

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

Reserved on : 29th August, 2012.
% **Date of Decision :** 26th September, 2012.

+ **WP(C) No.1121/2012 & CM No.2447/2012**

MITSUI AND COMPANY INDIA PVT. LTD. Petitioner
Through Mr.S.Ganesh, Sr.Advocate with
Ms.Auradha Dutt, Mr.Pawan Sharma
and Ms.madhvi Swaroop, Advocates
VERSUS

THE INCOME TAX OFFICER AND ANOTHERRespondents
Through: Mr.Kamal Sawhney, Sr.Standing
Counsel

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Y
3. Whether the judgment should be reported in the Digest? Y

R.V. EASWAR, J.:

This writ petition has been filed in the following circumstances. The petitioner is a private limited company. It filed its return of income for the assessment year 2006-07 on 30th November, 2006 declaring a total income of Rs.12.01 crores. The return was processed under Section 143(1) of the Income Tax Act, 1961 ('Act' for short) and it was accepted

without any adjustment. On 28th March, 2011 the Assessing Officer recorded the following reasons under Section 148(2) of the Act for reopening the assessment:-

- “1. Name & address of the assessee Mitsui & Co. India Pvt. Ltd.
2. PAN/ GIR
3. Status
4. Asstt. Year 2006-07

In this case, the information was received from DAO-45, New Delhi, that the assessee has received amounts in Yen from Mitsui & Co. Ltd. in A Y 2006-07 as under:

Name	Address	Gross income paid currency code	Gross income paid amount: Major unit of currency	Actual payer keyname	F Y
Mitshui & Co. India Pvt. Ltd.	G Floor, The Metropolitan Centre, Bangla Sahib Road, Gole Market, New Delhi	JYP	2665644	Mitsui & Co. Ltd.	2005-06
Total		-Do-	3430535		

In view of the above, I have reasons to believe that the income of JPY 2665344 (₹1128644) chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961.

Dated: 28.03.2011

*(Dr. Sheodan Singh Bhadoriya)
Dy. Commissioner of Income Tax
Circle-6(1), New Delhi”*

2. On the basis of the above reasons, a notice to reopen the assessment on the ground of escapement of income was issued to the petitioner on 29th March, 2011 and the petitioner was called upon to file the return of income. In response, the petitioner wrote to the Assessing Officer asking for a copy of the reasons recorded for initiating the reassessment proceedings. The reasons were provided to the petitioner who filed detailed objections by letter dated 17th January, 2012 (Annexure 11 to the writ petition). Before writing the above letter containing the objections to the initiation of reassessment proceedings, the petitioner had written several letters to the Assessing Officer on 2nd August, 2011, 9th August, 2011, 23rd August, 2011 and 25th August, 2011 and copies of these letters are collectively placed as Annexure 8 of the writ petition. These letters were followed up by another letter dated 19th September, 2011 in which it was pointed out that despite repeated reminders, the Assessing Officer had not provided the complete particulars of the alleged payment said to have been received by the petitioner from Mitsui & Co. Ltd. of Japan. It was pointed out that the petitioner's books of accounts did not reflect any

specific amount of Rs.11,28,644/- equivalent to Japanese yen 26,65,645/- said to have been received in the previous year relevant to the assessment year 2006-07. The petitioner also furnished the copy of the statement of Standard Chartered Bank for the year ended 31st March, 2006 in support of its submission.

3. On 1st December, 2011 the Assessing Officer, who is the first respondent herein, sent a letter to the petitioner in which he stated that the information regarding the receipt of the amount of Rs.11,28,644/- was received by the Government of India from the competent authority of the Government of Japan under mutual exchange of information contemplated by Article 26 of the DTAA (Double Tax Avoidance Agreement) entered into between India and Japan, that the information is authentic having emanated from the Government of Japan and that the assessee not having shown the receipt of the amount in its books of accounts, income chargeable to tax had escaped assessment and, therefore, the notice under Section 148 was validly issued. The objections of the petitioner raised by the letter dated 16th September, 2011, it was stated, were rejected. In the same letter, the Assessing Officer also called upon the petitioner to furnish the relevant ledger account of Mitsui & Co. Ltd. of Japan, confirmation from Mitsui & Co. of Japan about the transactions shown in the petitioner's books of accounts, transfer pricing report, copies of agreements entered into with that company and which were operational during the relevant previous year.

