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

\+ **ITA 292/2015**

COMMISSIONER OF INCOME TAX-CENTRAL-I .... Appellant
Through: Mr. Kamal Sawhney, Senior Standing Counsel.

versus

M/S. INDO ARAB AIR SERVICES ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Ms. Roopali Gupta and Ms. Mehak Gupta, Advocates.

\+ **ITA 299/2015**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-I .... Appellant
Through: Mr. Kamal Sawhney, Senior Standing Counsel.

versus

RL TRAVELS ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Ms. Roopali Gupta and Ms. Mehak Gupta, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
20.10.2015

Dr. S. Muralidhar, J.

1. ITA No.292/2015 is an appeal filed by the Revenue under Section 260A

of the Income Tax Act, 1961 ('Act') against an order dated 18th June, 2014 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No.5415/DEL/2011 for the Assessment Year (AY) 2002-03.

2. ITA No.299/2015 is an appeal filed by the Revenue under Section 260A of the Act against an order dated 22nd October, 2014 passed by the ITAT in ITA No.5414/DEL/2012 for the AY 2002-03. The Assessee in ITA No.299/2015, RL Travels, is a sister concern of the Assessee in ITA No.292/2015, M/s. Indo Arab Air Services ('Indo Arab'). Both Assessees are in the travel agency business. Since the question involved in both cases is more or less similar, the appeals are being disposed of by this common order.

3. The common question that arises for consideration in both cases, as urged by the Revenue, is whether in the facts and circumstances of the case, the ITAT was right in holding that the reopening of the assessment under Section 148 of the Act was bad in law as the reasons to believe formed by the Assessing Officer (AO) was not in terms of Section 147 of the Act.?

4. The facts in brief as far as ITA No.292/2015 is concerned are that the Assessee, Indo Arab, filed its return of income for the AY 2002-2003 on 21st October, 2001, declaring a total income of Rs.36,02,307. The return was processed and an acknowledgement was issued under Section 143(1) of the Act. Subsequently, the AO received information from the Enforcement Directorate (ED) that in the books of the Assessee there were huge cash deposits. The following reasons were thereafter recorded in the file by the

AO for reopening of the assessment under Section 148 of the Act:

> "Information has been received from the Enforcement Directorate that in the books of M/s. Indo Arab Air Services there has been huge cash deposits. In the books of M/s. Indo Arab Air Services, New Delhi there has been cash deposits of amounting to Rs 3,23,00,550/- during F..Y. 2001-02 as detailed in Annexure-A, but on perusal of records of the assessment year 2002-03 it is noticed that the assessee had no disclosed these transactions in its books of accounts. In the investigations of the Enforcement Directorate no plausible explanation has been offered by Shri. Chetan Gupta, partner of M/s. Indo Arab Air Services who failed to explain and substantiate the source of this cash receive.
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> In view of the fact that no satisfactory explanation has been furnished by the assessee regarding the source of the cash deposits of Rs.3.23 Crore, I have therefore reason to believe that the money U/S 68 of the IT Act, 1961, has escaped assessment."

5. On the above basis notice was issued by the AO to Indo Arab, on 27th March, 2009, asking it to file its return of income. The Assessee by letter dated 23rd July, 2009 stated that the original return filed by it may be treated as return under Section 148 of the Act. *Inter alia* the explanation given by the Assessee for the cash deposits found in its account was that they were counter sales of airline business of around Rs.18 crore during the AY 2002-2003 out of which a large percentage was in cash. Therefore the cash was shown as such in the books which was a normal trade practice. It stated that Indo Arab was the General Sales Agent (GSA) for Saudi-Arabian Airlines both for passenger and cargo. Indo Arab was issuing tickets to various travel agents and also selling air tickets. It had also issued tickets to pilgrims undertaking Umrah/Haj and collected payments from them in cash. It was further stated that the books of accounts of Indo Arab had been lost in a fire

which took place on 17th/18th June, 2003. A copy of the FIR registered in that regard was enclosed. Indo Arab also submitted that under Section 44AB of the Act, a tax audit had been conducted by its Chartered Accountants (CA), who had verified its books of accounts and gave a report on 1st July, 2002 *inter alia* stating that the balance sheet and profit and loss account give a true and fair view of the statement of affairs of the Assessee. It was pointed out that the said tax audit report and the balance sheet duly signed by the partners had formed part of the record of the assessment proceedings. In a further reply, it was *inter alia* stated by Indo Arab the cash deposit of Rs.3.23 crore was out of the business receipts and duly disclosed in its account.

6. The AO, however, rejected the above contentions of Indo Arab and held that in the absence of books of accounts the cash deposits in the sum of Rs.3,23,00,550 for Financial Year 2001-2002 was required to be treated as unexplained income. It was directed to be added back to the income of the Assessee.

