

**Civil Misc. Writ Petition No. 795 of 2004**  
**M/S Sunder Carpet Industries, Village and Post Barhi Newada, District**  
**Varanasi.....Petitioner.**  
**Versus**  
**Income Tax Officer 3 (2), Varanasi and**  
**another.....Respondents.**

**Hon'ble Rajes Kumar, J.**  
**Hon'ble Pankaj Mithal, J.**

(Delivered by Hon'ble Rajes Kumar, J.)

In the present writ petition the petitioner has claimed the following reliefs:

“(a) issue a writ, order or direction in the nature of certiorari quashing the impugned notices dated 13.05.2004 (Annexure-12) issued by respondent No. 1 under Section 143 (2) of the Act for the assessment years 1998-99, 1999-2000, 2000-2001 and 2002-2003.

(b) issue a writ, order or direction in the nature of certiorari quashing the impugned notice dated 22.03.2004 (Annexures-4, 5, 6 & 7) issued by respondent No.1 under Section 148 of the Act for the assessment years 1998-99, 1999-2000, 2000-2001 and 2002-2003.

(c) issue a writ, order or direction in the nature of prohibition restraining respondent No. 1 from proceeding ahead in pursuance of the impugned notice dated 13.05.2004 issued under Section 143 (2) of the Act and the notices dated 22.03.2004 to reassess the petitioner under Section 148 of the Income Tax Act.

(d) issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(e) Award cost of the petition to the petitioner.”

The brief facts of the case giving rise to the present petition are that the petitioner was a partnership firm and engaged in the business of manufacturing and sale of woollen carpets. The petitioner was also exporter and was exporting goods outside the country and being exporter the petitioner was entitled for the exemption under Section 80HHC of the Income Tax Act (hereinafter referred to as the “Act”). For the assessment years 1998-99, 1999-2000, 2000-2001 and 2002-2003, the petitioner had filed income tax return along with audit report under Section 44 AB of the Act before the Income Tax Officer, Ward -I, Varanasi. For the assessment years 1998-1999, 1999-2000 and 2001-2002, the petitioner had disclosed nil income and for the assessment year 2002-2003, the petitioner had disclosed net income at Rs.2,20,410/-. The returns for all the assessment years had been processed and accepted summarily under Section 143 (1)(a) and intimations in this regard had been sent to the petitioner. As per the petitioner, the factory building was constructed on Plot Nos. 217/4/3, 217/5/3 and 217/5/4 at Maryadapatti, Bhadohi in

the assessment years 2000-2001, 2001-2002, 2002-2003 and 2003-2004 and the factory building at Barhi Newada, Varanasi was constructed in the assessment years 1998-1999 and 1999-2000. The petitioner has disclosed the following investments in the construction of the building in the respective years:

Assessment years	Factory building at Maryadapatti, Bhadohi	Factory Building at Barhi Newada, Varanasi
1998-1999	.....	Rs.16,38,476/-
1999-2000	.....	Rs.11,71,738/-
2000-2001	Rs.10,02,482/-	
2001-2002	Rs.10,64,670/-	
2002-2003	Rs.17,94,366/-	
2003-2004	Rs.16,55,170/-	

For the assessment year 2001-2002, the petitioner had filed return declaring an income of Rs.55,430/- along with audit report, audited balance sheet, trading and profit and loss account etc. The return was processed and disclosed income was accepted under Section 143 (1)(a) of the Act summarily. The case for the assessment year 2001-2002 was selected for scrutiny and accordingly the assessing authority issued the notices under Sections 143 (2) and 142 (1) of the Act. During the course of the assessment proceedings, the assessing authority noticed the investment at Rs.10,64,669.90 P. in the construction of the factory building at Maryadapatti, Bhadohi. The assessing authority referred the matter to the Departmental Valuation Officer, Kanpur. The reference was made to determine the costs of construction in respect of the factory building constructed at Maryadapatti, Bhadohi as well as Barhi Newada, Varanasi. The Valuation Officer submitted its report. As per Valuation Report, there were differences in the expenses incurred in the construction of the factory building as shown by the assessee in the aforesaid years. The following costs of construction were estimated by the Departmental Valuation Officer, Kanpur:

