Reassessment - Issues and controversies – In Question and Answer Form

Kapil Goel Adv.(9910272806)

Question 1

Whether fresh tangible material is required for reopening the case u/s 148 even when the case is earlier processed u/s 143(1) simply and reopening is done within four years of the end of the assessment year?

Answer

There are more than two views.

One set of view from Bombay, Gujarat high court is that there is no condition of fresh tangible material for reopening the case on basis of Apex court verdict in case of Deputy Commissioner of
Income Tax Vs. Zuari Estate Development and Investment Co. Ltd.
(2015) 373 ITR 661. There are conflicting views of Delhi High Court in case of i) Orient Craft 354 ITR 536 & ii) Indu Lata Rangwala v. Deputy Commissioner of Income tax reported in (2016) 384 ITR 337 (Delhi). In former it was held fresh material is must in every reopening u/s 148 where return is filed and even if only 143(1) is only done earlier prior to reopening action. In latter decision, it is held that fresh material is only required if reopening takes place after 143(3) assessment (whether within 4 years or after four years). Second set of view is recent decision of Madras high court in case of:

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.12.2016

P RONOUNCED ON: 1 9 . 12.2016

Tax Case (Appeal) No.1426 of 2007

M/s.TANMAC India,

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the Assessing Officer is justified in reopening the assessment by issuance of notice under section 148 of the Act when no new material was unearthed justifying the re-opening of the assessment?

The sine qua non for the initiation of proceedings in terms of section 147 of the Act is '*reason to believe'* on the part of the assessing officer that income chargeable to tax has escaped assessment. While the court cannot examine the sufficiency of reasons on the basis of which re-assessment is initiated, the existence or otherwise such 'reason to believe' is certainly open to verification and would be evident from the reasons recorded prior to issue of notice under section148 as required in terms of section 148(2) of the Act. In order to examine this aspect of the matter, the records were called for and have been duly produced for our perusal by Mr..Narayanaswamy. The reasons recorded are as follows:

'*The debit claimed towards lump sum payment*

made as a compensation for future profits forgone
by the retiring partner Rs.5,50,000/- is not allowable
for the following reasons:
1. The payment has not been authorised by partnership deed.
2. Serving of future profit is contingent one. Contingent expenditure cannot be allowed.
3. Future profits does not relate to the AY in question. And so, the expenditure cannot be allowed in this AY.'

A perusal of the Reasons would indicate that the assessing officer proceeds solely on the basis of the return of income and the enclosures thereto, being the financials and the deed of partnership, to initiate proceedings for re-assessment. The aforesaid documents however are part of record and the basis on which the intimation under section 143(1)(a) has been issued on 1.12.98. Let us bear in mind that the intimation dated 1.2.1998 has been manually issued, being prior to the electronic era which came into force on and with effect from 2003. The assessing officer has thus evidently applied his mind to the return and annexures even at that stage.

The scheme of assessment as set out in section 143 requires an assessing officer to process the return by issue of an intimation (which has been done in the present case) and thereafter issue a notice under sub-section (2) of section 143 to the assessee if the assessing officer considers it necessary or expedient to ensure that the assessee has not understated income, computed

excessive loss or underpaid tax calling upon him to attend his office and require him on a date to be specified therein, to produce or cause to be produced any evidence on which the assessee may rely in support of such claim. Having done so, an assessment is to be completed in terms of section 153(1) of the Act within a period of two years from the end of the assessment year in which the income was first assessable, in this case, on or before 31.3.2001. 11.The phrase 'reason to believe ' in section 147 relates to such other new or tangible material as may have come to the knowledge of the assessing officer pursuant to the original proceedings for assessment. The Supreme Court in *CIT Vs. Kelvinator of India (320 ITR 561)* states thus in the context of the 'belief' that should form the basis for a re-assessment; If the assessing officer, after issuing intimation u/s section 143(1) does not to issue a notice u/s 143(2) of the Act toinitiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of reassessment, but of review. The reasons make it abundantly clear that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to

conduct the proceedings under scrutiny. ***What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of notice u/s 148***. The notice under section 148 dated 9.12.2002 is initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of reassessment, but of review. The reasons make it abundantly clear
that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of

notice u/s 148. The notice under section 148 dated 9.12.2002 isThere is yet another relevant aspect. Mr.Kapur, to whom
the payment was made in the present case, also retired from two other firms simultaneously, M/s.Jarvis International (hereinafter referred to as 'Jarvis') and M/s Aryavartha Impex (hereinafter referred to as 'Aryavartha'). The facts in the case of Jarvis, Aryavartha and TANMAC, the appellant before us, are identical. However, it appears that the Department, in the cases of Jarvis and Aryavartha, issued notices u/s.143(2) of the Act and completed scrutiny assessment proceedings within time. Thus, in those cases, when proceedings for re-assessment were initiated by issue of notice under section 148, the Tribunal in the case of Jarvis and the Commissioner of Income Tax (Appeals) in the case of Aryavartha as confirmed by the Income Tax Appellate Tribunal, took the view that the assumption of jurisdiction under section 148 was bad in law.

It is incorrect to state that the Assessing Officer had no opportunity as the statute grants him full opportunity to scrutinize the assessment if he felt it was necessary and expedient for him to do so. Having chosen not to, he cannot resort to the provisions of S.147 in the absence of any new or fresh material indicating escapement of income. The facts as well as the law remain identical in all three
cases. Thus merely by virtue of the non-action on the part of the assessing officer in the case of the present assessee, i.e. by his
failure to issue a notice under section 143 (2) of the Act, the Department gets the advantage of another four years from

31.3.2002 to initiate proceedings for re-assessment. This obviously can neither be the proper interpretation of section 147 nor the intention of Legislature. The we answer question of Law No.2 in favour of the assessee.

In authors opinion, the view taken by Madras high court is more convincing and appropriate. When two views are there one view which is favorable to assessee shall be followed is trite law.

Question 2: Whether in reopening proceedings based on back material like investigation wing report and prior statements recorded during search/survey:

i) Is it necessary that revenue *suo motto* offers for confrontation and cross examination of statements & persons concerned, even though not asked for by assessee at the inception of reopening itself? If principle of natural justice are not followed and adhered to whether entire order and addition will be strike down?

ii) Is it necessary that investigation wing report forming basis of reasons and reopening is supplied or narrated to assessee specifically (can assessee ask for copy of the same at inception itself)?

iii) Whether simply referring investigation wing report can constitute tangible material in eyes of law?

iv) It is necessary that AO independently applies his own mind and do not simply refer the investigation wing report (how to judge that independent application of mind is there in reasons recorded)?

Answer:

i) H.R. Mehta Hon'ble Bombay High Court 387 ITR 561

Held AO under duty to supply third party statement and offer cross examination even though assessee has not asked for.

a) Held this requirement is to be met at the threshold.

If above is not followed proceedings will become void-ab-initio and coram non judice.

Andaman Timber Industries V/s CCE (2015) 281 CTR 0241 (SC)

"Not allowing the assessee to cross exarrune the witnesses by the Adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullify in as much as it amounted to violation of principles of Natural Justice because of which the assessee was adversely affected."

ii) IN THE HIGH COURT OF DELHI AT NEW DELHI + W.P.(C) 3732/2017 & CM No.16414/2017

POONAM JAIN ..... Petitioner Through: Mr. H.S. Bhullar, Ms. Bhawani Gupta & Mr. M.P. Rastogi, Advocates versus
UNION OF INDIA & ORS. ..... Respondents

"1. The short point involved in these petitions is that neither of the Petitioners has been furnished with the copies of the documents relied upon in the Show Cause Notice („SCN") issued to them by the Respondents. Both the petitioners seek copies of the documents and their statements referred to in the SCN to enable them to file a reply to the SCN.

5. On 18th April, 2017, the Assistant Director of the Income Tax (ADIT) sent a reply to each of the Petitioners stating that the said documents have been confronted to the Petitioners during the course of search; that an opportunity had already been granted earlier by the summons dated 9th November, 2016 issued to them under Section 131 (1A) of the Act. A further representation was sent by the Petitioners on 22nd April, 2017 and thereafter the present petitions were filed. 6. When notice was accepted by Mr. Ashok Manchanda, learned counsel for the Revenue on the last occasion, i.e., 1st May, 2017, he sought time to seek instructions on whether copies of the documents, statements etc. which were shown to the Petitioners could be provided to them.
7. Today, Mr. Manchanda appears along with the ADIT concerned who had sent the replies to the Petitioners on 18th April, 2017. The Court was

informed that under Article 26(2) of the OECD Model Tax Convention on Income and on Capital ('OECD Model Convention') , there is a restriction on the authorities in India sharing information that may have been obtained from foreign countries, except with either authorities or the persons concerned with proceedings of the assessment or prosecution etc. It is stated that since the documents relied upon in the SCN include statement of bank accounts maintained with foreign banks, the above prohibition comes in the way of the Respondents furnishing copies of the said documents to the Petitioners. Mr. Manchanda went one step further to state that there was no requirement for any SCN to be issued to the Petitioners in the first place in terms of Section 279 of the Act. 8. Article 26(2) of the OECD Model Convention states: "Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. ***Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use***."