7. As far as ITA No.299/2015 is concerned, the Assessee, RL Travels, filed its return of income for AY 2002-2003 on 28th October, 2002 declaring a total income of Rs.45,82,407/-. The following reasons were recorded by the AO for seeking to reopen the assessment under Section 148 of the Act:

> "In the books of M/s. R.L. Travels, New Delhi there has been cash deposits of Rs.90,50,000/- during the F.Y 2001-02 as detailed in Annexure - A. Also, in the books of accounts of M/s. R.L. Travels, Trivendrum, it is seen that two amounts of Rs.15 lacs and Rs.10 lacs have been shown as received in cash by M/s. R.L. Travels, New Delhi

from its Trivendrum Branch in the month of March 2002 but no plausible explanation has been offered by Sh. Chetan Gupta, partner of RL Travels, regarding the purpose and mode of transfer of such money during investigation by Enforcement Directorate.

Further, during examination of books of accounts of M/s. RL Travels, New Delhi for the FY 2001-02, the Enforcement Directorate observed that in the ledger "Advance for land purchase", the total transaction are amounting to Rs.91.50 lakhs. Before Enforcement Directorate Sh. Chetan Gupta stated that though some of these payments were mentioned in the books of accounts as if paid by Cheque, in reality he had withdrawn the cash trough self/bearer cheques & entire amount was paid in cash to one party Sh. Dharam. This is indicative of the fact that Sh. Chetan Gupta had cash transaction with some parties on a regular basis whose identity cannot be established."

8. Pursuant to the notice issued to it under Section 148 of the Act on 27th March, 2009, RL Travels filed a letter dated 23rd July, 2009 stating that the return originally filed by it may be treated as the return under Section 148 of the Act.

9. In response to a questionnaire issued to it by the AO, RL Travels explained that it was a GSA for Asiana Airlines and Oman Air for passenger and cargo. It too contended that *inter alia* air tickets were being sold in cash/cheque which were duly accounted for in the books of accounts and bank accounts. RL Travels also relied upon the tax audit report given by its CA under Section 44AB of the Act which *inter alia* stated that its balance sheet and profit and loss account give a true and fair view of the statement of affairs. It was further stated that all the debtors and creditors were duly verified at the time of audit as was evident from the certificate issued by the CA. The CA had also verified the cash sales accounted for in the books of

account. Had the cash sales not been made or not accounted for, the CA would have qualified their report.

10. However, the AO disbelieved the above contention of RL Travels and held that in the absence of the books of accounts, the cash deposit in the sum of Rs.90,50,000/- ought to be treated as unexplained income. It was accordingly added back to the income.

11. The Commissioner of Income Tax (Appeals) [CIT (A)] through a separate order dated 3rd September, 2012 partly allowed the appeal by Indo Arab and restricted the addition to Rs.46,38,800/-. As regards the appeal by RL Travels, the CIT (A) affirmed the addition made by the AO.

12. The appeal filed by Indo Arab was allowed by the ITAT by the impugned order dated 18th June, 2014. The ITAT noted that the information in the first place was not correct inasmuch as Indo Arab was regularly assessed to income tax. The AO had himself given a finding that the cash transaction was recorded in the books of accounts. Further the observation that there was no plausible explanation offered by the Assessee from the ED's point of view was vague and could not form the basis for the AO to form a belief regarding income escaping assessment. The statement given by Mr. Chetan Gupta to this effect was also not enclosed with the information sent by the ED. Consequently both sets of information received from the ED were found to be factually incorrect. The ITAT was of the view that the said information ought to have been verified from the available record by the AO to form a reason to believe that income had escaped assessment.

13. With regard to the appeal filed by the RL Travels, the ITAT noted that it was a sister concern of Indo Arab and relying on the order in the case of Indo Arab, the ITAT by the impugned order dated 22nd October, 2014 set aside the addition and quashed the reopening of the assessment in the case of RL Travels as well.

14. Mr. Kamal Sawhney, learned Senior Standing Counsel for the Revenue, first submitted that since this was a case where returns were not picked up for scrutiny and only an acknowledgement was issued under Section 143(1) of the Act. So there was no occasion for the AO to form any opinion in the first place. Consequently, the reopening of assessment could not be said to be on the basis of a change of opinion. Relying on the decisions in ***Signature Hotels (P) Ltd. v. Income Tax Officer (2012) 20 taxmann.com 797 (Del)*** and ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.(2007) 291 ITR 500*** he submitted that there was no reason for the AO to make a detailed investigation and come to a definite opinion on the basis of the information provided by the ED that the income of the Assessee had escaped assessment. As long as there was information received from a governmental agency it constituted a valid and tangible material on the basis of which AO could form a tentative or *prima facie* belief regarding escapement of income. He sought to further make a distinction between the cases of the two Assessees. In the case of RL Travels, he pointed out that there was additional information regarding the cash transactions entered into by the Assessee with the parties whose identities could not be established.

15. Mr. Ajay Vohra, learned Senior Counsel appearing for the Assessees submitted that there had to be a nexus between the material given to the AO and the formation of the reason to believe. A reopening of the assessment under Section 147 of the Act could not be based merely on suspicion.

