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

Reserved on: 10.02.2014
Pronounced on: 28.02.2014

\+ **W.P.(C) 1954/2013, C.M. APPL.3721/2013**

ACORUS UNITECH WIRELESS PRIVATE LIMITED .....Petitioner

Through: Sh. C.S. Aggarwal, Sr. Advocate with Sh. Prakash Kumar and Sh. Sheel Vardhan, Advocates.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX.....Respondents

Through: Sh. Rohit Madan and Sh. Akash Vajpai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

%

1. This writ petition impugns reassessment notices issued and proceedings conducted under Section 148 of the Income Tax Act, 1961 ("*the Act*") in respect of the Assessment Year ("*AY*") 2009-2010.

2. The writ petitioner, (hereafter "Acorus"), is a company incorporated under the Companies Act, 1956. It filed its return of income on 6.10.2010, declaring nil income for AY 2009-2010. This return was processed under Section 143(1) of the Act, without any notice under Section 143(2). Subsequently, Acorus was served with a notice dated 5.7.2011 under Section 148 of the Act for reassessment of the AY 2009-2010. Acorus requested a copy of the reasons that led to opening of the reassessment proceedings. No such reasons were provided; however a questionnaire dated 16.9.2011 was sent, to which the petitioner duly responded. Thereafter, reasons to believe that income had escaped assessment were provided to the petitioner by a letter dated 30.3.2012. In response, Acorus contended that since

> "*2……reasons have been supplied after a gap of more than nine months and that is highly belated and as such, in terms of judgment of the Hon'ble Delhi High Court in the case of Haryana Acrylic Manufacturing Co. Ltd. Vs. CIT depicted in 308 ITR 38, notice u/s 148 of the Act is without jurisdiction.*
>
> *XXXXXX XXXXXX XXXXXX*"

3. Acorus requested a copy of the report prepared by the DIT (Inv.) in respect of the 2G spectrum cases. The DIT responded by a letter dated 2.4.2012, indicating that materials relied upon the Revenue, including the report on the 2G spectrum cases, is confidential and cannot be disclosed. By a letter dated 2.4.2012, the Revenue asked the petitioner to file its objections to the reasons recorded, and supplied to the petitioner. Acorus filed objections by a letter dated 9.4.2012, which were disposed off by the Revenue by an

order dated 10.4.2012. The proceedings were, at this stage, challenged before this Court in W.P.(C) No. 2155/2012. Acorus then contended in those proceedings that the notice under Section 147 was bad in law, as the Assessing Officer ("*AO*") could have initiated proceedings under Section 143(2) of the Act. The Court rejected this submission, in its judgment, dated 28th May, 2012, holding that:

> "*it is not possible to accept the broad universal affirmative submission of the petitioner that notice under Section 147/148 of the Act cannot be issued when the Assessing Officer could have (sic) issue a notice under Section 143(2) of the Act. This will depend upon the facts.*"

4. After examining the facts of the case, the Court disposed off the writ petition in the following terms:

> "*23. The writ petition is accordingly disposed of recording that the respondents have agreed to and will be bound by the statement to withdraw notice under Section 147/148 dated 5th July, 2011, but will have liberty and right to issue fresh notice under Section 147/148, after recording reasons to believe. The said notice will not be barred because the respondents had not initiated proceedings by issue of notice under Section 143(2) of the Act or they had earlier issued notice under Sections 147/48 dated 5th July. 2011. With the aforesaid findings and observations writ petition is disposed off. In the facts of the case, there will be no orders as to costs.*"

5. Accordingly, by a letter dated 19.7.2012, the Revenue informed the petitioner that in pursuance of the order of this Court, previous proceedings under Section 147/148 had been dropped, and a fresh notice was issued. In a letter dated 30.8.2012, the reasons to believe

that income had escaped assessment were also communicated to the petitioner, which read as follows:

> "*M/s Acorus Unitech Wireless Pvt Ltd was incorporated on 24/10/2008. The FY 2008-09 relevant to AY 09-10 was the 1st year of operation of the company. Based on information received from the office of DIT (Inv.)-1, New Delhi, vide letter dated 23/6/2011, the then jurisdiction ITO, Ward 1(1), New Delhi issued notice u/s 148 for AY 2009-2010, on 5th July, 2011.*
>
> *Subsequently, the case was transferred to the undersigned for completing assessment proceedings as the assessee was a new assessee and filed return for the first time. During the course of the proceedings the assessee filed its objections to the initiation of proceedings u/s 148 which were duly disposed off by way of speaking order dated 10/4/2012.*
>
> *On 13/4/2012, the assessee company filed Civil Writ Petition challenging the action of the AO for issuance of the notice u/s 148 as well as the merit of the case with regard to the reasons recorded. The Hon'ble High Court, vide their order in ITA No. 2155/2012 dated 28/5/2012, while disposing off the writ petition, has held that the revenue has agreed to and will be bound by the statement to withdraw the notice u/s 148 dated 5th July, 2011, but will have liberty and right to issue fresh notice u/s 147/148, after recording reasons to believe. The court has further held that the said notice will not be barred because the revenue had not initiated proceedings by issue of a notice u/s 143(2) of the act or they had earlier issued notice u/s 147/148 dated 5th July, 2011. Thus, in view of the observations and directions of the Hon'ble Delhi High Court, the fresh reason to believe that the assessee has income which has escaped assessment, are hereby recorded as follows.*

As per the information received from the DIT (Inv.)-1, New Delhi, vide letter dated 23rd June, 2011, it is seen that eight subsidiaries of Unitech Ltd., had applied for Unified Access Service Licenses (UASL) (SG Spectrum) in September 2007 and were allotted 21 circles by the DOT in January 2008. Post allotment of UASL, M/s. Unitech Ltd. transferred 75% of its stake in these eight telecom subsidiaries (Now merged and known as United Wireless (Tamil Nadu) Pvt. Ltd.) at par i.e. Rs. 10 per share to three of its group companies on the basis of agreement dated 25th October, 2008. One out of these three group companies i.e. M/s Acorus Unitech Wireless Pvt. Ltd. is being assessed in this circle.

Simultaneously, the above referred eight telecom companies and subsidiaries of M/s Unitech Ltd. entered into an agreement with Telenor Asia Pvt. Ltd., Singapore, for issue of fresh shares at a huge premium of Rs. 159 per share with Face Value of Rs. 10/-. This agreement was finalized on 28th October, 2008.

After considering the above facts, it is clear that M/s Unitech Ltd sold shares of its telecom licensing companies to its three group companies which includes M/s Acorus Unitech Wireless Pvt. Ltd. at a rate lower than the market rate. The market rate was Rs. 169 per share, including the premium of Rs. 159 per share, because this is the rate at which M/s Telenor Asia Pvt. Ltd., Singapore purchased shares of the licensing companies from M/s Unitech Ltd. This is particularly apparent because both the transactions i.e. the transaction of sale of shares by M/s Unitech Ltd. to its three group companies including M/ AcorusUnitech Wireless Pvt. Ltd. and sale of shares to M/s Telenor Asia Pvt. Ltd., Singapore took place within days of each other. The total number of shares transferred to M/s Acorus Unitech Wireless Pvt. Ltd. by the eight licensees companies were 45659850. Hence, as discussed above,

the differential amount of Rs. 159/- per share which comes to Rs. 7259916150/- is the income of the assessee in the form of benefits arising from business carried on by the assessee and it to be taxed under the provisions of Section 28(iv) of the Income Tax Act.

M/s Acorus Unitech Wireless Pvt. Ltd. filed its return of income for AY 2009-2010 on 6th October, 2010. Further in response to the earlier notice u/s 148 dated 5th July, 2011, the assessee fled its return of income vide letter dated 1st August 2011. It is noticed that the assessee has not declared the above income in the shade of benefits arising from business carried on by the assessee amounting to Rs. 7259916150/- taxable under the provisions of Section 28(iv) of the IT Act in the return filed suo-moto and has neither declared this income in the return filed in response to notice u/s 148 for AY 2009-2010. After considering the above facts and the issues involved therein, I have reasons to believe that income Rs. 7259916150/- has escaped assessment for AY 2009-2010 and hence it is a fit case to issue notice u/s 148 of the Income Tax Act, 1961. The notice u/s 148 is issued separately."

6. Acorus filed detailed objections to this notice, which were dismissed by the Revenue by orders dated 15.2.2013 and 12.3.2013. Accordingly, the petitioner has approached this Court under Article 226 impugning this notice under Section 147/148 of the Act.

