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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 9659/2015 & CM No.23056/2015

RAJIV AGARWAL

..... Petitioner

Through: Mr S. Krishnan, Advocate.

versus

**ASSISTANT COMMISSIONER OF INCOME
TAX & ANR.**

..... Respondents

Through: Mr Dileep Shivpuri, Senior Standing
Counsel and Mr Sanjay Kumar, Junior Standing
Counsel.

AND

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W.P.(C) 9661/2015 & CM No.23059/2015

VIJAY LAXMI AGARWAL

..... Petitioner

Through: Mr S. Krishnan, Advocate.

versus

**ASSISTANT COMMISSIONER OF INCOME
TAX & ANR.**

..... Respondents

Through: Mr Dileep Shivpuri, Senior Standing
Counsel and Mr Sanjay Kumar, Junior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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16.03.2016

1. These petitions have been filed by the Assesseees, *inter alia*, impugning separate notices dated 31st March, 2015 issued under Section 148 of the Income Tax Act (hereinafter the 'Act') for Assessment Year (AY) 2008-09

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and further proceedings initiated pursuant thereto. At the request of the Assessee, the reasons for re-opening the assessments were disclosed to them. The said reasons as provided to the Assessee indicate that proceedings for re-assessments were initiated on the basis of a complaint received by the Income Tax Authorities. Since the reasons disclosed as well as the issues involved are similar, these petitions were heard together.

2. Briefly stated the relevant facts are as under:

2.1 Both the Assessee (Rajiv Agarwal – Petitioner in W.P.(C) No.9659/2015 and Vijay Laxmi Agarwal – Petitioner in W.P.(C) No.9661/2015) were at the material time – during the Financial Year 2007-08 – directors of a company, namely, M/s Scan Holdings (P) Ltd (hereafter ‘SHPL’). The said Assessee filed their return of income for the AY 2008-09 disclosing income from salaries from SHPL as well as income under the heads ‘Income from House Property’ and ‘Income from Other Sources’.

2.2 Apparently, there is some dispute between the company M/s SHPL and its erstwhile auditor, Naveen Chaudhary, with regard to the remuneration payable to the said auditor. The Court was also informed that a complaint alleging misconduct on the part of Naveen Chaudhary was filed by Rajiv Agarwal before the Institute of Chartered Accountants of India (ICAI). The Board of Discipline of the ICAI, in its order dated 3rd February, 2011 found the said Chartered Accountant guilty of “other misconduct” within the meaning of Clause (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949 and his name was removed/suspended from the rolls of ICAI for a period of three months. The appeal against the

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said order was rejected by the Appellate Authority by an order dated 24th September, 2011.

2.3 It is contended on behalf of the Assesseees that in view of disputes/animosity, Shri Naveen Chaudhary has made repeated complaints to various authorities in order to harass the Assesseees; and the complaint made to the Income Tax Authorities is also one such complaint.

2.4 On the basis of a complaint of tax evasion dated 10th December, 2014, the Assessing Officer ('AO') initiated the proceedings for re-opening of the assessments for AY 2008-09 and on 31st March 2015, issued notices under Section 148 of the Act calling upon the Assesseees to file their return of income for AY 2008-09. In response to the aforesaid notice, the Assesseees filed a copy of their respective original return of income for the relevant AY and requested for the reasons for re-opening of their assessment. In response to the aforesaid request, the AO by separate letters dated 27th April 2015 provided the reasons as requested by the Assesseees. In the case of Rajeev Agarwal, the Assessee/Petitioner in W.P. (C) No.9659/2015 the reasons recorded reads as under:

"Income Tax Return for the A.Y 2008-09 was filed by the assessee on 29.07.2008 declaring income of Rs. 14,64,950/-.

In this case, the information in the form of complaint of tax evasion dated 10.12.2014 pertaining to Sh. Rajiv Agarwal has been received in this office.