Assessment year	Factory Building at Maryadapatti, Bhadohi			Factory Building at Barhi Newada, Varanasi		
	Disclosed	Estimated	Differences	Disclosed	Estimated	Differences
1998-1999	.....	.....	.....	Rs16,38,476/-	Rs.14,94,300/-	Rs.3,22,562/-
1999-2000	.....	.....	.....	Rs.11,71,738/-	Rs.20,89,600/-	Rs.4,51,124/-
2000-2001	Rs.10,02,482/-	Rs.12,05,900/-	Rs.2,03,418/-			
2001-2002	Rs.10,64,670/-	Rs.12,80,700/-	Rs.2,16,030/-			
2002-2003	Rs.17,94,366/-	Rs.21,58,400/-	Rs.3,64,034/-			
2003-2004	Rs.16,55,170/-	Rs.19,91,000/-	Rs.3,58,830/-			

On the basis of the Departmental Valuer's Report and the alleged differences in the investment in the construction, the assessing authority had made an addition in the assessment year 2001-2002 and had also issued notices under Section 148 of the Act for the assessment years 1998-1999, 1999-2000, 2000-2001 and 2002-2003 which are subject matter of challenge. The reasons recorded for the issue of notices for all the aforesaid years are common.

Heard Sri R.R. Agrawal, learned counsel for the petitioner and Sri Shambhu

Chopra, learned Standing Counsel.

Learned counsel for the petitioner submitted that for the purposes of estimate of costs of construction, the matter could not be referred to the Departmental Valuation Cell. He submitted that the matter could be referred to the Valuation Cell for the determination of value of the property for the purposes of capital gains under Section 55A of the Act. He submitted that the assessing authority could not invoke Section 55A of the Act for the purposes other than those mentioned in the Section. Under Section 55A of the Act, the matter could be referred only for the purposes of valuation of the property for the purposes of capital gains and, therefore, the reference to the Valuation Cell for the purposes of determination of the costs of construction was without the authority of law and, therefore, such report cannot be relied upon. In support of the contention he relied upon the decision of the Apex Court in the case of ***Smt. Amiya Bala Paul versus Commissioner of Income Tax, reported in 2003 U.P.T.C.-1181***. He further submitted that the addition made in the assessment year 2001-2002 on the basis of the Departmental Valuer's Report has been deleted in revision under Section 264 of the Act by the Commissioner of Income Tax vide order dated 17.11.2004. The order of the Revisional Authority is Annexure-S.A.-II to the supplementary affidavit dated 6<sup>th</sup> July, 2009. He further submitted that the provisions of Section 142A of the Act after the amendment does not apply as the costs of construction come under 'expenditure' as contemplated under Section 69C of the Act and not under 'investment' and Section 69C is not covered and, therefore, Section 142A does not apply. In support of the contention he relied upon the decision of Delhi Court in the case of ***Commissioner of Income-Tax v. AAR PEE Apartments P. Ltd., reported in [2009] 319 ITR 276 (Delhi)***. He, therefore, submitted that there is no case of escaped assessment, inasmuch as notices have been issued on an irrelevant consideration and, therefore, liable to be set aside.

Sri Shambhu Chopra, learned Standing Counsel submitted that under Section 143 (1) (a) of the Act, only after the summary processing of the return, an intimation was issued. Such intimation is not the assessment order. In support of the contention he relied upon the decisions of the Apex Court in the case of ***Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers P. Ltd., reported in [2007] 291 ITR 500 (SC)***, the Division Bench decision of Gujarat High Court in the case of ***S.R. Koshti v. Commissioner of Income-Tax, reported in 276 ITR-165*** and the Division Bench decision of the Punjab and Haryana High Court in the case of ***Commissioner of Income-Tax v. Kartar Singh and Co. P. Ltd., reported in [2008] 300 ITR- 440***. Therefore, the notices under Section 148 of the Act prior to 30<sup>th</sup> September, 2004 were in accordance to law. He submitted that Section 142A of the Act can be invoked for the purposes of Section 69 which says investment in the movable or immovable property and the investment made in construction of the building is covered under Section 69 of the Act and, therefore,

for the purposes of determination of the investment in the construction of building, the reference could be made to the Valuation Cell under Section 142A of the Act. He submitted that Section 142A has been brought in the statute by the Finance (No.2) Act of 2004 with effect from 15.11.1972 to circumvent the decision of the Apex Court in the case of **Smt. Amiya Bala Paul versus Commissioner of Income Tax** (Supra). In support of the contention he relied upon the decisions of the Uttarakhand High Court in the case of **Smt. Kiran Lata v. Income-Tax Appellate Tribunal and others, reported in [2009] 318 ITR-44 Uttarakhand**), in the case of **Amit Estate Organizer v. Income-Tax Officer, reported in [2009] 316 ITR (AT)190 (Ahmedabad)**, in the case of **Bawa Abhai Singh v. Deputy Commissioner of Income-Tax, reported in 253 ITR-83** and in the case of **Vippy Processors Pvt. Ltd. v. Commissioner of Income Tax and another, reported in 249 ITR-7**. He submitted that the decision of the Delhi High Court in the case of **Commissioner of Income-Tax v. AAR PEE Apartments P. Ltd.** (Supra) does not lay down correct law. He submitted that under Article 226 of the Constitution of India the jurisdiction of this Court is very limited. This Court can only examine whether there was any material on the basis of which a belief could be formed about the escaped assessment for the purposes of reopening of the case under Section 147 of the Act and for issuing notices under Section 148 of the Act. Sufficiency of the material cannot be examined. He submitted that whether the Departmental Valuation Report was correct or not can only be examined in the assessment proceedings wherein the petitioner will have full opportunity to plead its case on merit.

