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

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Date of Judgment: 8th January, 2018

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W.P.(C) 9800/2015

SCAN HOLDING P LTD.

..... Petitioner

Through Mr. S. Krishnan, Advocate

Versus

ASSISTANT COMMISSIONER OF
INCOME TAX & ANR.

..... Respondents

Through

Mr. Ruchir Bhatia and Mr. Puneet
Rai, Standing Counsel for the
Income Tax

Mr. Zoheb Hossain, Sr. Standing
Counsel for Revenue

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

1. We have heard counsel for the parties, and with their consent taken the writ petition for final hearing. We have also perused the departmental records which has been produced by the counsel for the respondents.
2. The petitioner, Scan Holding (P) Ltd., has challenged initiation of proceedings under Section 147 read with 148 of the Income Tax Act, 1961 (Act, for short) vide notice dated 31.03.2015 for the Assessment Year (AY) 2008-09.
3. It is accepted and admitted that the original return filed by the petitioner for the AY 2008-09 was not subjected to scrutiny assessment

and was processed under Section 143 (1) of the Act. Thus, this is not a case of change of opinion.

4. Reasons to believe, for initiation of proceedings for the AY 2008-09, read :-

"Income Tax Return for the A.Y. 2008-09 was filed by the assessee on 28.09.2008 declaring income of 3,64,26,780/-.

1. Commission on sales received:

In the case, information in the form of complaint of Tax evasion dated 10.12.2014 & 12.03.2015 has been received in this office. As per the information received, the company is stated to be involved in money laundering. The company has tried to convert its black money into legitimate business income. The modus operandi of the case is that a company i.e. M/s Ball Corporation (a listed company on NYSE) has incorporated a wholly owned subsidiary in India namely M/s Ball Packaging India Pvt Ltd with the object of installation of beverage can manufacturing amount to the assessee company as bribe to get the various clearances/licences/permission from govt departments. The Ball Corporation has made a payment of Rs. 1,26,20,250/- and Rs. 2,19,71,126/- as commission on sales. The total amount of commission declared was received by a singly cheque by M/s Scan Holdings Pvt Ltd who has also declared this amount as commission of Rs. 1,26,20,250/- in FY 2007-08 pertaining to AY 2008-09 but in fact, no commission has been paid by M/s Ball Corporation. Further the payment is received in foreign currency but shown in Indian currency. As per the complaint, there are no legitimate business activity between two parties which looks like a sham transaction. It could be an accommodation entry transactions which needs to be examined/verified deeply to know the source of income/funds.

2. Income escaped from Investment of Rs. 2,65,734/- in Joint Venture in Singapore;

On perusal of the Balance Sheet of the company it is noticed that the company has invested Rs. 2,65,734/- in joint Venture of Scan Holdings Ltd. Singapore. On perusal of P&L A/c of

the company, it revealed that no income from the above investments has been shown by the company resulting in escapement of income. The Escapement of Income cannot be quantified at this juncture but I have reason to believe that some Income has Escapement Assessment

3. Escapement of Income u/s 14A read with Rule 8D:

On perusal of assessee company's computation of income, it is revealed that the assessee had shown exempt dividend income amounting to Rs.2,27,600/- whereas the assessee had not disclosed the expenditure to earn this exempt income as per section 14A read with Rule 8D resulting in escapement of income.

4. Bogus and Personal expenses:

Information has also been received that the assessee has claimed bogus and personal expenses as business expenses to suppress the income and therefore lowering or avoiding the payment of tax. The same issue was also raised in the AY2007-08. However, the amount cannot be quantified at this point of time but I have reason to believe that this issue needs to be scrutinized and this type of expenses is liable to be disallowed,

5. Expenditure on account of Foreign Travelling

It is noticed from perusal of P&L Account that the company has debited Rs.3465948/- as Foreign Travelling in its P&L A/C. The same issue was also raised in the AY2007-08. However, the amount cannot be quantified at this point of time but I have reason to believe that this issue needs to be scrutinized and this type of expenses is liable to be disallowed.

6. Rent to Director

It is stated by the complainant that the rent paid to directors is just an adjustment entries as there no rent agreement and

even though the same has not been paid on monthly basis. Further, the company office is lying vacant still rent is paid for the office related to directors.

7. Deprecation on Office:

The assessee has claimed depreciation on investment in office which includes cost of land also. The company has claimed depreciation on entire consideration paid for this which is liable to be disallowed.

8. Therefore, I have reason to believe that during the assessment year 2008-09, certain amount has escaped assessment which cannot be quantified at this stage.