Keyman Insurance

In the said complaint, it is stated that the company (M/s Scan Holdings Pvt Ltd) in which Shri Rajiv Agarwal is one of

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the Director of the Company has paid premium for the policies of directors amounting to Rs. 20 lakh up to financial year 2007-08 (i.e. AY 2008-09) and claimed as business expenses. Before it is due for maturity and liable for tax, the policies were shown as sold in FY 2007-08 for a meager amount of Rs. 4.16 lakhs to its directors. It has been used to tooi to avoid tax and transferred the money to its directors without payment of tax. The exact amount of each director is still to be quantified. therefore, it is clear that un quantified income in this case but quantified income of Rs. 20,00,000/- (in the case of both the Directors of the company) has escaped assessment because the assessee has not disclosed fully and truly all material facts in the return of income and the same could not be verified/assessed to tax as the case was not selected under scrutiny assessment. Therefore, I have reasons to believe that the assessee has not offered the income referred above which needs to be scrutinized and hence income as above has escaped assessment within the meaning of section 147(b) of the I. T. Act, 1961 in the interest of revenue/to protect the revenue.

The case of assessee was not assessed u/s 143(3) of the Act and Since 4 years has lapsed and the case falls under section 151 (2) of the I. T. Act, 1961, therefore, the reason are put up before Addl. CIT, Range-22, New Delhi for necessary approval for issuing notice u/s 148 of the I. T. Act, 1961."

2.5 The reasons recorded in the case of Vijay Laxmi Agarwal, Petitioner/Assessee in W.P.(C) No.9661/2015, but for the figure of her returned income, is identical to the reasons as recorded in the case of Rajiv Agarwal.

2.6 The Assesseees, by separate letters dated 15th May, 2015, filed their objections to the reasons recorded for re-opening of the assessments and

raised several contentions. It was, *inter alia*, contended by the Assesseees that the complaint on the basis of which their assessments were sought to be re-opened was *malafide* and stemmed from the disputes with Naveen Chaudhary, the erstwhile auditor of SHPL. Rajeev Agarwal further asserted that there was no transaction whereby any Insurance Policy was assigned by SHPL to him during the relevant period and, therefore, the fundamental premise on the basis of which his assessments were sought to be re-opened was factually erroneous. Insofar as Vijay Laxmi Agarwal is concerned, she stated that during the Financial Year 2007-08, a Keyman Insurance Policy (Policy No.122936684) was assigned to her against a consideration of Rs.2,08,000/- (Rupees Two Lakhs and Eight Thousand) and the surrender value of the said policy at the material time was Rs.2,07,236/- (Rupees Two Lakhs Seven Thousand Two Hundred and Thirty Six). Therefore, no income could be said to accrue to her pursuant to the said transactions in the Financial Year 2007-08. She also provided a copy of the resolution passed by the Board of Directors of SHPL for such assignment and a letter from Life Insurance Corporation of India confirming the guaranteed surrender value of the said policy as on 23rd October 2007.

2.7 The Assesseees further contended that a complaint of evasion could not possibly form tangible material on the basis of which the concluded assessments could be re-opened. They also sought a copy of the complaint dated 10th December, 2014 referred to by the AO in the reasons recorded by him.

2.8 The objections raised by both the Assesseees were rejected by the AO

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by separate orders dated 11th September, 2015 which are more or less similarly worded. The AO held that the sufficiency or the correctness of the material for re-opening could not be questioned. The request of the Assesseees to be provided a copy of the complaint on the basis of which the assessments were sought to be re-opened was also rejected. The AO after referring to several decisions, including the Supreme Court and this court, held that since the reports were not scrutinized under Section 143(3), a deeper scrutiny was required. The Assessee's contention that there was no failure on their part to truly and fully disclose all material facts was rejected by holding that whether omission was deliberate or inadvertent was not relevant and that the AO would have jurisdiction to re-open the assessments if there was omission or failure on the part of the Assesseees.

