another direction given by the Assessing Officer's immediate superior officer, namely, the Additional Commissioner of Income Tax to also issue a notice under Section 148 of the said Act. Therefore, according to the learned counsel for the respondent/ assessee, there was no 'belief' whatsoever formed by the Assessing Officer that there was any escapement of income. He has merely acted on the directions of the Deputy Director of Income Tax (Investigation) and the Additional Commissioner of Income Tax, which have been also referred to in the purported reasons recorded. He has not independently made up his mind on the basis of the information received from the Deputy Director of Income Tax (Investigation).

8. After having heard the counsel for the parties, we are inclined to agree with the submissions made by the respondent / assessee. We find that the Supreme Court in ***Rajesh Jhaveri*** *(supra)* made it absolutely clear that before an Assessing Officer issues a notice under Section 148, thereby re-opening the assessment under Section 147 of the said Act, he must have formed a belief that income had escaped assessment and that there must be some basis for forming such a belief. The Supreme Court made it clear that the basis of such belief could be discerned from the material on record which was available with the Assessing Officer. However, the Supreme Court in ***Rajesh Jhaveri*** *(supra)* did not say that it was not necessary for the

Assessing Officer to form a 'belief' and that the mere fact that there was some material on record was sufficient.

9. In the present case, we find that the first sentence of the so-called reasons recorded by the Assessing Officer is mere information received from the Deputy Director of Income Tax (Investigation). The second sentence is a direction given by the very same Deputy Director of Income Tax (Investigation) to issue a notice under Section 148 and the third sentence again comprises of a direction given by the Additional Commissioner of Income Tax to initiate proceedings under Section 148 in respect of cases pertaining to the relevant ward. These three sentence are followed by the following sentence, which is the concluding portion of the so-called reasons:-

> "Thus, I have sufficient information in my possession to issue notice u/s 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of reasons recorded as above."

10. From the above, it is clear that the Assessing Officer referred to the information and the two directions as 'reasons' on the basis of which he was proceeding to issue notice under Section 148. We are afraid that these cannot be the reasons for proceeding under Section 147/148 of the said Act. The first part is only an information and the second and the third parts of the beginning paragraph of the so-called reasons are mere directions. From the so-called reasons, it is not at all discernible as to whether the Assessing Officer had applied his mind to the information and independently arrived at

had escaped assessment. Consequently, we find that the Tribunal has arrived at the correct conclusion on facts. The law is well settled. There is no substantial question of law which arises for our consideration.

The appeal is dismissed.

BADAR DURREZ AHMED, J

V.K. JAIN, J

APRIL 27, 2010
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