7. Learned counsel for the petitioner argues that the reasons for initiation of the present reassessment proceedings were recorded on 17.7.2012, which was during the pendency of the proceedings initiated by the previous notice issued under Section 148. It is argued that the plea of the Revenue that the proceedings were dropped on 18.6.2012

was an afterthought which is not supported by any material on record, and is, in fact, contrary to the communication dated 19.7.2012, wherein the Revenue had admitted that the proceedings were dropped only subsequently, on 19.7.2012. This, it is submitted, justifies the setting-aside of the fresh notice under Section 147/148. Reliance is placed on the decision of the Supreme Court in *Trustees of HEH The Nizam's Supplemental Family Trust* v. *CIT*, [2000] 242 ITR 381 (SC), for the holding that:

> "*10……unless the return of income already filed is disposed of, notice for reassessment under Section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated.*"

Similarly, reliance is placed on the decision in *CESC Ltd. and Anr.* v. *DCIT*, 263 ITR 402 (Cal) to argue that unless the assessment is complete, no suspicion under Section 147/148 can be the basis of a valid notice.

8. Further, learned counsel argues that the earlier proceedings were stated to be based upon a letter of the DIT (Investigation) dated 23.6.2011, as are the present proceedings. However, despite the identical facts before the Revenue, the first proceedings alleged that the income had not shown up under the head Short Term Capital Gain arising on transfer of equity shares, while the present proceedings indicate that income has escaped assessment under Section 28(iv) of the Act. These contrary opinions formed on the basis of the same facts, learned counsel urges, is arbitrary and such a change in opinion

is in itself a ground to quash the proceedings initiated under Section 147/148. Reliance here is placed upon the decision of the Supreme Court in *Commissioner of Income Tax* v. *Excel Industries Ltd.*, 358 ITR 295, for the proposition that although the principle of *res judicata* does not apply in such cases, "*the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.*"Learned counsel argues that far from being based on tangible and concrete facts, the impugned notice merely makes a roving and fishing enquiry without any tangible material on record, which is impermissible under the strict standards of Section 147/148 of the Act. Further, it is argued that the concept adopted by the Revenue is baseless, as even if the shares were transferred at a rate less than the rate at which shares were subscribed in the eight telecom companies by the Singapore entity, that fact by itself cannot be made the basis of the allegation that the petitioner has received a benefit in the course of business, which is the requirement under Section 28(iv). Rather, it is argued – as is clear from the record, and the audited balance sheet of the petitioner submitted along with the return under Section 143(1) – that an aggregate consideration ₹4.63 crores was made for the purchase of 45550000 equity shares of the eight telecom companies from M/s Unitech Limited. The entire purchase consideration, it is urged, was paid out of borrowings raised from Prakausali Investment India (P) Ltd. and by issuing unsecured debentures to M/s Unitech Holding Ltd., which means that the income so-called is not chargeable to tax under Section 28(iv), being outside the course of business. Learned

counsel submits that as a condition precedent for invoking Section 28(iv), a benefit must arise from business or exercise of a profession. Thus, before the aforesaid provision could be invoked, there has to be a nexus between the business of the assessee and the purported benefit arising in the course of business, in terms of the judgment in *CIT* v. *Jindal Equipments Leasing and Consultancy Services Ltd*, 2010 (325) ITR 87 (Del), which is clearly absent in this case.

9. It is submitted that Acorus merely invested in shares of the telecom companies and had so reflected this fact in its annual balance sheet. The acquisition and sale of shares in this case, it is argued, it clearly for the purpose of investment and not business, and thus the allusion to Section 28 in the reasons to believe that income has escaped assessment is clearly and patently incorrect is terms of the judgment of the Gujarat High Court in *ElscopePvt. Ltd.* v. *CIT*, 313 ITR 293 (Guj). It is urged that no benefit or gain accrued to the petitioner, and the mere fact that there was a difference in the share price does not logically lead to the conclusion that a profit was made by the petitioner without disclosing the same. It is further argued that as the funds for the investment were provided by the company who had sold the shares in the first place, the entire economic benefit remained with the said company, and thus, there is no tangible and relevant material to conclude that there is a reason to believe that Section 28(iv) of the Act is applicable to this case. It is argued that merely because the petitioner had purchased shares, the market value of which was allegedly higher, does not lead to the conclusion that income escaped assessment. For this, reliance is placed on various

decisions of the Supreme Court, most notably, *ITO* v. *Lakhmani Mewal Das*, 103 ITR 437 (SC), for the observations that the AO must initiate reassessment only on the basis of definite information, and not distant, remote or far-fetched facts that do not warrant such an inference. Further, learned counsel argues that there is no fresh material, apart from what was disclosed in the original return of income itself that could justify the reopening of assessment. This, it is argued, is because the fact of sale and purchase of these shares was disclosed in the accounts of the petitioner along with the original return, and no new material has surfaced to trigger the powers under Section 147/148.