4. It is in response to the aforesaid letter dated 16th September, 2011 that the petitioner wrote a detailed letter under the subject “*Objections to notice under section 148 dated 28th March 2011 as per law declared by Hon’ble Supreme Court in case of GKN Driveshaft (India) Ltd Vs. ITO (2003)259 ITR 19 (SC)*” and strongly objected to the continuation of the reassessment proceedings on the ground that the assumption of jurisdiction was invalid. It was pointed out that the reasons recorded by the Assessing Officer showed that there was nothing on record, much less any material, apart from the information received from DAO-45, New Delhi to sustain the claim of escapement of income. It was urged that there was no live link between the material before the Assessing Officer and the belief that income chargeable to tax had escaped assessment, which was a prime requirement for the valid assumption of jurisdiction as held by the Supreme Court in the case of *ITO vs. Lakhmani Mewal Dass (1976)103 ITR 437*. It was also submitted that the Assessing Officer did not himself reach the satisfaction regarding escapement of income but was acting on the satisfaction of the DAO-45, New Delhi which was not permissible under Section 147 as it would amount to “borrowed” or “dictated” satisfaction, and not an independent satisfaction. Objection was also taken on the footing that the reasons recorded were not self-sufficient and, therefore, they were sought to be buttressed by reference to extraneous material and they were sought to be improved by different stages by reference to other material which, according to the petitioner, was opposed to the rulings of the Supreme Court in *M.S.Gill’s case*

(1978) 1 SCC 405 and Commisioner of Police, Bombay vs. Goverdhan Das Bhanji AIR 1952 SC 16. It was thus pleaded that the reassessment proceedings, being invalid, be dropped.

5. Apparently the Assessing Officer did not respond specifically to the above letter of the assessee containing the objections because he thought that he had disposed of the objections of the petitioner on 1st December, 2011 itself. This is evident from the fact that he issued a letter to the petitioner on 30th December, 2011 in relation to the computation of the arm's-length price in respect of the year ended 31st March, 2006. It may also be recalled that in the letter of 1st December, 2011, the Assessing Officer had expressed his intention to proceed with the reassessment proceedings and had also called for several details relating to the reassessment. Therefore, in its letter dated 30th January, 2012, the petitioner invited the attention of the transfer pricing officer to the fact that its objections were not disposed of by the Assessing Officer and, therefore, the transfer pricing proceedings may be kept in abeyance. This letter is placed as Annexure 12 of the writ petition.

6. It is at the above stage of pendency of the proceedings that the petitioner moved this Court under Article 226/227 of the Constitution of India praying for the issuance of a writ or order in the nature of certiorari or any other appropriate writ or order quashing the notice dated 29th March, 2011 issued by the respondent under Section 148 of the Act and all proceedings initiated pursuant thereto, including the order passed by

the Assessing Officer on 1st December, 2011 rejecting the objections of the petitioner. Consequential reliefs have also been prayed for.

7. In the counter affidavit filed by the respondent, it has been stated that there was no prior assessment under Section 143(3) and that the return filed by the petitioner was only processed under Section 143(1), and that in this background any information received from an authentic source that the petitioner had received an amount from outside India which was not reflected in its accounts would certainly give rise to “reason to believe” that income chargeable to tax at escaped assessment. It has been averred in the counter that the information was received from the foreign tax authorities under the aegis of the OECD on which the respondent had no control. It is stated that the credibility of the information cannot be, therefore, questioned. It is further averred in the counter that the information pertains only to an amount which was not disclosed by the petitioner in its accounts or return of income and, therefore, it was all the more incumbent upon the Assessing Officer to issue notice reopening the assessment on the ground of escapement of income. It was further stated that at the stage of issuing notice under Section 148 reopening the assessment, the Assessing Officer is not required to firmly establish that the amount sought to be included represented the income of the assessee; at this stage, the Assessing Officer is required only to form a tentative or prima facie belief, on the basis of the material coming to his possession, that income chargeable to tax had

escaped assessment. It was stated that in the light of the information received from DAO-45, New Delhi, it cannot be said that there was no material on the basis of which the Assessing Officer could have acted under Section 147.

8. In the rejoinder the petitioner has stated that the Japanese authorities have no authority to verify the accounts of the petitioner to find out whether the amount of Rs.11,28,645/- has been accounted for in its books and, therefore, the Assessing Officer was not right in stating that the information received from the Japanese authorities related only to the amount not disclosed in the books of accounts of the petitioner. The assumption of the Assessing Officer that the material in his possession related to the amount of income that had escaped assessment was challenged on this basis. It is contended by the petitioner in the rejoinder that the material in the possession of the Assessing Officer cannot in any case constitute “reason to believe” so as to clothe the respondent with jurisdiction to reopen the assessment. Reference has been made to the details filed by the petitioner before the respondent which showed that it had disclosed interest income of Rs.84,13,948/- in its return under the head “income from other sources” which included interest of Rs.11,68,091/- from Mitsui & Co. Ltd., Japan and this would clearly indicate that the petitioner has duly accounted for the interest in its account but has also specifically informed the Assessing Officer about the

same. It has been stated in the rejoinder that the reasons for reopening the assessment were frivolous and were only pretence.