9. The exception includes both the „persons" and „authorities." It is inconceivable that the person against whom the prosecution or the

proceedings is proposed can be denied the material relied upon to prosecute such person. The basic principle of natural justice requires that the person being proceeded against has to be furnished with copies of the material (whether in the form of documents or statements) gathered against such person and which is being relied upon by the authority which is prosecuting such person. This may, in a given case, and if the prosecution or agency makes out a case in that behalf, be subject to safeguards requiring the person to maintain the confidentiality of such document depending on their nature and contents. But to say that the person being prosecuted or proceeded against can only be 'shown' such documents, but not provided copies there is untenable even on a plain reading of Article 26 (2) of the OECD Model Convention. 10. As regards the contention that a SCN is not required to be issued, it is obvious that the Department itself recognises the importance of complying with the rules of natural justice and has therefore rightly issued the SCN to the Petitioners, which has to be responded to by them. Indeed, for an effective response, the Petitioners would be required not merely to be 'shown' the material relied upon in the SCN but with copies thereof. This would include their own statements, documents seized during the search and documents gathered from other sources including statements of bank accounts, relied upon against them to be provided copies thereof. Such a requirement inheres in the principles of natural justice and would be applicable even if the statute governing the proceedings does not specifically mandate it. 11. It is accordingly directed that not later than 1st June, 2017, the Respondents will provide to each of the Petitioners copies of the documents referred to and relied upon in the SCN issued to the Petitioners, including the statements made by the Petitioners, copies

of the statements of bank accounts and any other documents relied upon and referred to in the SCN. Subject to the above, not later than two weeks thereafter, i.e., on or before 15th June, 2017, both the Petitioners will send in their respective replies to the SCNs."

iii) Application of mind angle is discussed in detail by Delhi high court recently in Meeakshi overseas 2017] 82 taxmann.com 300 (Delhi), which is narrated below (gist):

Hon'ble Delhi High Court decision in case of Meenakshi Overseas Pvt. Ltd., order dated 26.05.2017(ITA no. 692/2016)

Relevant Extract:

"12. Perusing the reasons for re-opening of the assessment in the present case, the ITAT came to the conclusion that it was apparent that the AO proceeded to send a notice under Section 147/148 of the Act "solely on the basis of information received from the DIT(I)." After writing about information received, the AO "jumped to the conclusion that said tabulated instrument are in the nature of accommodation entry." This was done without further verification, examination or any other exercise. The ITAT also noted that the AO "has not mentioned nature of transaction which was effected for alleged accommodation entry and even without mentioning the date of recording of reasons." Following the decision of this Court in ***Commissioner of Income Tax v. G&G Pharma (2015) 384 ITR 147 (Del.),*** the ITAT held that the AO had not applied his mind at the time of initiating

the proceedings of reassessment under Section 147 of the Act. The ground Nos. 1(a) to 1(d) of the Assessee‟s appeal were, accordingly, allowed.

13. Mr. Rahul Chaudhary, learned Senior standing counsel appearing for the Revenue submitted that as the original return was processed under Section 143(1) of the Act, the Revenue was only to demonstrate the existence of tangible material which formed the basis of formation of a belief by the AO that the income had escaped assessment. This tangible material was in the form of an investigation report of the DIT(I) which was mentioned in the reasons for re-opening the assessment. Relying on the decisions in ***Signature Hotels Pvt. Ltd. v. Income Tax Officer (2011) 338 ITR 51 (Del), AGR Investment Ltd. v. Additional Commissioner of Income Tax (2011) 336 ITR 146 (Del.), AG Holding v. Income Tax Officer (2013) 352 ITR 364 (Del)***, Mr. Chaudhary submitted that the adequacy or sufficiency of the material of the basis on which the belief was formed by the AO for re-opening of the assessment could not be enquired into at this stage.

14. Mr Chaudhary referred to the fact that it became apparent in the assessment proceedings that credible information was received in the case of one Mr. Mahesh Garg, accommodation entry provider. Statements were made during investigation by former directors who admitted that Mr Garg was providing accommodation entries to various persons including the Assessee. This itself shows the formation of belief by the AO that the escaped assessment was justified.

15. Countering the above submissions, Mr. Kapil Goel, learned counsel for the Respondent/Assessee first pointed out that the Court is not obliged to examine the reasons with reference of any material that may be disclosed subsequently by the Revenue either at the stage of considering the

objections by the Assessee to the reopening or during the re-assessment proceedings. The reasons for the reopening as penned by the AO had to speak for themselves. Secondly, it is submitted that the reasons recorded by the AO in the present case were based on a „borrowed satisfaction" and on the directions of the Investigation Wing without any independent application of mind. The crucial link between the material and the formation of the belief was missing. Thirdly, it is submitted that in ***G&G Pharma*** (*supra*) this Court dealt with a similar instance of reopening of an assessment by the AO on the basis of the report of the DIT(I) without making any effort to discuss the material on the basis of which such belief was formed. The reopening was invalidated by this Court and its decision was accepted by the Revenue since no Special Leave Petition was filed by it.

16. Relying on the decision in ***Union of India v. Kaumudini Narayan Dalal (2001) 10 SCC 231, Commissioner of Income Tax v. Narendra Doshi (2004) 2 SCC 81, Berger Paints India Limited v. Commissioner of Income Tax, Calcutta (2004) 12 SCC 42*** and ***Commissioner of Income Tax v. Shivsagar Estate (2004) 9 SCC 420*** Mr Goel submitted that once the Revenue did not challenge the correctness of the law laid down by the High Court and accepted it in case of one Assessee, it was not open to the Revenue to challenge its correctness in the case of another Assessee "without just cause."

17. In support of his contention that the information received from the Investigation Wing cannot constitute tangible material for re-opening the assessment without the Assessee being informed what in the report of the investigation wing constituted tangible material for forming a belief, Mr Goel placed reliance on the decisions in ***CIT v. SFIL Stock Broking Limited (2010) 325 ITR 285 (Del.), Sarthak Securities Co. Pvt. Ltd. v. ITO (2010)***

329 ITR 110 (Del.), Signature Hotels Pvt Ltd v. ITO (*supra*), ***CIT v. Insecticides (India) Limited (2013) 357 ITR 330 (Del.)*** and ***Krown Agro Foods (P) Ltd v. Assistant Commissioner of Income Tax, Circle 5(1) (2015) 375 ITR 460 (Del)***. Reliance was also placed on the decision of this Court dated 19th November, 2015 in ITA No. 108 of 2013 (***Commissioner of Income Tax-IV v. Independent Media P. Limited***), ***Oriental Insurance Company Limited v. Commissioner of Income Tax (2015) 378 ITR 421 (Del), Rustagi Engineering Udyog (P.) Limited v. DCIT (2016) 382 ITR 443 (Del), Agya Ram v. CIT (2016) 386 ITR 545 (Del)*** and ***Rajiv Agarwal v. ACIT*** (decision dated 16th March, 2016 in Writ Petition (Civil) No. 9659 of 2015).

18. It must be noted at the outset that by an order dated 4th November, 2016, this Court had directed that "the file by which reasons to believe for the escapement of income was recorded by the AO for the purpose of reassessment shall be produced for consideration by the Court." The said file has been produced today by Mr. Chaudhary, learned counsel for the Revenue. It is seen that the reasons recorded by the AO for re-opening the assessment has been extracted verbatim by the ITAT in para 2 of the impugned order.

19. A perusal of the reasons as recorded by the AO reveals that there are three parts to it. In the first part, the AO has reproduced the precise information he has received from the Investigation Wing of the Revenue. This information is in the form of details of the amount of credit received, the payer, the payee, their respective banks, and the cheque number. This information by itself cannot be said to be tangible material.

20. Coming to the second part, this tells us what the AO did with the information so received. He says: "The information so received has been

gone through." One would have expected him to point out what he found when he went through the information. In other words, what in such information led him to form the belief that income escaped assessment. But this is absent. He straightaway records the conclusion that "the abovesaid instruments are in the nature of accommodation entry which the Assessee had taken after paying unaccounted cash to the accommodation entry given (*sic* giver)". The AO adds that the said accommodation was "a known entry operator" the source being "the report of the Investigation Wing".

21. The third and last part contains the conclusion drawn by the AO that in view of these facts, "the alleged transaction is not the *bonafide* one. Therefore, I have reason to be believe that an income of Rs. 5,00,000 has escaped assessment in the AY 2004-05 due to the failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment... "

22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.

23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self

evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

25. At this stage it requires to be noted that since the original assessment was processed under Section 143 (1) of the Act, and not Section 143 (3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.*"*

On similar conclusion read following decisions:

i) Delhi high court in G&G Pharma case 384 ITR 147;
ii) Delhi high court in RMG Polyvinyl Ltd (order dated 7/7/2017)
iii) Delhi high court in SNG Developers Ltd 12/07/2017

For similar discussion refer following decisions in other laws:

i) Aslam Mohd. Merchant v. Competent Authority & Ors: (2008) 14 SCC 186, the Supreme Court considered the meaning of the expression ‘reason to believe’ in the context of Narcotic Drugs and Psychotropic Substances Act, 1985

REASON TO BELIEVE

37. This brings us to the next question as to what does the term "reason to believe" mean. We may in this behalf notice some precedents operating in the field.

38. In the context of the provisions of Section 147 of the Income Tax Act, this Court in Phool Chand Bajrang Lal Vs. ITO : [1993] 203 ITR 456] held:-

"From a combined review of the judgments of this court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under section 147(a) read withsection 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to

light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income- tax Officer, the sufficiency of reasons for forming this 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."

See also Income Tax Officer Vs. Lakshmani Mewal Das [(1976) 103 ITR 437].

In Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. [2007 (8) SCALE 396], interpreting the term `reason to believe' as used under Section 247 (a) of the Income Tax Act, 1961, it was opined :

"To confer jurisdiction under Section 247(a) two conditions were required to be satisfied firstly the AO 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 (i) 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 AO 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."