10. Learned counsel further argues that the reasons provided by the Revenue are patently false as there is no comparison between the shares purchased by the petitioner, and the Singapore entity, as the shares purchased by the petitioner were encumbered property (having been pledged by M/s Unitech Ltd. with various banks to obtain loans), whereas the fresh shares allotted to the Singapore entity were free property. Thus, it is argued that in terms of the nature of the shares, the management control, the transfer restrictions, business risks etc., the two transactions are not comparable and thus, the reasons provided by the Revenue cannot sustain reassessment proceedings.

11. In any case, learned counsel argues that the report of the DCIT (Investigation) which forms the basis of the Section 147/148 notice in this case has not been provided to the petitioner, despite a specific request to that effect, thus denying the petitioner the opportunity to present complete objections. Such failure to provide the evidence

along with the reasons to believe is, in the argument of the learned counsel, fatal to the proceedings as the petitioner has the right to be supplied the information on the basis of which such proceedings are sought to be imitated. Reliance is placed on the decision of the Allahabad High Court in *Dr. Roop* v. *CIT*, [2012] 209 TAXMAN 421 (All), the Bombay High Court in *Spacewood Furnishers* v. *DGIT*, [2012] 340 ITR 393 (Bom), and the Calcutta High Court in *Smt. Uma Devi Jhawar* v. *ITO*, 1996 (218) ITR 573 (Cal), for the proposition that confidentiality is not a valid ground for failure to disclose documents relied upon by the Revenue in order to initiate reassessment proceedings against the assessee. It is argued that while the documents may be confidential, they cannot remain as such during Section 147/148 proceedings as the assessee must be given an opportunity to answer the allegations put to it.

12. Counsel for the revenue highlighted that the petitioner cannot question the legality of the notice proposing reassessment in this case, because in the previous judgment of this Court, the option of issuing such notice was expressly kept open. It was argued that having regard to the nature and magnitude of the transaction and the material which the revenue secured subsequently, this was the clearest case where reassessment was warranted in respect of income escaping assessment; there could be no reason to question the notice as not disclosing any fresh material or tangible reasons warranting exercise. Once this option to reopen the assessment is conceded, the Court should not exercise its discretion in examining the merits of the transaction to consider whether it is taxable.

13. Three issues arise in the present case. *First*, whether the timing of the notice in this vitiates the proceedings under Section 147/148; *secondly*, whether the Revenue is within its right to keep the 2G Spectrum Report from the assessee on the ground of confidentiality, or whether the failure to supply the report vitiates the proceedings, and *finally*, whether the reasons to believe that income has escaped assessment in this case meet the test under Section 148 and judicial directives in that regard.

14. On the first issue, the Court notices the observations in W.P.(C) 2155/2012, whereby the first round of reassessment proceedings were withdrawn. The Court disposed off the writ petition with the clear finding that the fresh notice "*will not be barred because the respondents ... had earlier issued notice under Sections 147/48 dated 5 July. 2011.*" The plea taken by the petitioner presently is that the proceedings initiated by the order dated 5.7.2011 came to be withdrawn only on 19.7.2012, *after* recording reasons for the fresh notice under Section 147/148 (dated 19.7.2012) on 17.7.2012. However, consequent to the decision of this Court in W.P.(C) 2155/2012, the DCIT dropped the previous proceedings initiated under Section 147/148 by an order sheet entry dated 18.6.2012, proceeding subsequently to record fresh reasons for reassessment. This, however, is countered by the petitioner as an order sheet entry does not by itself end the proceedings, without the necessary intimation to the assessee that such withdrawal has taken place. In this case, the issuance of a fresh notice under Section 147/148 (and the reasons recorded for that purpose) has to be judged in the context of