3. Mr S. Krishnan, learned counsel appearing for the Assesseees/Petitioners has contended that the entire exercise of initiating re-assessment proceedings is based on a mere suspicion and the AO had no material to form a reason to believe that income of the Assesseees had escaped assessment. He contended that a mere complaint by a person could not possibly constitute tangible material on the basis of which the AO could form a belief that income of the Assesseees has escaped assessment. He relied upon the decision of this Court in *CIT v. Atul Jain (2008) 299 ITR 383(Delhi)* and drew the attention of this court to paragraph 16 and 17 which read as under:

“16. In *United Electrical Co. Pvt. Ltd. v. Commissioner of Income Tax (2002) 258 ITR 317*, this Court considered the entire issue afresh. It was observed that the expression "reason to believe" occurring in Section 147 of the Act is crucial. Reference was made

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to Bawa Abhai Singh v. Deputy Commissioner of Income Tax (2002) 253 ITR 86 wherein it was observed that "reason to believe" postulates a foundation based on information and a belief based on reasons. In so far as "information" is concerned, a Division Bench of this Court held in *L.R. Gupta v. Union of India* : [1992] 194 ITR 32 (Delhi) that:

“The expression 'information' must be something more than a mere rumour or a gossip or a hunch.”

“17. Of course, this was in the context of Section 132 of the Act but as held in *United Electrical Co. P. Ltd.* [2002] 258 ITR 317 (Delhi) the logical is equally applicable to a case under Section 147 of the Act.”

4. Mr Shivpuri, learned Senior Standing counsel appearing for the Revenue supported the issuance of impugned notices as well as the AO's orders rejecting the objections raised by the Assessee. He referred to the decision of the Supreme Court in the case of *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (2007) 291 ITR 500 (SC) and contended that at the stage of issuing a notice under Section 148, the AO was not required to apply its mind to determine whether the income of the Assessee had escaped assessment but was only required to form a prima facie view. He contended that the question whether any taxable income arose in the hands of the Assessee which had escaped assessment would be finally determined during the re-assessment proceedings initiated by the AO.

5. We have heard the learned counsel for the parties.

6. It is apparent from the plain reading of the reasons recorded by the

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AO that the AO has relied solely on a complaint dated 10th December, 2014 received by the AO and assumed that certain Keyman Policies, on which a premium aggregating Rs.20 lakhs had been paid, was sold to the Assessee for a sum of Rs.4.16 lakhs and this transaction had resulted in an income of Rs.20 lakhs arising in the hands of both the Directors. Insofar as Rajeev Agarwal is concerned, it is not disputed that no policy was assigned and no such transaction as recorded by the AO in the reasons to believe that the income had escaped assessment was entered into by Rajeev Agarwal with SHPL. In the circumstances, the fundamental premise on which the assessment of Rajeev Agarwal was sought to be re-opened is bereft of any factual foundation. We note that Rajeev Agarwal had specifically pointed out the said fact in his objections against the reasons recorded by the AO. However, the same was neither considered nor adverted to by the AO in its order dated 11th September, 2015 disposing of the said objections.

7. Since the foundation on the basis of which re-assessment proceedings have been initiated in the case of Rajeev Agarwal is absent, the same must fail on this ground alone.

8. In the case of Vijay Laxmi Agarwal, the Assessee had filed objections before the AO on 15th May, 2015 and had informed the AO that SHPL had assigned a Keyman Policy to the said Assessee for a consideration of Rs.2,08,000/- and the surrender value of the said policy as on 23rd October, 2007 was Rs.2,07,236/- and thus, there was no question of any income arising or accruing to the Assessee on account of that transaction. A perusal of the AO's order dated 11th September, 2015 rejecting the objections raised

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by the Assessee indicate that the AO had simply ignored the facts pointed out and simply proceeded on the basis that those were not required to be considered at that stage and would be considered during the re-assessment proceedings.