NON APPLICATION OF MIND Applying these tests, it is evident that the statutory requirements have not been fulfilled in the present case.

39. Non- application of mind on the part of the competent officer would also be evident from the fact that a property named `Rose Villa' which was the subject matter of the decision of this Court in Fatima Amin (supra), was also included herein.

Once the show cause notice is found to be illegal, the same would vitiate all subsequent proceedings.

40. In Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai and Another [(2007) 6 SCC 329], this Court held:

"86. It is of some significance that in the standard pro forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the assessing officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations. The impugned

order, therefore, suffers from non- application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. Vs. CIT)"

RECORDING OF REASONS

41. Submission of Mr. Singh that the appellants have not been able to discharge the burden of proof which was on them from the impugned orders, it would appear that they have utterly failed to prove their own independent income; they being close relative of the detune as in terms of the statutory requirements , it was for them to show that they had sufficient income from those properties.

42. Had the show cause notice been valid, Mr. B.B. Singh, might have been right, but if the proceedings themselves were not initiated validly, the competent authority did not derive any jurisdiction to enter into the merit of the matter.

Legality and/or validity of the notice had been questioned at several stages of the proceedings. Despite their asking, no reason was disclosed by the authority to the appellants. They had asked for additional reasons, if any, which were not reflected in the show cause notices. None was disclosed.

CONCLUSION

44. We are not unmindful of the purport and object of the Act. Dealing in narcotics is a social evil that must be curtailed or prohibited at any cost. Chapter VA seeks to achieve a salutary purpose. But, it must also be borne

in mind that right to hold property although no longer a fundamental right is still a constitutional right. It is a human right.

The provisions of the Act must be interpreted in a manner so that its constitutionality is upheld. The validity of the provisions might have received constitutional protection, but when stringent laws become applicable as a result whereof some persons are to be deprived of his/her right in a property, scrupulous compliance of the statutory requirements is imperative.

45. For the reasons aforementioned, the impugned judgments cannot be sustained. They are set aside accordingly. The appeals are allowed. However, it would be open to the respondents to initiate fresh proceeding"

ii) IN **THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NOS.7439-7440 OF 2004**

M/S. TATA CHEMICALS LTD. …APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS (PREVENTIVE) JAMNAGAR

...RESPONDENT

15. Statutes often use expressions such as "deems it necessary", "reason to believe" etc. Suffice it to say that these expressions have been held not to mean the subjective

satisfaction of the officer concerned. Such power given to the

concerned officer is not an arbitrary power and has to be

exercised in accordance with the restraints imposed by law. That this is a well settled position of law is clear from the following judgments. ***See: Rohtas Industries Ltd. v. S.D. Agarwal, (1969) 3 S.C.R. 108 at 129.*** *To similar effect is the judgment in* ***Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, Calcutta, (1972) 1 SCR 175 at 182.*** *In that case it was held as under:*

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

See also ***Bar Council of Maharashtra*** *v.* ***M.V. Dabholkar****, [1976] 2 S.C.R. 48 at 51.* ***N. Nagendra Rao & Co.*** *v.* ***State of A.P.*** *(1994) 6 SCC 205 at 216.*

iii) The expression 'reason to believe' has been defined under Section 26 of the Indian Penal Code as under:- "26. "Reason to believe".–A

person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise."

iv) Instruction No. 5/2016

iv) Refer discussion in (iii) above

Conclusion

Above question answer can cover the validity of reopening made in context of i) Penny stock ii) Client code modification iii) Capitation fees iv) AIR information and v) MCX cases etc which are apparently bad because of non application of mind and serious violation of principle of natural justice.

Question 3:

Whether in reopening u/s 148 on basis of search based seized & impounded material whether assessee can say same should be covered u/s 153C instead what are the favorable decisions in this regard?

Answer: Yes 153C shall prevail over section 148 former being specific and later being general in nature: *Head to head comparison between two provisions as to their scope and ingredients etc*

Section 147	*Section 153C*
• *Is general provision deals with income escaping assessment based on reasons to believe to be recorded in writing*	• *Is a specific provision which triggers when search u/s 132 leads to discovery of prima facie incriminating material qua other person not under search*
• *Only requires prima-facie cause or justification in reasons*	• *Requires as per **CBDT extant guidelines (circular no 24/2015)** satisfaction notes u/s 153C*
• *Requires **approval u/s 151** on reasons recorded prior to assessment (pre facto approval)*	• *Requires **approval u/s 153D** on assessment framed (post facto)*

• ***Explanation III to section 147*** *(also used by AO in present case refer impugned order and paper book- order disposing objections) expands scope of reopening to other/fresh issues not referred in reasons*	• ***No provision parallel to explanation III u/s 147 in section 153C*** *(au contaire amendment made in finance act 2014 (held to be retrospective by Third Member/Special bench weight age decision in cochin bench in Royal Cartons case order dated 8/9/2015) states scope u/s 153C limited to "**material having bearing on determination of total income**" – year wise and issue wise requirement)*
• ***No parallel provision to section 153C(2)***	• ***Contains specific provision u/s 153C(2)*** *for certain years like present one which requires assessment u/s 153A read with section 153C (highlighted infra)*

Revenue's stand in high court agreed by senior counsel of income tax department before Hon'ble Allahabad high court & noted with *approval* in:

Commissioner of Income Tax v. Gopi Apartments: (2014) 365 ITR 411 (All.) /[2014] 270 CTR 447 (Allahabad)/**[2014] 46 taxmann.com 280 (Allahabad)**

"….34. *The contention of Sri Agrawal that Section 153C is only procedural in nature, therefore, the non-recording of prior satisfaction does not vitiate the assessment order, as, such satisfaction, has been recorded in the assessment order passed subsequently with regard to the other person, is also not acceptable for the reason that the Supreme Court in the case of Calcutta Knitwears (supra) has already considered this aspect of the matter in the context of Section 158BD, and after taking note of the fact that the said provision is a machinery provision has interpreted the same. In the light of the interpretation given by it and in view of the ratio laid down therein, the contention of Sri Agrawal does not hold ground. A clear and plain reading of Section 153C leaves no doubt that recording of satisfaction by the Assessing Officer of the person searched is mandatory and it has to precede the initiation of proceedings against the other person (not searched).*

35. A specific query was put to Sri Agrawal as to whether, on the basis of the material collected during the search and seizure operation or during the assessment, proceedings against the 'searched person' or thereafter, any proceeding could be initiated against the 'other person' under any other provision of the Income Tax Act, he categorically replied that except Section 153C, there was no other provision under which action could be initiated against him…."

Refer:

1. ***Hon'ble Vishakapatnam ITAT bench decision in case of G Koteswar Rao, order dated 29.10.2015 (ITA no. 400/Vizag/2014)***
2. **Income Tax Appellate Tribunal – Delhi Rajat Shubra Chatterji, New Delhi vs Assessee on 20 May, 2016**
3. **Delhi ITAT** I.T.A. No. 1500/DEL/2017;A.Y. : 2007-08;SUSHIL GAUR, 08/08/2017.

Question 4: Whether validity of reopening u/s 148 (or for that matter any order like 143(3)) can be challenged during revision proceedings u/s 263 when cit revises a reopening order for example by saying that reasons are bad etc:

Answer

Yes : reference can be made to Kolkatta ITAT recent decisions in cases of Classic Flour & Food Processing Pvt Ltd (order dated 05/04/2017) and Sanjeev Kr Khemka (ITA 1361/Kol/2016 order dated 02/06/2017) and Mumbai ITAT in Westlige Development Ltd (ITA 688/Mum/2016)

Principle: Hon'ble Supreme Court in the case of Kiran Singh & Ors. V. Chaman Paswan & Ors. [1955] 1 SCR 117 wherein the Hon'ble Supreme Court observed as follows :-

" It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of

execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

Question 5: Whether reopening u/s 148 can be made during the pendency of time limit of return filing u/s 139(4) that is belated return?

Answer:

No (refer **LUCKNOW BENCH "B", LUCKNOW ITAT in** UP Housing & Development Board, Date of pronouncement 05/09/2014:"In our considered opinion, till the time available to the assessee for filing return u/s 139(4) has not expired, it cannot be said that any income has escaped assessment")

Question 6: Whether once an assessment is strike down u/s 143(3) or section 148 on technical ground (like non service of notice etc) can reopening u/s 148 be again made on same set of material, provided limitation is there?

Answer : This is highly contentious issue and a moot point. In authors opinion, once revenue fails to use the available information and material in first go, permitting reopening in same set of material may not be permissible given SC ruling in case of Parshuram Potteries 106 ITR 1 held there must be finality in all proceedings. (Refer: Punjab & Haryana in the case of "Smt. Anchi Devi vs. CIT"

(2008) 218 CTR 11. R. Kakkar Glass & Crockery House vs. CIT" (2002) 173 CTR (P&H) 50); Manoo Lal Kedarnath vs. Union of India 114 ITR 884 (All) CIT vs. V.R. Durgamba 223 ITR 96 (Mad))

Revenue favoring decision: **Biotech International Ltd. v. Assistant Commissioner of Incometax** reported in (2010) 230 CTR 533 (Delhi); **Commissioner of Incometax v. Vishal Gupta** reported in (2012) 22 taxmann.com 82(Delhi)

Question 7: What is the ratio of recent Supreme court ruling in L&T decision Civil Appeal No. 5390 of 2007 Dt.21-3-17) in context of reopening? (can have impact in foreign bank a/c reopening? Yes)

Answer:

It is also pertinent to understand the meaning of the word 'information' in its true sense. **According to the Oxford Dictionary, 'information' means facts told, heard or discovered about somebody/something. The Law Lexicon describes the term 'information' as the act or process of informing, communication or reception of knowledge. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or having a bearing on the assessment**. We agree that a mere change of opinion or having second thought about it by the competent authority on the same set of facts and materials on the record does not constitute 'information' for the purposes of the State Act. But the word "information" used in the aforesaid Section is of the widest amplitude and should not be construed

narrowly. It comprehends not only variety of factors including information from external sources of any kind but also the discovery of new facts or information available in the record of assessment not previously noticed or investigated. Suppose a mistake in the original order of assessment is not discovered by the Assessing Officer, on further scrutiny, if it came to the notice of another assessor or even by a subordinate or a superior officer, it would be considered as information disclosed to the incumbent officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Officer in such circumstances is in one sense extraneous to the record. It will be information in his possession within the meaning of Section 19 of the State Act. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment or wrong assessment.