the previous decision of this Court. The fresh notice served upon the assessee was *consequent* to and *within the framework* of the earlier order of this Court. While the first round of reassessment proceedings was not withdrawn *qua* the petitioner by way of an intimation; the fresh reassessment proceedings equally cannot be said to have begun until the notice under Section 147/148 was issued, i.e. on 19.7.2012. The fact that the reasons recorded bore the date 17.7.2012 does not vitiate these proceedings in any way, as the order sheet entries – which are at the very least relevant for this purpose – clear demonstrate that the order of this Court in the earlier writ petition was complied with methodically. The fact that the reasons recorded were prepared (which *necessarily precedes* the issuance of the notice) before 19.7.2012 is only logical. There is no nexus between the withdrawal of the first reassessment notice issued and the recording of reasons *in order to prepare* for a subsequent notice, as long as two notices/proceedings are not pending against the same assessee in respect of the same AY at the same time. That, quite clearly, is not the case in the present circumstances.

15. Acorus's plea that the proceedings would have been justified had intimation of the withdrawal of the earlier notice been given prior to 17.7.2012, as opposed to 19.9.2012, is unpersuasive as it attempts to draw a distinction where none exists. There is complete transparency in the manner in which the reasons were recorded, and the fresh proceedings instituted. Acorus failed to demonstrate how the mere fact that a letter conveying the decision taken in the order sheet entry dated 18.6.2012 before the reasons recorded for the fresh notice

would save the proceedings in this case, and importantly, how the present course of action prejudices the petitioner or violates any procedural mandate under Section 147/148 or any other provision of the Act. To the contrary, in this case the reasons were supplied and thus intimated to the petitioner along with the notice on 19.9.2012, and thus, the internal date on which the reasons were prepared cannot vitiate the proceedings, as the relevant date is that on which it is communicated to the petitioner (and not prepared within the Revenue). As a Division Bench of this Court held in *Haryana Acrylic Manufacturing Company* v. *CIT*, [2009] 308 ITR 38 (Delhi), "*the issuance of the notice and the communication and furnishing of reasons go hand-in-hand.*" The reasons recorded on 17.7.2012 are necessarily to be read with the fresh notice dated 19.7.2012, when both documents were communicated afresh to the petitioner, and the previous proceedings were dropped.

16. Indeed, the date on which the reasons were prepared may – in some cases – render the action of the Revenue arbitrary given the chronology of events, but that inference does not present itself in this case. The order sheet entries demonstrate a clear and chronological compliance with the earlier order of this Court. In any case, the previous order of this Court *expressly* bars any objections by the petitioner to the fresh notice on the ground that the Revenue "*had earlier issued notice under Sections 147/48 dated 5 July, 2011.*" In principle, the petitioner's present argument is that the proceedings are vitiated because the reasons in this case were recorded before the earlier notice was dropped. This plea, in other words, seeks to bar the

present notice on the ground that an earlier was issued and not revoked at the time the impugned action took place. This argument – attempting to play the legality of the second notice against the existence of the first notice – was one that the previous order of this Court foresaw and specifically barred in terms of the order dated 28.5.2012, which is now final and binding upon both parties. Indeed, holding that the present notice is to be set aside would set to nought the direction of this Court in the earlier writ petition. Accordingly, this ground argued by the petitioner is rejected.

17. The Court will deal with the second and third questions together, as they relate to the common issue of the adequacy of the material disclosed to justify reassessment proceedings.

18. First, Acorus argues here that the Revenue's failure to disclose the 2G Spectrum Report, on the basis of which it initiated proceedings under Section 147/148, renders the proceedings void. The Revenue in the present case claims that the 2G Spectrum Report is confidential, and thus has not disclosed the document.Before addressing this question, it is important to restate an accepted, but often neglected, principle, that in its writ jurisdiction, the scope of proceedings before the Court while considering a notice under Section 147/148 is limited. The Court cannot enter into the merits of the subjective satisfaction of the AO, or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such a conclusion. This was recognized by the Supreme Court in *M/s. Phool Chand Bajrang Lal* v. *Income Tax Officer and Anr.*, [1993] 203 ITR 456 (SC):