We have heard learned counsel for the parties, considered the rival submissions of learned counsels for the parties and gone through the documents available on record.

This is a settled principle of law that under Article 226 of the Constitution of India, this Court can only examine whether there was any material on the basis of which a belief of escaped assessment could be formed. The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It must be in good faith and not in mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year for which the assessment is sought to be reopened. It is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of income. The belief must be formed on the basis of the material, which has a nexus to the escaped income. This Court cannot examine the sufficiency of the material.

To examine the issue whether there was material to form the belief of escaped assessment, it would be appropriate to refer some relevant provisions. Section 142A, Section 69 and Section 69C of the Act reads as follows:

### **Estimate by Valuation Officer in certain cases.**

**Section 142A.** “(1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.

(2) The Valuation Officer to whom a reference is made under sub-section (1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).

(3) On receipt of the report from the Valuation Officer, the Assessing Officer may, after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment:

**Provided** that nothing contained in this section shall apply in respect of an assessment made on or before 30<sup>th</sup> day of September, 2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.

*Explanation.*--In this section, “Valuation Officer” has the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

### **Unexplained investments.**

**Section 69.** Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

### **Unexplained expenditure, etc.**

**Section 69C.** Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year:

**Provided** that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.”

It appears that Section 142A of the Act has been introduced to circumvent the decision of the Apex Court in the case of **Smt. Amiya Bala Paul versus Commissioner of Income Tax** (Supra). Under Section 142A of the Act, the matter

can be referred to the Departmental Valuation Cell for the purposes mentioned therein. Under Section 142A of the Act, a reference can be made for the purposes of Section 69. Section 69 says about the unexplained investment. We are of the view that investment made in the construction of the building, if not recorded in the books of account falls under Section 69 of the Act. With due respect, we are not able to subscribe the view taken by the Delhi High Court in the case of **Commissioner of Income-Tax v. AAR PEE Apartments P. Ltd.** (Supra) wherein the Delhi High Court has held that investment made in the construction of building falls under expenditure incurred by the assessee and is covered under Section 69C of the Act and not under Section 69 and since Section 69C is not covered under Section 142A of the Act, the reference to the Valuation Cell cannot be made for the purposes of determination of the investment made in construction of the building.

In this view of the matter, we are of the opinion that the reference made to the Departmental Valuation Cell for the purposes of determination of the investment in the construction of building cannot be said to be without the authority of law. The Valuation Report disclosed the higher investments in the constructions which have not been disclosed in the books of account. Thus, there was escaped assessment. We are of the view that Departmental Valuer's Report constitutes material for entertaining a belief of escaped income in the years under consideration. The Delhi High Court in the case of **Bawa Abhai Singh v. Deputy Commissioner of Income-Tax** (Supra) has held that the report of the District Valuation Officer constitutes the reasons for entertaining a belief about escapement of an income. Similar view has been taken by the Division Bench of Madhya Pradesh High Court in the case of **Vippy Processors Pvt. Ltd. v. Commissioner of Income Tax and another** (Supra). In the case of **Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.** (Supra), the Apex Court has held as follows:

**“Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991] 191 ITR 662, for initiation of action under Section 147 (a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was**

**relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. P. Ltd.* [1996] 217 ITR 597 (SC); *Raymond Woollen Mills Ltd. v. ITO* [1999] 236 ITR 34 (SC).”**

Therefore, we are of the view that there was material on record to form the belief that there was escaped assessment for the assessment years under consideration. Thus, the notices issued under Section 148 of the Act for the aforesaid years cannot be said to be without any material. Whether the Departmental Valuer has valued the investment properly or not is a question of fact and can be considered only in the assessment proceedings. In the assessment proceedings it will be open to the petitioner to take all the pleas which shall be considered by the assessing authority while passing the assessment order.

In the result, the writ petition fails and is dismissed.

Dated: 15<sup>th</sup> April, 2010

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