9. It is important to refer herein the Auditor's report (3CD Report) for AY 2007-8. According to notes 6 of Schedule 13 of Balance Sheet as on 31.03.2008, the auditor has indicated that no external supporting document for any financial transaction were made available and the auditor only relied upon the entries appearing in the books of account and explanation given the management of the company.

Further, as per records, no scrutiny assessment u/s 143(3) was undertaken and only summary assessment u/s 143(1) was completed. Therefore, the books of accounts and details of expenses have not been verified and the detail verification of issues can be done only during the re-assessment Proceedings.

9 In view of the above mentioned issues and facts from Point No.1 to 6, it has been observed that a quantified income of Rs 1,26,20,250/- and further an un quantified income as has escaped assessment on account of various issues as per the details, given above by reasons of failure on the part of assessee by not disclosing" the true and correct particulars of Income for the A.Y. 2008-09. Hence, I have reasons to believe that income in the case of assessee has escaped assessment as the assessee has not offered in its case honestly within the meaning of section 147 (C) of the I. T. Act 1961

10. Since 4 years has lapsed and the case falls under section 151 of the I. T.

Act, 1961, therefore the reason are put along with case recorded before Addl. CIT, Range-22, New Delhi for necessary approval."

5. The petitioner/assessee, upon receipt of reasons to believe, had filed detailed objections dated 10.06.2015, which has been enclosed with the present petition as Annexure P-10. The objections are legal and also deny each and every factual assertion as mere assumption and imagination. The reasons to believe, it is asserted merely refer to the complaint made by the former statutory auditor, a Chartered Accountant. The complaint was reproduced in the reason to believe without ascertaining and examining whether there was any basis and substance in the allegations, or they are vague and biased insinuations, which were nothing more than gossip and canards. We are not reproducing the entire letter, but would like to reproduce some portion of the objection letter:-

"5. PRELIMINARY OBJECTION 2 - WHETHER THE CONTENTS OF THE COMPLAINTS AS BROUGHT INTO THE REASONS RECORDED LEAD TO ANY BELIEF AS TO ESCAPEMENT OF INCOME - Since we are not privy to the complaints themselves, these submissions are being made on a perusal of the Reasons recorded, requesting for leave to make further submissions if required after receipt of copies thereof: Two points are noteworthy from the contents of the Reasons:

a. If the Complainant is the Assessee's erstwhile auditor as referred to at Para 2 above, it is interesting that he has helped write the Assessee's books of account, then conducted audit and certified them to be true and fair, then had the Assessee's return for the subject year filed, and finally, when there were issues as to increased audit fee demanded by him, started to write and shoot of complaints with regard to the very same accounts. ANNEXURE-g to this letter contains document after document wherein the Assessee's accounts have been certified to be true and fair by the same individual. Doubtless, while

applying your mind to the allegations made by him, your kind self would have referred to the Assessee's annual accounts and found this contradiction to exist. At the worst therefore, at the time of recording' reasons, your kind self had on the very same file, a set of allegations and a set of certifications by the very same person as to the very same annual accounts. At worst, such a singular coincidence would lead to the logical conclusion that one of the two acts o the complainant is false. But no such process of reasoning or verification is gleaned from a perusal of the Reasons Recorded. There is therefore nothing on record to tip the scales and hold that the complaints are correct and the certifications are erroneous. That clearly amounts to no material.

b. The observations made in respect of each of the seven issues listed have been tabulated at Para 3(c) above, shows that all of the seven allegations either have no nexus with escapement of income, or are so far-fetched, that no reasonable person would find them even noteworthy. The issue with regard to commission on sales is a case in point.

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10. Therefore, the proposed reopening of the assessment appears mechanical and non-reasoned for as many as three issues:

a. ALLEGATIONS ARE FALSE & MOTIVATED - The factual sequence of events as listed in the complaint are motivated, and do not lead to any belief as to escapement of income. Despite this, and without any verification or substantiation, they have been lifted into reasons recorded. It may be the say of the Revenue that in many cases, they receive complaints that require verification, but in such cases, there should be some testing of the waters before Reasons are recorded and notices are shot off.

b. ALLEGATIONS THEMSELVES DO NOT DEMONSTRATE ESCAPEMENT OF INCOME - Even forming the worst possible

conclusion from the allegations listed, they do not lead to any conclusions to escapement of income; as has been pointed out at Para5(c) above.

c. NO OBSERVATION AS TO ESCAPEMENT OF INCOME – No observation or finding-in this regard appears in the Reasons Recorded either, as pointed out at Para 8 above. The belief as to escapement of income is to be formed by your kind self alone, and such belief must resonate from the Reasons Recorded. As the Assessing Officer, your kind self has to demonstrate that as per provisions of the Income-tax Act 1961, there is escapement of income. In the subject case though, the Reasons only indicate allegations and probabilities. The phrase 'I have reason to believe' is not a magic wand. It needs to be tested by its vicinity. The vicinity only comprises of unsubstantiated allegations and non-allegations. That being the case, the existence of the belief must be held to be a fiction, So it is prayed."