> "*27. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."*

19. In this case, the AO has supplied reasons to believe that income has escaped assessment. This records the alleged undervaluation of shares in the sale/purchase agreement with Unitech Ltd., as compared to the transaction with Telenor, the nature of the transaction, the charging section under the Act such income would fall under, the precise monetary differential on a comparison of the two transactions etc. The notice thus provides details of the precise transaction sought to be reassessed, the reasons for why income has escaped assessment, and the information supporting such a belief. Far from being vague and irrelevant material, these facts constitute new and tangible information supporting the Section 147/148 notice in this case. Importantly, the petitioner in this case has not denied the correctness of these facts either – that such shares were bought at the nominal price of ₹10/-, while the shares were sold to Telenor at a substantial premium. The petitioner, however, seeks to urge that the *inferences* drawn by the AO – in terms of the tax effect of these transactions – are

incorrect. At this juncture, it is important to remember the words of the Supreme Court in *Calcutta Discount Company Ltd.* v. *ITO, Companies District, I and Anr.*, [1961] 41 ITR 191 (SC), where the Court noted:

> "*From the primary facts in his possession, whether on disclosure by the assesses, or discovered by him on the basis of the facts disclosed, or otherwise - the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable.*"

20. Therefore, primary facts in this case – that lead to the AO's satisfaction – have been spelt-out in this case in the reasons recorded by the AO. These facts are, at the very least, *capable* of supporting the inference that the sale of shares to the petitioner in this case from Unitech Ltd. was undervalued, and that such undervaluation (compared to the Telenor transaction) was not disclosed by the assessee. Indeed, this is where the Court's inquiry terminates. The adequacy of the reasons provided by the AO fall outside the Court's review powers, and within the domain of the AO, *at this stage of the proceedings* where only a preliminary finding under Section 147/148 has been made.

21. Acorus advanced arguments as to the incorrectness of the AO's views. Here, various aspects of this transaction have been canvassed before the Court, i.e. the lack of comparability between the Unitech-

Telenor transaction and the present case, the difference between the nature of the shares itself in the two cases, the inapplicability of Section 28 of the Act given that the purchase of shares was in the nature of an investment and not a business, the lack of accrual of any benefit to the petitioner etc. The Court, however, cannot enter the merits of the satisfaction recorded by the AO. These issues may indeed be raised, but before the AO in the first instance, and subsequently within the appellate regime provided by the Act itself, as opposed to a disguised merits review under Article 226 at such an early stage of the proceedings. At the time of a Section 1476/148 notice, the inquiry is at a preliminary stage, and thus, conclusive legal or factual determinations are neither called for nor provided. As the Supreme Court noted in *Sri Krishna Pvt. Ltd. Etc.* v. *ITO, Calcutta and Ors.*, [1996] 221 ITR 538 (SC):

> "*8……..It is necessary to reiterate that we are now at the stage of the validity of the notice under Section 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind.*"

22. In this context, the Court will now turn to the question of whether the disclosure of the 2G Spectrum Report is mandatory, and whether the failure to supply it is fatal to the present proceedings. The law only requires that the information or material on which the AO records his or her satisfaction is communicated to the asseseee, without mandating the disclosure of any specific document. While the

2G Spectrum Report has not been supplied in this case on grounds of confidentiality, the reasons recorded have been communicated and *do* provide – independent of the 2G Report – details of the new and tangible information that support the AO's opinion. These facts are capable of justifying the satisfaction recorded *on their own terms*, as discussed above. In this context, there is no legal proposition that mandates the disclosure of any additional document. This is not the say that the AO may in all cases refuse to disclose documents relied upon by him on account of confidentiality, but rather, that fact must be judged on the basis of whether other tangible and specific information is available so as to justify the conclusion irrespective of the contents of the document sought to be kept confidential. In cases such as the present, however, where the information and facts communicated by the AO are themselves in accordance with the minimum requirement under Section 147/148, the petitioner cannot compel the disclosure of other documents that the assessee may have *also* relied upon.