…From a perusal of the last paragraph of the aforementioned report of the audit party, it is clear that the Assessing Officer was of the opinion that as the goods had not been transferred to appellant-Company but had been consumed, so it does not come under the purview of taxation. In other words, the Assessing Officer was not satisfied on the basis of information given by the audit party that any of the turnover of the appellant-Company had escaped assessment so as to invoke Section 19 of the State Act. From the above, it also appears that the assessing officer had to issue notice on the ground of direction issued by the audit party and not on his personal satisfaction which is not permissible under law…..

Question 8: What is the latest judicial position on Apex court verdict in case of GKN Driveshaft 259 ITR Page 19 which is treated as gravamen of entire reopening action?

Answer: As per current trend, failure to communicate reasons (even though not asked by assessee), and failure to dispose assesssee's objections by separate independent speaking order, would invalidate the entire proceeindgs. That is, said infirmity cannot be cured subsequently by set aside and remand back.

KSS Petron Private Limited Bombay high court ITA no. 224/2014

> *8 We note that once the impugned order finds the Assessment Order is without jurisdiction as the law laid down by the Apex Court in GKN Driveshafts (supra) has not been followed, then there is no reason to restore the issue to the Assessing Officer to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure), yet the only consequence, would be that in appeal, it would be restored to the Assessing Officer for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the Assessee by reviving stale/ old matters."*

Bombay High Court, in the case of CIT Vs. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66, has held that in case reasons are not furnished by the A.O. to the assessee, before completion of re-assessment proceedings, re-assessment order cannot be upheld. (same in Hon'ble High Court of Bombay in the case of Commissioner of Income Tax v. Trend Electronics reported in (2015) 379 ITR 456 (Bombay).)

Similar view has been reiterated by Hon'ble Karnataka High Court, in the case of Kothari Metals in writ appeal no.218/2015 (IT) *377 ITR 581*, wherein it has been held that the question of nonfurnishing the reasons for re-opening on already

concluded assessment goes to very route of the matter and that the assessee is entitled to be furnished reasons for such re-opening and that if reasons are not furnished to the assessee, then the proceedings for the re-assessment cannot be taken any further, and re-opening of the assessment would be bad in law.

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.177 of 2016

Order reserved on: 27-4-2017

Order delivered on: 19-6-2017

Smt. Kamala Ojha, aged about 71 years, wife of Shri Pankaj Ojha,

R/o Qr.No.MIG-II-06, MP Nagar, Korba (C.G.)

---- Petitioner

Versus

1. Income Tax Officer-1, Korba, Mahanadi Complex, Niharika Road,

Thus, in light of the principle of law laid down in Calcutta

Discount (supra) followed in M/s. A. Raman and Co.'s case

(supra) and Jeans Knit Private Ltd. (supra) and considering the

facts leading to challenge to the show cause notice, I do not have

any slightest doubt in my mind to hold that the writ petition is maintainable to challenge the notice for reassessment issued under Section 147 read with Section 148 of the Act, 1961 and accordingly, I overrule the first preliminary objection raised on behalf of the Revenue in that regard,

If the facts of the present case are examined in light of the principle of law laid down in Asian Paints Ltd. (supra) and Aroni Commercials Limited (supra), it would appear that in the present case, preliminary objections filed by the assessee were rejected on 13-12-2016 and the petitioner immediately filed writ petition challenging the notice issued under Section 147 read with Section 148 of the Act, 1961, on 16-12-2016, but on 20-12-2016, the Assessing Officer passed order of reassessment without granting reasonable time and opportunity to the petitioner to lay challenge to that order. Thus, the Assessing Officer has passed order in haste and it does not appear to be bona fide. The Assessing Officer ought to have, in all fairness, granted sufficient/reasonable time to the assessee to question in view of the principle of law laid down in Asian Paints Ltd. (supra) and Aroni Commercials

Limited (supra) in which Their Lordships have clearly held that undue haste in passing the order of reassessment without giving sufficient time to the assessee to challenge the order rejecting preliminary objections is an attempt to overreach the Court and to thwart the petitioner's challenge to the order rejecting preliminary objections. I respectfully agree with the view rendered by the Bombay High Court in this regard and hold that the Revenue has shown undue haste in passing the order of reassessment with even waiting for few days in order to enable the petitioner to challenge the order rejecting preliminary objections filed by her. Therefore, the writ petition cannot be thrown on the ground that the petitioner has alternative statutory remedy of filing appeal before the appellate authority under Section 246A of the Act, 1961.

The expression 'reason to believe' employed in Section 147 of the Act, 1961 has been considered and explained by Their Lordships of the Supreme Court in various judgments. It has been held that the words 'reason to believe' mean that a reasonable man, under

the circumstances, would form a belief which will impel him to take action under the law. The formation of opinion has to be in good faith and not a pretense. (See Ajit Jain v. Union of India and others11.)

Thus, "reason to believe" is a common feature in taxing statutes. It has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. The reasons are objective but belief thereon is subjective.

Thus, from a careful perusal of reasons recorded under Section 148 (2) of the Act, 1961 for initiation of reassessment proceeding it appears that the entire basis for initiation of reopening reassessment is the report received from the Assistant Valuation Officer-II, Mumbai on 12-6-2015.

Thus, it appears that only on the basis of the valuation report received from the said officer – Assistant Valuation Officer, the assessing authority sought to reopen the proceeding under Section 147 of the Act, 1961 which is clearly not an information for reopening the assessment proceeding as held by the Supreme

Court in Dhariya Construction Company's case (supra) wherein it has been observed that opinion of the District Valuation Officer is not an information for the purposes of reopening assessment under Section 147 of the Act and the Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon, as such, opinion of a third person cannot be the basis for reopening the proceeding for reassessment under Section 147 of the Act, as in the present case, the reopening proceeding is based only on the report received from the Assistant Valuation Officer and the assessing authority has not applied its mind and solely relied upon that opinion of the AVO to reopen the assessment under Section 147 read with Section 148 of the Act, 1961, which is in teeth of the decision of the Supreme Court in Dhariya Construction Company's case (supra) and as such, contrary to law.

This would bring me to the next submission raised on behalf of the petitioner that the order disposing of the preliminary objections is not a reasoned and speaking order, therefore, that order is

liable to be quashed.

In order to consider the question as to whether the preliminary objections were decided in accordance with law or not, it would be appropriate to notice the law on the relevant subject i.e. the law regarding the manner of disposal of preliminary objections by the competent authority

Their Lordships of the Supreme Court in GKN Driveshafts (India) Ltd. (supra) have clearly held that preliminary objections must be decided by the assessing authority by a reasoned and speaking order and observed in paragraph 5 as under: -

Similarly, in the matter of Godrej Industries Ltd. v. Deputy Commissioner of Income Tax and others19, the Bombay High Court has clearly held that the order disposing of the objections has to clearly record reasons why the objections are not tenable. The Bombay High Court further held that the reproduction of the reasons and reiterating them again is no compliance with the law laid down, there must be application of mind by the assessing authority. It has also been held that if the objections are not found

to be worthy of acceptance or have no merits, then, the order must speak as to why the said conclusion has been reached. The statutory power has to be exercised having regard to the provisions of Section 147 of the Act, 1961.

. In the entire reply/order facts have been serially mentioned and in the last paragraph it has been concluded that the application for dropping the proceedings initiated under Section 147 of the Act, 1961 was considered and same is based on the facts mentioned above, the objections are rejected and the case is fixed for final hearing on 20-12-2016. The petitioner has raised number of preliminary objections to question the notice initiating reassessment, none of them have been considered in seriatim on their merits and simply after narrating the entire facts, in one paragraph all objections have been rejected summarily holding that the objections are not tenable without assigning any reason and such a course is wholly impermissible in law, as it has already been held that preliminary objections have to be decided by a reasoned and speaking order giving reasons that why the objections are not tenable in law. No such reason appears to

have been assigned, rather no application of mind has been made by the assessing authority while deciding the objections which is contrary to the mandate of law declared in that behalf and in force. Therefore, the order deciding preliminary objections cannot be sustained

Thus, in the present case, if the order passed by the Revenue is perused, recourse to Section 263 of the Act, 1961 can certainly be made which the Assessing Officer did not do and proceeded to reopen the assessment under Section 147 of the Act, 1961 by issuing notice under Section 148 of the Act which does not satisfy the jurisdictional pre-requirement for exercise of jurisdiction under Section 147. Therefore, I am unreservedly and unhesitatingly of the opinion for the reasons mentioned herein-above that the order passed by the Assessing Officer under Section 147 of the Act, 1961 seeking to reopen the assessment already made is without jurisdiction and without authority of law and the order disposing of the preliminary objections is also not in accordance with law. Consequently, the order finally passed making reassessment is also contrary to law.