6. We have not reproduced paragraph 3 of the objections to avoid prolixity, albeit the petitioner had asserted that the allegation were conjunctures and imaginations and not worthy of being treated as cogent reasons. The petitioner had stated :-

[1] Commission received from Ball Corporation has been declared and taxed. Ball Corporation is a third and unrelated party with whom the assessee has arms length, albeit long business relations. The allegations of money laundering, sham transaction converting black money into legitimate income are bald allegation and completely illogical. There is not even a remotest ground or reason to support the assertion.

[2] Investment of Rs.2,65,734/- in a joint venture in Singapore was made in assessment year 2007-08, but no income from the said investment was earned in the year by the assessee. The assertion that the income must have been earned is ex-facie flawed and mere guess work. No such assumption could be made.

[3] Allegation of bogus and personal expenses being booked business expenses have been made without any details and particulars.

[4] Alleged non-disclosure of expenditure incurred to earn exempt dividend income, is based upon surmises and conjectures without specific detail as to what expenditure was incurred.

[5] There cannot be any assumption that foreign travel was not for business purpose. Substantial purchases as well as sales of the assessee were from foreign trading.

[6] Allegation with regard to rent and depreciation were also without basis and elucidation. The accommodation was used for business activities and was also its registered address. There was no basis or reason to assume or alleged that the premises was not used for business activities. The petitioner had disclosed income of over Rs.3.64 crores and the turnover of more than Rs.28.55 crores.

[7] Depreciation was charged on the cost of the assets purchased as per Rules.

7. The Assessing Officer by order dated 11.09.2015 rejected the objections filed by the petitioner to initiation of proceedings under sections 147/148 of the Act. This order after reproducing the reasons, in a cryptic and cursory manner refers to the objections raised and thereafter rejects them without much examination and elucidation, in the following words:-

“III. In response to reasons, the assessee vide letter dated 10/06/2015 filed written submission regarding its objections to there-opening of assessment u/s 147 of the Act, on the following grounds:

- The contents of complaint on the basis of which the case was reopened cannot be treated as material for reopening the case.*
- The contents of complaint on the basis of which the case was reopened cannot lead to any belief as to escapement of income.*

- *The reopening appears to be mechanical and is non reasoned.*
- *commission income earned from M/s. Ball Packaging has been duly offered to tax*
- *No disallowance can be made on account of Section 14A, Bogus expenses and Foreign Travel expenditure, rent paid to directors or depreciation on office premises.”*

IV. The submission made by the assessee have been considered. but found not acceptable. In the present case as the case for the relevant assessment year-was not assessed u/s 143(3) of the Act and six years have not elapsed for the relevant assessment year, prior approval as per Act was taken from the Competent Authority before .issuing the notice u/s,JA8. Hence the notice u/s 148 of the Act for assessment of the assessee Company's case is valid and as per law.

Thereafter, the order quotes case laws on the question of initiation of proceedings under Sections 147 and 148 of the Act. It is recorded in paragraph IV.2 that the contention of the petitioner that there was no "tangible" material or new information, was not correct and rather it was supported by facts, without setting out the "tangible" material and meeting the submission that the complaint was nothing but false-hood, unsupported and vapid.

8. On the issue of initiation of proceedings under sections 147/148 of the Act, distinction is drawn between ‘reasons to believe’ and ‘reasons to suspect’ for the statute permits re-opening in the former case and not in the latter case. In ***Income Tax Officer, Calcutta and Others versus Lakhmani Mewal Das***, (1976) 103 ITR 437 (SC), it was held as under:-

“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.”