23. The three cases relied upon by the petitioner to argue that the AO cannot claim privilege over documents utilized by him do not support such a broad *ratio*, but cohere with the above discussion. In *Dr. Roop* (supra), the assessee impugned the validity of a search and seizure operation under Section 132 of the Act on the ground that no 'reason to believe' arose in that case. There, the Revenue claimed privilege as regards the satisfaction note itself and other material/documents – which in the Revenue's stance – supported the search and seizure. In essence, no reasons, documents or even the warrant of authorization were communicated to the assessee to

demonstrate that there was a 'reason to believe', taking the stance rather that the say-so or assertions of the Revenue were sufficient. It was in this context that the Court held that the Revenue cannot claim privilege (in that case, under Section 123 of the Evidence Act) as regards the satisfaction note and the documents supporting the search and seizure operation. In *Spacewood Furnishers (supra),* the question again was of the validity of a Section 132 search and seizure. The satisfaction note had not been communicated to the assessee. The Court held that in such cases, the assertion of the Revenue is not sufficient, and the Court may call upon the Revenue to produce the satisfaction note file. Relying on *Uma Devi Jhawar* (supra), the Court held:

> "*However, as the petitioners have not made any express prayer seeking inspection of satisfaction note file, we do not find it necessary to conclude this aspect. We, however, express that when the satisfaction recorded is justiciable, the documents pertaining to such satisfaction may not be immune and if appropriate prayer is made, the inspection of such documents may be required to be allowed.*"

24. In this case, the Revenue contended – without disclosing the satisfaction note or the supporting documents – that "*after discreet enquiries, the action has been taken and … there is material on record which supports it.*" After compelling disclosure of the satisfaction note file – as *no* other information/material was brought on record by the Revenue – the Court noted that it "*does not show any date, time or place of any such discreet enquiry or even does not name the person*

with whom it was made". Accordingly, the proceedings were set aside for failure to disclose any specific and relevant information.

25. Finally, in *Uma Devi Jhawar (supra)*, the question concerned the validity of reassessment proceedings under Section 147/148. The asssessee had purchased a plot of land, on which she had constructed a building. She had disclosed the cost of construction in her return of income. In the reassessment proceedings, the reasons recorded by the AO indicated that the valuation officer of the Income Tax Department valued the cost of construction at a greater amount than disclosed, leading thus to the belief under Section 147/148 that income had escaped assessment. However, as the Income Tax Appellate Tribunal had – in the course of the assessment itself – earlier held that the increased valuation, which was also questioned at the time of the filing of the return, was incorrect, the Court held that the reasons recorded cannot properly rely on a report of the valuation officer that agitates a question previously decided on appeal, and which was now final and binding between the parties. In holding that the "*materials having a natural nexus to the formation of belief have to be disclosed by the Income Tax Officer*", the Court cast some light on the sort of material that have to be disclosed:

> "*22. He can do so by filing an affidavit. <u>The mere disclosure of the belief in the affidavit filed by the Income Tax Officer without setting out any material on the basis of which the belief was arrived at is not sufficient</u>. Where no affidavit is filed by the Income Tax Officer, in spite of the opportunity given, the court may direct production of the records containing materials to establish that there is a direct nexus or live link between the materials and the*

> *formation of his belief. If the court allows the Income Tax Officer to produce such records and the court examines the materials to find whether there are tenable reasons, the court must allow inspection of such records to the assessee. The recorded reasons or materials or the letter of proposal sent by the Income Tax Officer to the Commissioner are not privileged documents. In our view, the learned judge was not right in denying inspection of the records to the assessee. No litigant should have a feeling that the procedure adopted by the court has denied him a reasonable opportunity of hearing. Unless a document is privileged, if the court looks into such document for the purpose of deciding the merits of the respective contentions, inspection of such document cannot be withheld from the adversary.*"

26. Far from holding that all documents used by the AO, let alone specific documents indicated by the assessee, are to be disclosed, the *ratio* of these decisions is far narrower. Only when the privilege is claimed as regards the reasons recorded (i.e. the satisfaction note), or when no material is provided in addition to the mere assertion of the subjective satisfaction of the AO, may the principle denying privilege or confidentiality operate. Even then, the claim for privilege may still prevail in that the Court may consider the manner in which the documents are to be inspected, but such questions does not arise in cases such as the present, where concrete and specific details – which support the belief under Section 147/148 – are communicated to the assessee independent of the document sought to be disclosed. Thus, the non-disclosure of the 2G Spectrum Report does not affect the impugned notice in this case.

27. For the above reasons, this writ petition has to fail; it is dismissed. In the circumstances, the writ petitioner shall bear the costs of the proceedings, quantified at ₹50,000/-.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

FEBRUARY 28, 2014