9. In support of the writ petition counsel for the petitioner drew out attention to the details filed along with return of income. It was submitted that the interest of Rs.84,13,948/- declared under the head “income from other sources” included the interest amount of Rs.11,68,091/- and there is no separate amount of Rs.11,28,644/- equivalent of JPY 26,65,641/-. The interest amount having been declared in the return of income, there is no escapement of income, according to the counsel. It is further contended that it is only in the counter affidavit that the Assessing Officer has for the first time stated that the amount of Rs.11,28,644/- mentioned in the information received by the Assessing Officer represented interest. The contention is that the respondent is trying to supplement or improve the reasons recorded by reference to extraneous material which is impermissible. Reliance is placed on the judgment of this Court in *Commissioner of Income Tax vs. SFIL Stock Broking Ltd. (2010)325 ITR 285* in support of the contention that the reasons recorded for reopening the assessment shall not be vague and scanty and the material before the Assessing Officer shall be such that it could constitute material on the basis of which a prima facie belief could be entertained that income chargeable to tax had escaped assessment in the hands of the petitioner.

10. The contention of the Revenue, however, is that the Assessing officer validly acted on the basis of information received from the DAO-

45, New Delhi, who was passing on the information under Article 26 of the DTAA between India and Japan. Counsel for the Revenue drew our attention to the judgment of the Supreme Court in *I.T.O vs. Selected Dalurband Coal Co. Pvt. Ltd.* (1996) 217 ITR 597, where reassessment proceedings initiated on the basis of a letter received from the Chief Mining Officer of the Government of India regarding irregularities in the affairs of a coal mining company were held to be validly initiated. It is contended that at the stage of recording reasons under Section 148(2) and issuing notice under Section 147 to reopen reassessment, the Assessing Officer is not expected to hold an enquiry, with the participation of the assessee, to firmly conclude that the amount sought to be included represented the income of the assessee; at that stage the assessing authority was expected only to arrive at a tentative or prima facie belief, on the basis of the material coming to his possession, that income chargeable to tax had escaped assessment. The material before the Assessing Officer in the present case, urges counsel, satisfied this test. It is thus contended that jurisdiction to reopen the assessment was validly assumed.

11. Having considered the facts and the rival contentions, we are unable to say that the notice issued under Section 148 is without jurisdiction. The petitioner has no doubt furnished the particulars relating to the interest received from the Japanese company in the return under the head “income from other sources”. The interest amounted to

Rs.84,13,948/-. The return was processed under Section 143(1) on the date on which it was filed, that is, 30th November, 2006. There was no scrutiny of the return under Section 143(3). After the return was processed thus, information was received from the DAO-45, New Delhi by the Assessing Officer to the fact that the petitioner had received JPY 26,65,644/- from Mitsui & Co. Ltd, Japan in the previous year relevant in the financial year 2005-06. The amount allegedly received by the petitioner was shown in the communication from DAO-45, New Delhi as “gross income paid amount”. This information is stated to have been received under the exchange of information contemplated by Article 26 of the Indo-Japanese Agreement for the Avoidance of Double Taxation. There is nothing on record to doubt the fact that the information was so received. At the stage when reasons are recorded under Section 148(2), the Assessing Officer is not expected to hold an enquiry, with the participation of the assessee, and come to a final determination that the amount in question represented the income of the assessee: *CIT vs. Mahaliram Ramjidas* (1940) 8 ITR 442(PC) and *Narayanappa vs. CIT* (1967) 63 ITR 219. He is required only to reach prima facie or tentative belief. The formation of the belief must be based on some valid material. It cannot be disputed that the information received from a governmental agency constitutes valid material on the basis of which the Assessing Officer could form a tentative or prima facie belief regarding escapement of income. In *Income Tax Officer vs. Selected Dalurband Coal Co. Pvt. Ltd.* (1996) 217 ITR 597, a judgment cited on behalf of the Revenue, the

facts were these. Against notice under Section 147(a) of the Act, issued to the assessee on the basis of a letter from the Chief Mining officer showing that a joint inspection was conducted in the colliery of the assessee by the officers of the mining department in the presence of the representatives of the assessee and that according to the information of all the officers of the mining department there was under-reporting of the raising figure (of coal) to the extent indicated in the letter, the assessee filed a writ petition before the Calcutta High Court which was allowed. The Revenue carried the matter in appeal to the Supreme Court. Reversing the judgment of the High Court, the Supreme Court held as under:-