9. In our view, the proceedings for re-assessment under Section 147 commenced by the AO are fundamentally flawed for several reasons. First of all, it is apparent that the proceedings have been initiated merely on an unsubstantiated complaint. It is now well settled by a number of decisions that concluded assessments cannot be re-opened merely on suspicion and the AO must have "reason to believe" that income has escaped assessment and this is quite different from merely having a reason to suspect. The Supreme Court in the case of *Income Tax Officer, Calcutta & Ors. v. Lakhmani Mewal Das (1976) 103 ITR 437 (SC)* had explained the same in the following words:

"The powers of the Income-tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied."

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10. In the present case, it is doubtful whether the AO even had any ground to suspect that income had escaped assessment. Apparently, apart from an unsubstantiated complaint there was no material which could possibly lead the AO to suspect that income had escaped assessment. This is quite apparent from the fact that the AO was also clueless of the fact that no such transaction as alleged had in fact been entered into between SHPL and Rajeev Agarwal. In *Rajesh Jhaveri Stock Brokers (supra)*, the Supreme Court had explained that the expression 'reason to believe' would mean justification to know or suppose that income had escaped assessment. While, it is correct that it is not necessary for the AO to finally ascertain whether income had escaped assessment, nonetheless, the AO must have sufficient cause to believe that it has.

11. Secondly, the AO's belief that income of an Assessee has escaped assessment must be based on tangible material. It has been explained in a number of decisions that there must be a 'close nexus' or 'live link' between tangible material and the reason to believe that income has escaped assessment. It follows that the material on the basis of which re-assessment proceedings can be initiated must be credible material which could lead to such belief. Clearly, an unsubstantiated complaint cannot be the sole basis for forming a belief that income of an assessee has escaped assessment. Even in cases where the AO comes across certain unverified information, it is necessary for him to take further steps, make inquiries and garner further material and if such material indicates that income of an assessee has escaped assessment, form a believe that income of the Assessee has escaped

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assessment. Plainly, in this case, the Assessee had not acquired any material to form such belief. On the contrary, when it is pointed out to the AO that SHPL had not assigned any policy to Rajeev Agarwal, the said fact was completely overlooked. Similarly, in the case of Vijay Laxmi Agarwal, the AO failed to take into account the fact that the Assessee had paid a sum of Rs.2,08,000/-, which was more than surrender value of the policy, for assignment of the policy in her favour. This too was completely ignored by the AO.

12. Thirdly, the procedure for providing reasons to believe to an assessee and thus enabling him to file his objections after he has filed his return – as directed by the Supreme Court in *G. K. N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)* - is not a purposeless exercise. The procedure as established is an essential safeguard provided to an Assessee against arbitrary initiation of re-assessment proceedings. It is thus, necessary that an AO consider the objections in a meaningful manner. In the present case, the AO has completely ignored the objections filed by the Assessee and has failed to apply its mind to any of the facts or material presented by the Assessee, thus rendering the entire exercise meaningless.

13. In our view, Mr Shivpuri's contention that the AO is not required to apply his mind to the facts in relation to the escapement of income at the stage of considering objections is wholly without merit. Whilst, the AO is not expected to finally decide whether income of an assessee has escaped assessment at the stage of considering the objections he, nonetheless, has to consider the facts presented in support of the objections in a meaningful

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manner and at least to consider whether his reason to believe that income escaped assessment is justified or is without sufficient basis. Since in the present case, the AO has failed to consider the objections filed by the Assessee, the order dated 11th September 2015 passed by the AO rejecting the objections raised cannot be sustained

14. Accordingly, the writ petitions are allowed. The impugned notices dated 31st March, 2015 issued under Section 148 of the Act as well as the orders dated 11th September 2015 passed by the AO rejecting the objections filed by the respective Assessee, are set aside.

15. No order as to costs.



S.MURALIDHAR, J



VIBHU BAKHRU, J

MARCH 16, 2016
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