As a fallout and consequence of aforesaid discussion, the

proceeding initiated under Section 147 of the Act, 1961 by issuing

notice under Section 148 of the Act, 1961, order deciding

preliminary objection and final order of reassessment are all

hereby quashed. The petitioner is entitled for cost of 15,000/-

from the respondents No.1 to 3.

Question 9 : Whether in reopening u/s 148, when once return in response to notice u/s 148 is filed whether bar of section 124(3) can come into play to challenge the jurisdiction at appellate and later stage?

Answer:

IN THE INCOME TAX APPELLATE TRIBUNAL LUCKNOW BENCH 'A', LUCKNOW

M/s Khushbu Industries

3. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We have also gone through the provisions of section 121, 122,section 2 sub section (7) which defines the jurisdiction of Assessing Officer as well as the provisions of section 124(3) of the Act. In our opinion, we have not to look into the question, on the basis of the ground of appeal taken by the Revenue, with which Assessing Officer the valid jurisdiction lies in this case to make the assessment. The Revenue has not challenged before us that

the jurisdiction in the case of the assessee does not lie with the Dy.C.I.T., Range-4, Lucknow but it lies with the Income Tax Officer-1(2), Lucknow. The only grievance of the Revenue before us is that the assessee failed to challenge the jurisdiction within the prescribed time of 30 days as per section 124(3)(a) of the Act. In view of the grievance of the Revenue, the only question before us is whether under clause (a) of section 124(3) the assessee was required to challenge the jurisdiction of the Assessing Officer who issued the notice u/s 148(2) of the Act. The relevant provision of section 124(3) reads as under:

"(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer--

(a) where he has made a return under sub-section (1) of section 115WD or under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or sub-section (2) of section 115WE or sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier ;

(b) where he has made no such return, after the expiry of the time allowed by the notice under sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144 to show cause I.T.A. No.371/Lkw/16 Assessment year:2008-09 why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier."

3.1 From the reading of section 124(2)(a) of the Act, it is seen that this section mandates that no person shall be entitled to call in question the jurisdiction of an Income Tax Officer after the expiry of one month from the date on which he has

furnished the return u/s 139(1) from the date on which he was served with a notice under sub section (1) of section 142 or sub section (2) of section 143 or after the completion of the assessment whichever is earlier. Clause (a) of section 124(3) does not talk of any time limit for questioning the jurisdiction of the Assessing Officer for the service of notice u/s 148 of the Act. This provision provides a time limit of one month to question the jurisdiction of the Assessing Officer to issue notice u/s 143(2) and 142(1) of the Act. **If we look into the said clause (b) of section 124(3), we noted that this clause talks of challenge of jurisdiction not after the expiry of the time allowed by the notice issued u/s 148 but clause (b) is applicable only in case where the assessee has not furnished the return. In the case of the assessee, the assessee has furnished the return u/s 139(1) therefore, it is only clause (a) of section 124(3) which is applicable. Clause (a) ofsection 124(3) does not refer to notice issued u/s 148 of the Act. Therefore, we do not find any illegality or infirmity in the order of CIT(A) which warrants our interference so far it relates to ground taken by the Revenue in respect of the provision of section 124(3)(a) of the Act is concerned**. We also noted that the CIT(A) has annulled the assessment not only on the basis of jurisdiction but has also annulled the reassessment on the basis of provision of section 151as in his opinion, the Assessing Officer has not taken approval in accordance with the provisions of section 151(2) before issue of notice u/s 148 of the Act. The relevant findings of CIT(A) are reproduced below as under:

I.T.A. No.371/Lkw/16 Assessment year:2008-09 "5(9) Keeping in view of above said views expressed by the different High Court and Apex Court it is very much clear that the approval/ sanction to reopen the case and issue the notice undersection 148 of the Act is to be of the same officer to whom law requires and not by the different officer. In the present case as per section 151(2) of the Act if

the case is to be re-opened after expiry of 4 years the approval/satisfaction should be of Joint Commissioner of Income Tax only but in the present case the case is re-opened and notice under section 148 of the Act has been issued on approval of Commissioner of Income Tax who is different authority then the Joint Commissioner of Income Tax as per section 2 of the Act. For the said reason the notice issued under section 148 of the Act is bad in law and liable to be quashed. The issue of valid jurisdiction is a condition precedent to the validity of any assessment under Section 147 of the Act. In any case the notice under section 148of the Act has been issued by the AO who did not have jurisdiction over the appellant as discussed above and consequently the approval granted by the administrative authorities under whom the said AO worked also did not have valid jurisdiction over the appellant to grant the said approval under section 151 of the Act. Hence, I hold that the reassessment on the basis of an illegal notice undersection 148 of the Act is not sustainable and accordingly I annul the assessment order passed by the AO in consequence of the notice under section 148 of the Act which was invalid. Ground of appeal numbers 2 and 3 are allowed."

3.2 The Revenue has not come in appeal against the aforesaid finding of CIT(A). Even if the first ground of appeal taken by the Revenue is allowed, the finding of the CIT(A) that the assessment order passed u/s 147 read with section 143(3) will remain to be final and the ground taken by the Revenue will become to be infructuous. In view of the aforesaid discussion, we dismiss ground No. 1 taken by the Revenue.

Question 10: Whether application of mind is separately required in approvals u/s 151 by higher authority?

Answer:

Various approvals which are practically seen are tabulated below:

Approval	Fate/Result/Impact
Mere "Yes" is endorsed by competent authority	Seems invalid
Mere signature is appended	Seems invalid
Mere "approved: is written	Seems invalid
"Yes I am satisfied"	Very dicey (author opinion not valid)
When through RTI or otherwise it is established on same day 2000 approvals are given by single CIT what shall be fate of such approvals?	Seems to be plainly bad and vitiated

IN THE HIGH COURT AT CALCUTTA

GA No. 2488 of 2006

ITA No.297 of 2006

PREM CHAND SHAW (JAISWAL)

Versus

ASSISTANT COMMISSIONER, CIRCLE- 38, KOLKATA & ANR

The

mere fact that the Additional Commissioner did not record his satisfaction in so many words would not render invalid the sanction granted under Section 151(2) when the reasons on the basis of which sanction was sought for could not be assailed. Even an appellate authority is not required to give reasons when it agrees with the finding unless statute or rules so requires. We are supported in our view by the Judgment of the Apex Court in R.P. Bhatt v. Union of India, reported in AIR 1986 SC 1040. In R.P. Bhatt (supra) the Apex Court relied on judgment rendered by a Constitutional Bench in the case of Som Datt Datta v. Union of India reported in AIR 1969 SC 414 wherein their lordships held as follows:

"Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, there is no legal obligation that the statutory tribunal should give reasons for its decision. There is also no general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.

Hon'ble Delhi High Court decision in case of M/s N.C. Cables Ltd., order dated 11.01.2017 (ITA no. 335/2015)(391 ITR 11)

Relevant Extract:

"11. Section 151 of the Act clearly stipulates that the CIT (A), who is the competent authority to authorize the reassessment notice, has to apply his mind and form an opinion. The mere appending of the expression 'approved' says nothing. It is not as if the CIT (A) has to record elaborate reasons for agreeing with the noting put up. At the

same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise appears to have been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer. For these reasons, the Court is satisfied that the findings by the ITAT cannot be disturbed."

Hon'ble High Court of Madhya Pradesh in the case of CIT vs. S. Goyanka Lime & Chemicals Ltd. reported in (2015) 56 taxmann.com 390 (MP) has held as under:-

"7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am Satisfied". In the case of ARjun Singh vs. Asstt. DIT (2000) 246 ITR 363 (MP), the same question has been considered by a Coordinate Bench of this Court and the following principles are laid down:-

"The Commissioner acted, of course, mechanically in order to discharge his statutory obligation properly in the matter of recording sanction as he merely wrote on the format "Yes, I am satisfied" which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 ho urs of time which also goes to indicate that the Commisisoner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material

8. If the case in hand is analysed on the basis of the aforesaid principle, the mechanical way of recording satisfaction by

the Joint Commissioner, which accords sanction for issuing notice under section 148, is clearly unsustainable and We find that on such consideration both the appellate authorities have interfered into the matter. In doing so, no error has been committed warranting reconsideration."

Hon'ble Supreme Court of India in the case of CIT vs. S. Goyanka Lime & Chemical Ltd. reported in (2015) 64 taxmann.com 313 (SC) in the Head Notes has held that *"Section 151, read with section 148 of Income Tax Act, 1961 – Income escaping assessment – Sanction for issue of notice (Recording of satisfaction) – High Court by impugned order held that where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice under section 148, reopening of assessment was invalid – Whether Special Leave Petition filed against impugned order was to be dismissed – Held, Yes (in favour of the Assessee).*"

Question 11: What is the latest position on transfer u/s 127 by apex court?