“3. It is well settled by various decisions of this Court that the notice under Section 148 read with Section 147 can be issued only where the Income-tax Officer has reason to believe that the income profits or gains chargeable to tax had been under-assessed or escaped assessment and further that such escapement or under assessment was occasioned by reason of the failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year. (We are not concerned with Clause (b) of Section 147 here but only with Clause (a). In other words, there must be relevant material before the assessing officer upon which he must reasonably and rationally form the requisite opinion (belief). The question, therefore, is whether the letter of the Chief Mining Officer aforesaid does not constitute relevant material upon which the Income-tax Officer could have formed the requisite belief? It must be remembered that the formation of belief by the Income-tax Officer is essentially within his subjective satisfaction.

4. *After hearing the learned Counsel for the parties at length, we are of the opinion that we cannot say that the letter aforesaid does not constitute relevant material or that on that basis, the Income- tax Officer could not have reasonably formed the requisite belief. The letter shows that a joint inspection was conducted in the colliery of the respondent on January 9, 1967 by the officers of the Mining Department in the presence of the representatives of the assessee and according to the opinion of the officers of the Mining Department; there was under reporting of the raising figure to the extent indicated in the said letter. The report is made by Government Department and that too after conducting a Joint inspection. It gives a reasonably specific estimate of the excessive coal mining said to have been done by the respondent over and above the figure disclosed by it in its returns. Whether the facts stated in the letter are true or not is not the concern at this stage. It may well be that the assessee may be able to establish that the fact stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the stage of the issuance of the notice, the only question is whether there was relevant material, as slated above, on which a reasonable person could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on we do not and we ought not to express any opinion on merits.”*

12. The judgment is authority for the proposition that a letter received from a governmental agency can constitute valid material on the basis of which the Assessing Officer can assume jurisdiction to reopen the assessment. The only caveat is that the material or information coming to

the possession of the Assessing Officer should not be a mere suspicion, gossip or rumour. In *Sheo nath Singh vs. Appellate Assistant Commissioner of Income Tax (Central) Calcutta, and Ors.* (1971) 82 ITR 147, the Supreme Court held that “reason to believe” should be a honest belief which a reasonable person based upon reasonable grounds would have come to and that the assessing authority “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.” Subject to this condition, the material or information can be acted upon by the Assessing Officer. In *CIT vs. Kelvinator of India Ltd.* (2010) 320 ITR 561, it was observed that the power to reopen the assessment should be based on “tangible material”.

13. If these tests are applied to the present case, it is difficult to appreciate the petitioner’s objection that the information received from DAO-45, New Delhi, acting under Article 26 of the Indo-Japanese treaty for the Avoidance of Double Taxation, cannot constitute valid material on the basis of which the Assessing Officer can form even a tentative or prima facie belief that income to the extent of Rs.11,28,644/- had escaped assessment. In *S.Narayanappa & Ors vs. Commissioner of Income Tax*,

Bangalore (1967) 63 ITR 219, it was observed by a three Judge Bench of the Supreme Court that the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue, but it is open to the assessee to contend that the assessing authority did not hold the belief. The existence of the belief can be challenged, but not the sufficiency of the reasons for belief. Of course the belief is not a purely subjective satisfaction; it must be held in good faith and cannot be merely a pretence. The present case satisfies these tests.

14. The contention of the counsel for the petitioner that the Japanese authorities have no power to examine the books of accounts of the petitioner and, therefore, to the extent that the information supplied by the DAO-45, New Delhi says that the amount of Rs.11,28,644/- has not been declared by the petitioner, it cannot be taken note of by the Assessing Officer, has no force. We do not have the communication sent by the DAO-45, New Delhi to the Assessing Officer. We only have the reasons recorded by the Assessing Officer on the basis of the communication. However the columnar chart set out in the reasons recorded appears to be a reproduction of what was stated in the communication. In this chart, column 4 is titled “gross income paid amount: major unit of currency”. Even assuming that the expression “gross income” has been loosely employed, the very fact that this information was received from a governmental agency under Article 26 of the DTAA constitutes the live link or nexus between the material and the formation of the belief that

income to that extent has escaped assessment. We are only concerned at that stage with the relevancy of the information or material and not with the sufficiency thereof. The material cannot be said to be irrelevant to the formation of the requisite belief.

15. For the above reasons, we see no merit in the writ petition which is hereby dismissed. All interim orders are vacated. No costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

September 26, 2012
Bisht