16. Before proceeding to examine the relevant facts in each of the present cases, the settled legal position concerning the fulfilment of a jurisdictional requirement under Section 147 of the Act prior to the reopening of the assessment requires to be recapitulated. What could constitute 'reason to believe' for the purposes of Section 147 of the Act was summarized by the Supreme Court in ***ITO v. Lakhmani Mewal Das (1976) 103 ITR 437*** as under:

> "(a) The powers of the Assessing Officer to reopen an assessment, though wide, are not plenary.
>
> (b) The words of the statute are "reason to believe" and not "reason to suspect".
>
> (c) The reopening of an assessment after the lapse of many years is a serious matter. Since the finality of a judicial or quasi-judicial proceedings are sought to be disturbed, it is essential that before taking action to reopen the assessment, the requirements of the law should be satisfied.
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> (d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason be held in good faith and cannot merely be a pretence.
>
> (e) The reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the

material coming to the notice of the Assessing Officer and the formation is belief regarding escapement of income.

(f) The fact that the words "definite information" which were there in section 34 of the Act of 1922 before 1948, are not there in section 147 of the 1961 Act would not lead to the conclusion that action can now be taken for reopening an assessment even if the information is wholly vague, indefinite, far-fetched or remote."

17. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) the effect of the amendment made to Section 147 of the Act from 1st April, 1989 was explained. It was pointed out that:

"The scope and effect of section 147 as substituted with effect from April 1, 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."

18. In ***ACIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)***, it was

pointed out as under:

> "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer..."

19. The decision of this Court in ***CIT v. Orient Craft Ltd. (2013) 354 ITR 536 (Del)*** provides a complete answer to the specific question whether even where a return had not been picked up for scrutiny and there was only an intimation under Section 143(1) of the Act, the jurisdictional requirement of the AO having to record 'reasons to believe' under Section 147(1) of the Act that income had escaped assessment had to be fulfilled. The Court explained:

> "13. Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt

different standards while interpreting the words "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

20. Keeping the above legal position in view when the cases on hand are examined, it is seen that as far as Indo Arab is concerned while the AO set out the information received from the ED, he failed to examine if that information provided the vital link to form the 'reason to believe' that income of the Assessee had escaped assessment for the AY in question. While the AO has referred to the fact that the ED gave information regarding cash deposits being found in the books of the Assessee, the AO did not state that he examined the returns filed by the Assessee for the said AY and detected that the said cash deposits were not reflected in the returns.

In fact, the AO contradicted himself in the reasons recorded by him by noticing the information of the ED to the above effect and then stating that on perusal of the records for the AY in question it was noticed that the Assessee "had not disclosed these transactions in its books of accounts." Further the AO refers to the ED's information that Mr. Chetan Gupta, partner of the Assessee, failed to explain the sources of the cash deposits as shown in the books of accounts. However, that by itself could not have led the AO to even *prima facie* conclude that income of the Assessee had escaped assessment. The explanation or the lack of it of the entries in the books of accounts may have certain relevance as far as ED is concerned but that by itself does not provide the vital link for concluding that for the purposes of the Act any part of cash deposits constituted income that had escaped assessment. There is a long distance to travel between a suspicion that income had escaped assessment and forming reasons to believe that income had escaped assessment. While the law does not require the AO to form a definite opinion by conducting any detailed investigation regarding the escapement of income from assessment, it certainly does require him to form a *prima facie* opinion based on tangible material which provides the nexus or the link to having reason to believe that income has escaped assessment.

21. It is in this context that the Court finds that the decision in ***Mitsui & Company India (P) Ltd. v. Income Tax Officer (2012) 26 Taxmann.com 1***, on which considerable reliance was placed by Mr. Kamal Sawhney, is distinguishable on facts. The nature of the information provided by the governmental agency in that case did not itself refer to any amounts or

entries in the books of accounts of the Assessee. In the present case, however, the information received from the ED makes a reference to what was found in the books of accounts of the Assessee.

22. The next question that had to be examined by the AO was whether what was disclosed in the books of accounts was also disclosed in the returns filed by the Assessees. If it was not disclosed, then possibly the AO could have reasons to believe that the cash deposits reflected in the books of accounts may have escaped assessment. However, no effort appears to have been made by the AO to examine the returns filed by the Assessee in either of these cases.

23. As far as RL Travels is concerned, the further information concerning payments made to third parties, which were unable to be verified by the ED, also required to be assessed by the AO by examining the returns filed to discern whether the said transaction was duly disclosed by the Assessee. It is the treatment of the entries in the books of accounts in the returns filed by the Assessee that would be determinative of whether in fact there was any concealment of relevant information or whether any income had in fact escaped assessment.

24. With the AO in either of these cases not having adopted that approach, it could not be said that the jurisdictional requirement of the AO having to form reasons to believe on the basis of some tangible material that income had escaped assessment was fulfilled.

25. Consequently, the Court finds no error having been committed by the ITAT in the impugned orders in coming to the conclusion that the reopening of the assessments was bad in law. This is consistent with the settled legal position as noticed hereinbefore.

26. No substantial question of law arises. The appeals are accordingly dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 20, 2015
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