Answer:

Head Note

S.127 : Power to transfer cases – Transfer from one Assessing Officer to another under two different jurisdictions – Agreement between two jurisdictional Commissioners – Absence of disagreement not same as

agreement – Positive state of mind required – The transfer of the income-tax assessment file of the assessee from Assessing Officer, Tamil Nadu to the Assessing Officer, Kerala was not justified

Where the assessee's case is transferred from one Assessing Officer to another and the two are not subordinate to the same Commissioner, under section 127(2)(a) of the Income-tax Act, 1961 an agreement between the Commissioners of the two jurisdictions is necessary. Section 127(2)(a) contemplates a positive state of mind of the two jurisdictional Commissioners. Held accordingly, that as the file of the assessee had been transferred from an Assessing Officer in Tamil Nadu to an Assessing Officer in Kerala and the two Assessing Officers were not subordinate to the same Director General or Chief Commissioner or Commissioner, under section 127(2)(a) of the Act, an agreement between the Director General, Chief Commissioner or Commissioner, as the case may be, of the two jurisdictions was necessary. The counter affidavit filed on behalf of the Department did not disclose that there was any such agreement. In fact, it had been consistently and repeatedly stated in the counter affidavit that there was no disagreement between the two Commissioners. Absence of disagreement was not tantamount to agreement as visualised under the section. The transfer of the income-tax assessment file of the assessee from Assessing Officer, Tamil Nadu to the Assessing Officer, Kerala was not justified or authorised under section 127(2)(a) of the Act and was to be set aside.

Noorul Islam Educational Trust v . CIT (2016) 388 ITR 489/ 243 Taxman 519 (2017) 291 CTR 230 (SC)

Question 12: How failure to disclose in reasons need to be displayed by AO as far as first proviso to section 147 is concerned?

Answer:

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 8164/2010

HCL TECHNOLOGIES LTD

20/07/2017

16. The AO has not made the effort of disclosing, in the reasons, what according to him constituted the failure by the Assessee to make a full and true disclosure. A mere reproduction of the language of the provision will not suffice. Also, although making such an averment either in the order rejecting the objections of the Assessee or subsequently in the counter-affidavit in the answer to a writ petition will not satisfy the requirement of the law. The reasons will have to speak for themselves. For complying with the jurisdictional requirement under the first proviso to Section 147 of the Act, the reasons would have to show in what manner the Assessee had failed to make a full and true disclosure of all the material facts necessary for the assessment. The failure to do so would not be a mere irregularity. It would render the reopening of the assessment after four years vulnerable to invalidation.

Recently, in its decisiondated 22nd September 2015 in ITA No. 356 of 2013 (Commissioner of

Income Tax II v. Multiplex Trading & Industrial Co. Ltd.) 378 ITR 351 this Court, in a

case where reopening of assessment was sought to be made four years after

the expiry of the original assessment, held that "in order to reopen an

assessment which is beyond the period of four years from the end of the

relevant assessment year, the condition that there has been a failure on the

part of the Assessee to truly and fully disclose all material facts must be

concluded with certain level of certainty."

Question 13: What are the various point of challenge in reopening made in cases where section 50C (circle rate) is involved?

Answer:

- Mere information that circle rate is high and actual consideration is less cannot decide the year of transfer and person in whose hands capital gains is assessable which is foundational fact;
- Information about return filing is crucial in reasons recorded;

- Application of mind by AO to information recd. is crucial like prima facie ascertainment of *capital gains* income escaping assessment and not the entire sale consideration can be treated as income escaping assessment (like merely on basis of joint development agreement reopening action cannot survive);
- Uniformity amongst various assesses (co-onwers/sellers) is required;
- Merely referring to sale proceeds without considering cost of acquisition of property to visualize resultant capital gains, action of AO marred on this count also. Dyaneshwar Govind Kalbhor ITAT Pune :ITA no.2405/PN/2012
- On Merits assessee can compel AO to refer the matter to DVO without which entire exercise shall be nullity (Delhi ITAT in Aditya Narain Verma 1/6/2017)

Question 14: What is latest trend on section 292BB?

Answer:

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

A.F.R.
Chief Justice's Court
Case :- INCOME TAX APPEAL No. - 24 of 2014
Appellant :- Commissioner Of Income Tax-II Lucknow
Respondent :- M/S Salarpur Cold Storage (Pvt.) Ltd. Barabanki
(2014) 50 Taxmann.com 105 (All)

The fiction in Section 292 BB of the Act overcomes a procedural defect in regard to the non-service of a notice on the assessee, and obviates a challenge that the notice was either not served or that it was not served in time or that it was served in an improper manner, where the assessee has appeared in a proceeding or cooperated in an enquiry without raising an objection. Section 292 BB of the Act cannot come to the aid of the revenue in a situation where the issuance of a notice itself was not within the prescribed period, in which event the question of whether it was served correctly or otherwise, would be of no relevance whatsoever. Failure to issue a notice within the prescribed period would result in the Assessing Officer assuming jurisdiction contrary to law.

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR
Court No.37

Income Tax Appeal No.142 of 2015

Asstt. Commissioner of Income ..... Appellant
Tax Circle-3 Noida
Vs.
M/s Greater Noida Industrial ..... Respondents
Development Authority
379 ITR 14

19. In view of the aforesaid, we are of the opinion that Section 292BB, which was inserted with effect from 01.04.2008 is not applicable to the proceedings for the assessment year 2006-07, 2007-08, 2008-09. ***We are also of the opinion that Section 292BB of the Act is not applicable also for the assessment years 2009-10, 2010-11 and 2011-12.*** **The deeming fiction that once an assessee has appeared in any proceeding or participated in any query relating to assessment or reassessment, it shall be deemed that the notice under the provisions of the Act, which is required to be served has been duly served upon him in accordance with the provisions of the Act and, therefore, is precluded from contending that the notice was not served upon him or was not served upon him in time or was not served upon him in a proper manner, in our view, is not applicable for the following reason.**

20. There is a clear distinction between "issue of notice" and "service of notice". In R.K.Upadhyaya Vs. Shanabhai P. Patel, 166 ITR 163, the controversy was that a notice under Section 148 was issued on 31.03.1970 i.e. the last date of limitation, which notice was served on the assessee on 03.04.1970, after the expiry of limitation. The High Court held that since the notice was served after the expiry of the period, the assessment order was invalid and had accordingly quashed the notice for reassessment issued under Section 147 of the Income Tax Act,1961. The Supreme Court held that the scheme of 1961 Act in so far as the notice for re-assessment was concerned was quite different than that contained under Section 34 of the Income Tax Act, 1922. The Supreme Court held that a clear distinction has been made between "issue of notice" and "service of notice" under the Act. The Supreme Court held that once a notice is issued within the period of limitation, the Income Tax Officer gets the jurisdiction to proceed to reassess and make the assessment order. The mandate of Section 148(1) of the Act is, that reassessment shall not be made until there has been a service of notice which is a condition

precedent to making an order of assessment. The Supreme Court further held that the requirement of issue of notice is satisfied when a notice is actually issued and that service under the Act, 1961 is not a condition precedent to conferment of jurisdiction on the Income Tax Officer to deal with the matter but it is only a condition precedent to the making of the order of assessment. The Supreme Court held:

"Section 34, conferred jurisdiction on the Income-tax Officer to reopen an assessment subject to service of notice within the prescribed period. Therefore, service of notice within limitation was the foundation of jurisdiction. The same view has been taken by this Court in Janni v. Indu Prasad Bhat, 72 ITR 595 as also in C.I.T. v. Robert, 48 ITR 177. The High Court in our opinion went wrong in relying upon the ratio of 53 ITR 100 in disposing of the case in hand. The scheme of the 1961 Act so far as notice for reassessment is concerned is quite different. What used to be contained in section 34 of the 1922 Act has been spread out into three sections, being sections 147, 148 and 149 in the 45 1961 Act. A clear distinction has been made out between 'issue of notice' and 'service of notice' under the 1961 Act. Section 149 prescribe the period of limitation. It categorically prescribes that no notice under section 149 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction in the Income-tax Officer to deal with the matter but it is a condition

precedent to making of the order of assessment. The High Court in our opinion lost sight of the distinction and under a wrong basis felt bound by the judgment in 53 ITR 100. As the Income-tax Officer had issued notice within limitation, the appeal is allowed and the order of the High Court is vacated. The Income-tax Officer shall now proceed to complete the assessment after complying with the requirements of law. Since there has been no appearance on behalf of the respondents, we make no orders for costs."

21. From the aforesaid, it is clear that the essential requirement is "issuance of notice" under Section 143(2) of the Act. The deeming fiction under Section 292BB of the Act is with regard to "service of notice". Since the initial requirement of issuance of notice was not made by the Assesssing Officer, the deeming fiction of service of notice under Section 292BB of the Act, consequently, does not arise and is not applicable.

IN THE HIGH COURT OF DELHI AT NEW DELHI 4. + **ITA 578/2015** PR. COMMISSIONER OF INCOME TAX -18 .....

Appellant Through: Mr. N.P. Sahni, Senior Standing counsel with Mr. Nitin Gulati, Advocate.

versus SILVER LINE ..... Respondent

383 ITR 455

13. In ***Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd.*** (*supra*), this Court has

also discussed the distinction between a failure to 'issue' notice and a failure to 'serve' a notice on an Assessee. It was held, after noticing the decisions of the Allahabad High Court in ***Commissioner of Income Tax v. Rajeev Sharma (2011) 336 ITR 678*** and ***Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. [2014] 50 taxmann.com 105 (All.)*** and the decision of the Madras High Court in ***Sapthagiri Finance & Investments v. Income Tax Officer (2013) 90 DTR (Mad) 289***), that Section 292 BB of the Act would apply insofar as failure of 'service' of notice was concerned and not with regard to the failure to 'issue' notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

14. Consequently, the Court does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act in the present case in view of the proviso to Section 292BB of the Act.

On basis of above discussion, it is clear that bar of section 292BB will also not come to rescue of *revenue.*

Question 15: Whether in search case u/s 132 for period outside the period referred u/s 153A can reopening u/s 148 take place?

Answer: On basis of harmonious reading of the law, in authors opinion answer should be No?

Question 16: Whether in reopening u/s 148 for matter already decided u/s 153A etc whether approval u/s 153D is again required?