9. In *Calcutta Discount Company Limited versus Income Tax Officer, Companies District I Calcutta and Another*, (1961) 41 ITR 191(SC), it was observed as under:

“37. The notices issued by the Income Tax Officer in the case before us undoubtedly fulfil conditions (2) and (3). Notices of reassessment were served before the expiry of eight years of the end of the relevant years of assessment. The Income Tax Officer also recorded his reasons in the reports submitted by him to the Commissioner and the Commissioner was satisfied that they were fit cases for the issue of such notices. The dispute in the appeal relates merely to the fulfilment of the two branches of the first condition and that immediately raises the question about the true import of the expression “has reason to believe” in Section 34(1)(a). The expression “reason to believe” postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Income Tax Officer. If it be asserted that the Income Tax Officer had reason to believe that income had been under-assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief,

but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that income has been under-assessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information.”

10. More direct and appropriate is the reasoning given in *Sheo Nath Singh versus Appellate Assistant Commissioner of Income Tax, Calcutta*, (1972) 3 SCC 234, wherein it has been held as under:-

“10. In our judgment, the law laid down by this Court in the above case is fully applicable to the facts of the present case. There can be no manner of doubt that the words “reason to believe” suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court.”

We wish to clarify, least there be any doubt and debate. At the stage of issue of notice what is required and necessary is that the information must be "definite", i.e, it should not be mere guess, gossip or rumour. In the context of the two Sections "definite" does not mean conclusion of certainty at the stage of notice for there is clear distinction between receipt

of information as a consequence of which the Assessing Officer forms an honest belief and notice is issued, and the final determination, which takes place when the assessment order is passed. Once the Assessing Officer has formed a *bona fide* and honest belief upon materials, which reasonably support such belief, issue of notice would be valid as held and observed in ***A.N. Lakshman Shenoy versus ITO, Ernakulam and Another***, (1958) 34 ITR 275 (SC).

11. The aforesaid discussion means that a complaint or information from a third party before the Assessing Officer, when it is "definite" information as explained in ***A.N. Lakshman Shenoy*** (supra), and not mere gossip or guess or rumour, can certainly be a ground for issue of notice under Section 147/148 of the Act, *albeit* the Assessing Officer must form an honest belief upon some material, and basis, which supports such belief.

12. The petitioner has pointed out that similar complaints were made by the same Chartered Accountant for Assessment Years 2006-07, 2007-08 and for subsequent Assessment Years, i.e., 2010-11 onwards. Complaints were also made against the individual directors, namely, Vijay Aggarwal, Rajiv Aggarwal and Juhi Dixit. The individual directors had filed writ petitions in this Court, which have been allowed. Similarly, for the Assessment Year 2007-08, the petitioner had participated in the assessment proceedings under Section 147/148 of the Act and some additions in the scrutiny assessment were made, but these additions have been deleted in the first appeal. We are not giving any firm or affirmative opinion, but would require the Assessing Officer to consider the aforesaid aspects and pass a reasoned and a speaking order dealing with the contentions of the assessee.

13. This is a case wherein there was no assessment and in case Assessing Officer felt that there was nexus between the grounds and the facts stated

and available which have basis and foundation to form the 'reasons to believe' that income has escaped assessment, it is open to him to say so and thereafter continue with the proceedings under sections 147/148 of the Act. However, the findings of the Assessing Officer must be honest and cogent, based upon some material available on record, to support the *prima facie* finding and not predicated on mere assumption and guess work. A complaint or information may merit examination and consideration, but every complaint does not merit reopening or proceeding under sections 147/148 of the Act. The Assessing Officer must examine and ascertain whether or not allegation made are mere guess work, surmise and rumour, or has some basis to make it the basis for detailed final determination.

14. The procedure for filing of objections and a speaking order by the Assessing Officer dealing with the objections, came to be adopted in terms of the decision of the Supreme Court in ***GKN Driveshafts (India) Limited versus ITO***, (2003) 259 ITR 19 (SC), the relevant portion of which reads as under:-

"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

15. In the facts of the present matter, we feel that the Assessing Officer has merely observed and recorded that the objections raised by the assessee were untenable and wrong, without elucidating and dealing with the

contentions and issues raised in the objection letter dated 10th June, 2015. The Assessing Officer has not applied his mind to the assertions and contentions raised by the petitioner and the core issue to be examined and considered.

16. Accordingly, we set aside the order dated 11th September, 2015 with a direction of remand to the Assessing Officer to pass a fresh order after hearing the petitioner or its authorised representative, without being influenced by the earlier order dated 11th September, 2015 or by this order. We have not formed any firm opinion on merits.

17. To cut short delay, the petitioner/authorised representative will visit the office of the Assessing Officer on 31st January, 2018 at 2.30 P.M., when a date of hearing will be fixed.

18. The writ petition is disposed of in the aforesaid terms, without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 08, 2018
b/VKR