Answer: Seems to be Yes although highly debatable

Question 17: Whether audit objections can result in straight reopening on issue relating to legal interpretation in supersession of earlier view taken u/s 143(3) assessment?

Answer: No (refer Delhi high court in case of Sun Pharmaceuticals reported in 381 ITR 387 :

> *"18. That a quasi judicial authority, which is expected to exercise statutory functions on an objective criteria, cannot act on the dictates of any superior authority, or on any instruction that may be issued by an authority that may*

have administrative control over such quasi-judicial authority, is fairly well settled."

Also refer CBDT Circular No. 8/2016

Question 18: Whether protective assessment can be made in reopening u/s 148?

Answer: No

Refer: Hon'ble Bombay high Court in the case of DHFL Venture Capital Fund Vs. ITO 358 ITR 471 (Bom).

The facts of the case before the Hon'ble Bombay High
Court was that the Assessee, registered with SEBI as a Venture Capital Fund filed a return of income claiming the status of an AOP. For AY 2008-09, the assessee claimed that the contributions by its investors in terms of the trust deed and contribution agreements constituted revocable transfers under the provisions of the Act and hence, the income accruing to the fund was not liable to tax in the hands of the assessee, but in the hands of the investors / contributors in proportion to their respective contributions. A similar note was appended in the notes to the accounts. The AO held that the contributors to the scheme have practically no control over it and hence, the provisions of Sections 61 and 63 were not applicable. In the circumstances, the total income was held to be exigible to tax. In appeal, the Commissioner (Appeals) came to the conclusion that there was a revocable transfer within the meaning of Sections 61 to 63 and the income which arose to the trust was taxable in the hands of the contributors and not in the hands of the Assessee. Consequently, it was held that when the share of income received by the contributors

from the fund had been included in the total income of the contributors and was offered to tax by the contributors, it was not open to the department to proceed to tax the same income again in the hands of the fund. Against the order of the CIT (A), the Revenue was in appeal before the Tribunal. At that point of time, a notice had been issued by the AO u/s 148 to "the AOP of the contributors of M/s. DHFL Venture Capital Fund" at the address of the Assessee for reopening the assessment. The notice u/s.148 of the Act was challenged as one issued without belief that Contributor's income has escaped assessment because the Trust Assessent was still being pursued

by the Revenue in an appeal before the Tribunal. The Hon'ble Bombay High Court held that the entire exercise was only contingent on a future event and a consequence that may ensure upon the decision of the Tribunal, that again if the Tribunal were to hold against the Revenue. A reopening of an assessment u/s 148 cannot be justified on such a basis. There has to be a reason to believe that income has escaped assessment. 'Has escaped assessment' indicates an event which has taken place. Tax

legislation cannot be rewritten by the Revenue or the Court by substituting the words

'may escape assessment' in future. Writing legislation is a constitutional function entrusted to the legislature. The reassessment proceedings were held not properly initiated on the ground that the jurisdictional requirement for reopening an assessment

u/s 147 for AY 2008-09 has not been fulfilled. In the course of its decision Hon'ble Court also held that there cannot be a protective assessment in a reassessment. The following were the relevant observations, in this regard:

"17. Undoubtedly as counsel appearing on behalf of the Revenue submits the concept of a protective assessment is well known to the law of income tax in

India. The basis on which a protective assessment is carried out is summed up succinctly in Sampath Ayengar's Law of Income Tax (11th edition, Vol. VI, page 9724) :

"**Protective assessment** – The Assessing Officer may often have to assess the same income in more than one place. Sometimes they may be made by different officers as, for example, where an officer assessing *A* thinks that certain income belongs to him but another officer assessing *B* is of the opinion that the income is his. Sometimes the same officer may find that an assessee before him is returning a particular income but is of the opinion that it should be assessed in the hands of a firm or a family and not in the hands of the person who returned it. It has been held that the officer may, when in doubt, CIT v. Shri Ramchandraji Maharaj Ka Bada Mandir (1988) 73 CTR (MP) 79 to safeguard the interests of the Revenue assess it in more than one hand., Lalji Haridas v. ITO (1961) 43 ITR 387 (SC) But this procedure can be permitted only at the stage of the assessment as, at higher levels, it is possible for the appellate or revisional authority to give a clear finding as to the assessee who is liable to be so assessed leaving the one who is aggrieved to get redress by appropriate proceedings., See Dayabai v. CIT (1985) 154 ITR 248 (MP). In any event, if , at the stage of the Tribunal or High Court it is found that the same income is assessed in both places, the Department should provide relief *suo motu* to one of them, ITO v. Bachu Lal Kapoor (1966) 60 ITR 74 (SC). There can be precautionary assessments but not protective recovery, CIT v. Cochin Co Pvt Ltd (1976) 104 ITR 655 (Ker.). But where an assessment is intended to be protective, it should be so expressed, CIT v. Khalid Mehdi (1987) 165 ITR 685 (AP)."

18. A protective assessment as the learned author indicates5 is regarded as

being protective because it is an assessment which is made *ex abundant cautela* where the department has a "doubt as to the person who is or will be deemed to be in receipt of the income". A departmental practice, which has gained judicial recognition, has emerged where it appears to the Assessing Officer that income has been received during the relevant Assessment Year, but where it is not clear or unambiguous as to who has received the income. Such a protective assessment is carried out in order to ensure that income may not escape taxation altogether particularly in cases where the Revenue has to be protected against the bar of limitation. **But equally while a protective assessment is permissible a protective recovery is not allowed. However, such an exercise which is permissible in the case of a regular assessment must necessarily yield to the discipline of the statute where recourse is sought to be taken to the provisions of Section 148. Protective assessments have emerged as a matter of departmental practice which has found judicial recognition. Any practice has to necessarily yield to the rigour of a statutory provision. Hence, when recourse is sought to be taken to the provisions of Section 148, there has necessarily to be the fulfillment of the jurisdictional requirement that the Assessing Officer must have reason to believe that income has escaped assessment. To accept the contention of the Revenue in the present case would be to allow a reopening of an assessment under Section 148 on the ground that the Assessing Officer is of the opinion that a contingency may arise in future resulting an escapement of income. That would, in our view, be wholly impermissible and would amount to a rewriting of the statutory provision.** Moreover, the reliance which is sought to be placed on the provisions of Explanation 2(a) to Section 147 is misconceived. Explanation 2 provides a deeming definition of cases where income chargeable to tax has escaped assessment and clause (a)

includes a case where no return of income has been furnished by the assessee although his income or the income of any other person in respect of which he is assessable exceeds the maximum amount which is not chargeable to tax. As the reasons which have been disclosed to the assessee would indicate, this is not a case where an assessee has not filed a return of income simplicitor. The whole basis of the reopening is on the hypothesis that if the provisions of Sections 61 to 63 are attracted as has been claimed by the assessee, and the income of Rs.32.83 Crores which has been claimed by the assessee to be exempt is treated as exempt, in that event an alternate basis for taxing the income in the hands of the AOP of the contributories is sought to be set up. For the reasons already indicated, the entire exercise is only contingent on a future event and a consequence that may enure upon the decision of the Tribunal, that again if the Tribunal were to hold against the Revenue. A reopening of an assessment under Section 148 cannot be justified on such a basis. There has to be a reason to believe that income has escaped assessment. 'Has escaped assessment' indicates an event which has taken place. Tax legislation cannot be rewritten by the Revenue or the Court by substituting the words 'may escape assessment' in future. Writing legislation is a constitutional function entrusted to the legislature.”

Question 19: Whether on retracted statement reopening can survive?

Answer: No refer

Hon’ble Karnataka High Court in the
case of CIT vs Dr. R. N. Thippa Shetty reported as 322 ITR
525 (Karnataka) speaking for

High Court of Karnataka, their lordships held that if the very basis on which reopening was ordered did not exist, then there was no question for reopening of the case on the basis of withdrawn/retracted statement.

Question 20: Whether to simply initiate penalty u/s 269SS and section 271D reopening can be made?

Answer: No refer: Deep Recycling IndustriesHon'ble High Court of Gujarat at Ahmedabad O/d- 02.08.2016 & Special Civil Application no. 3611/2013

a) Merely because AO feels penalty u/s 269 SS / 271(D) would be imposable cannot justify prime requirement of reopening that income chargeable to tax head escaped assessment.

b) Reopening cannot be made for mere scrutiny and verification which is roving and fishing enquiry.

Question 21: Whether while reopening u/s 148, on basis of documents found from possession of another person during survey etc, on basis of limited presumption u/s 292C to person possessing it, action can be initiated without first bringing on record i) statement of person/author from whose possession such document was found and ii) establishing that such document is reliable?

Answer : In authors opinion, simply using section 148 on 3rd party documents, without having statement of person possessing such document, and establishing the

incriminating nature of such document qua subject assessee, reopening can not be made.

For right scope of section 292C, refer latest verdict in:

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction (Income Tax)

ORIGINAL SIDE

GA No.1685 of 2016

With

ITAT No. 200 of 2016

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL – 1, KOLKATA

Versus

M/S. AJANTA FOOTCARE (INDIA) PVT. LTD.

Date : 15th June, 2017.

The Revenue has approached us invoking the jurisdiction of this

Court under Section 260A for invalidation of the decision of the

Tribunal. The Revenue in substance s

eeks restoration of the

assessment order.

As it would be evident from the question suggested by the Revenue, it

wants us to interfere with concurrent finding of fact in relation to contents of a document by two Statutory Appellate Authorities. This we can do only if it is demonstrated before us that findings in the order of the two Statutory Appellate Authorities were perverse.

Appearing on behalf of the Revenue, Ms. Das De, learned counsel, has submitted that the assessee disowned this document and, therefore, did not give any explanation. She wants us to hold that in such a situation the presumption would be that the content of the document would be true and the computation made by the Assessing Officer to which we have referred to earlier would be valid in terms of Section 69C of the Act. She has taken us through Section 292C of the Act, which stipulates:-

On the basis of the aforesaid provisions, Ms. Das De has argued that content of the document ought to be held to be true and as the document was recovered from the assessee's custody or possession, the same should be treated to have had belonged to the assessee only. She points out that considering the presumption available to the Revenue under Section 292C of the Act, there was no necessity of independent examination of the assessee or further enquiry for

corroborating the contents of the document. Ms. Das De had relied on a judgment of the Delhi High Court in Mahavir Wollen Mills Vs. Commissioner of Income Tax reported in [(2000) 245 ITR 297] in support of her submission on this point.

On the basis of the aforesaid provisions, Ms. Das De has argued that content of the document ought to be held to be true and as the document was recovered from the assessee's custody or possession, the same should be treated to have had belonged to the assessee only. She points out that considering the presumption available to the Revenue under Section 292C of the Act, there was no necessity of independent examination of the assessee or further enquiry for corroborating the contents of the document. Ms. Das De had relied on a judgment of the Delhi High Court in Mahavir Wollen Mills Vs. Commissioner of Income Tax reported in [(2000) 245 ITR 297] in support of her submission on this point.

document with the assessee in the first place. Thus, primary fact was not established from which presumption could be drawn.

10. In the subject proceeding, two Statutory Appellate Authorities have exercised their discretion against the Revenue and in favour of the

assessee. The reason for exercising such discretion is that no stock discrepancy could be demonstrated and there was no corroboration of the figures forming the basis of addition to the income of the assessee as was directed by the Assessing Officer. No question about the said document was put to the Director of the assessee in course of search. This factor was also taken into consideration by the aforesaid Appellate bodies. The two Statutory Appellate Authorities doubted the inherent probative value or quality of the above-referred document upon applying their mind on it. In substance, the said authorities found no reason to draw presumption against the assessee on the basis of scribbled figures appearing on the document in question. This is how two fact finding bodies chose to deal with that document. ***In our view, even without proper explanation from the assessee, when the mandate of law is that authorities may presume certain facts under Section 292C of the Act to come to a conclusion in favour of Revenue, the nature of information contained in or revealed by such document would have to be examined to link such document to undisclosed income of the assessee.*** Both the Commissioner and the Tribunal found no linking factor. Both these authorities rejected the reasoning of the

Assessing Officer on this basis of which the latter came to his finding that the figures appearing on the said document could be computed to arrive at undisclosed income of the assessee. The findings of the Statutory Appellate Authorities cannot be held to be perverse or based on no evidence in this case. The Statutory Appellate Authorities had examined the said document and found that the same could not be connected with assessee's transactions for the relevant assessment year.

11. In such circumstances, we are unable to hold the manner in which discretion has been used by the Statutory Appellate Authorities to be perverse or their finding to be contrary to evidence.

12. We do not find any substantial question of law in involved in this appeal. The appeal and the connected application are accordingly dismissed.

Question 22: Whether issuance of notice u/s 143(2) during assessment u/s 148 is must even though return is filed at fag end of the proceedings?

Answer: Yes ; ACIT and another vs. Hotel Blue Moon, 2010(321) ITR

362 (SC); Income Tax Appeal No. 14 of 2015, U.P. State Industrial Development Corporation Ltd. vs. Commissioner of Income Tax-II, Kanpur, decided on 11.07.2016; Principal

Commissioner of Income tax v. Jai Shiv Shankar Traders (P.) Ltd. [2016]

383 ITR 448 (Del) ; Kerala high court in M/S. TRAVANCORE DIAGNOSTICS (P) LTD Dated this the 19th day of October, 2016

Question 23: Whether reopening u/s 148 is limited to issue raised in reasons and whether it can be expanded at the leisure of AO by just citing explanation 3 to section 147:

Answer:

No refer

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR
COURT NO.37

Income Tax Appeal No. 137 of 2015

Dr. Shiva Kant Mishra
Vs.
Commissioner of Income Tax (Central) Kanpur

Dated:9.7.2015.

in order to proceed further, it could be relevant to produce Section 147 and Explanation (3) to Section 147 of the Act. For facility, Section 147 is extracted hereunder:-

"147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in section 148 to 153 referred to as the relevant assessment year) :

Provided ....
Provided ....
Provided ....
Explanation 1.....
Explanation 2.....

Explanation 3. -- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

Explanation 3 to Section 147 was inserted by Finance Act No.2 of 2009, w.e.f. 1.4.1989. The Central Board of Direct Taxes (CBDT) issued a circular No.5 of 2010 providing an Explanatory Note to the provisions of Finance Act No.2 of 2009 by which Explanation 3 to Section 147 of the Act was inserted w.ef. 1.4.1989. Relevant paragraph is extracted hereunder:-

"Clarificatory amendment in respect of reassessment
proceeding under section 147

The existing provisions of section 147 provides, inter alia, that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess such income after recording reasons for re-opening the assessment. Further, he may also assess or reassess such other income which

has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section.

Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.

With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, not withstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148.

This amendment will take effect retrospectively from 1st April, 1989 and will, accordingly, apply in relation to assessment year 1989-1990 and subsequent years."

This clarificatory note was issued because some of the Courts held that the assessing officer had to restrict the reassessment proceedings only to the reasons recorded for reopening the reassessment proceedings and was not empowered to decide any other issues for which reason had not been recorded. The explanatory note was, therefore, issued in order to clarify the legislative intent, namely, that the assessing officer may assess or re-assess the income in respect of any issue which comes to his notice, subsequently in the course of proceedings under Section 147 of the Act notwithstanding that the reasons for such issue has not been included in the reasons recorded under sub-section (2) of Section 148 of the Act.
Explanation 3 to Section 147 of the Act and the Explanatory Note issued by the CBDT makes it apparently clear that even though the notice that had been issued under Section 148 containing the reason for reopening the assessment does not contain a reference to a particular issue with reference to such income as escaped assessment, the assessing authority may assess or reassess the income in respect of any issue which has escaped assessment when such issue came to his notice, subsequently in the course of proceedings. The words "such issue comes to his notice subsequently in the course of proceedings under this Section" is of importance. The language is clear and there is no ambiguity, namely, that the issue which is being assessed and which has escaped assessment must come to the notice of the assessing officer subsequently

in the course of reassessment proceeding under Section 147 of the Act, which in the instant case was lacking. The issue relating to long term capital gains was already declared by the appellant in his returns filed under Section 139 of the Act. This issue was discussed in detail in the block assessment proceedings by the assessing officer in the assessment order passed under Section 158-BC. This block assessment order under Section 158-BC was passed prior to the issuance of reassessment notice under Section 148 of the Act. Consequently, information regarding long term capital gains was already existing on the file of the assessee and did not come up as an issue for the first time during reassessment proceedings under Section 147 of the Act nor can it be said that such issue came to the knowledge or notice of the assessing authority subsequently in the case of reassessment proceedings. The assessing officer in the reassessment order under Section 147 of the Act has clearly indicated that the matter was discussed and examined in detail in the block assessment order and an addition of Rs.36,60,072/- was made on a protective basis in order to protect the interest of revenue. It is apparently clear, that this issue relating to long term capital gains had not come to the notice of the assessing officer subsequently in the course of reassessment proceeding.

We are of the opinion, that the assessing officer could not have made this addition in reassessment proceeding under the cover of "protective basis". We are of the opinion that protective assessment could only be made at the stage when there was any doubt or dispute about the assessability of a particular sum either in relation to the assessment year and/or in relation to the assessee.

We are of the opinion that the reason for adding this amount on "protective basis" by the assessing officer could be on account of the fact that the assessee's appeal against the block assessment order was pending, on the ground, that no material was found at the time of search with regard to the sale of shares. The assessing officer must have become aware that such addition could not have been added in the block assessment proceedings under Section 158-BC of the Act.

Further, we are of the opinion, that the assessing authority could only assess or reassess such income which has escaped assessment. In order to take an action under Section 147 of the Act there must be a reason to believe that such income had escaped assessment which came to his notice subsequently in the course of re-assessment proceedings. In the instant case, we find that the amount which is alleged to have escaped assessment was duly indicated by the assessee in his return under Section 139 of the Act and was also considered in the block assessment order under Section 158-BC. In the block assessment order the assessing authority had assessed this amount on long term capital gains as undisclosed income. The block

assessment order was set aside on the ground that such amount was not an undisclosed income which finding was affirmed by the Tribunal. Once the Tribunal has given a categorical finding that the amount was not an undisclosed income, which order has attained finality, the said amount cannot be treated as an escaped income chargeable to tax under Section 147 of the Act. We are also fortified by the aforesaid view by a decision of this Court in Vishwanath Prasad Ashok Kumar Sarraf vs. Commissioner of Income Tax and others, 327 ITR 190.

For the reasons stated aforesaid, the appeal is allowed. The order of the Tribunal is set aside. The question of law, as framed aforesaid, is answered in favour of the assessee.

Question 24: Whether during pendency of rectification proceedings u/s 154 (that is without disposing it and communicating the same to assessee) can reopening u/s 148 be initiated for same cause of action for same asst period?

Answer: No (refer SC in 242 ITR 381)

Question 25: Whether reopening u/s 148 can be initiated mechanically applying observations of appellate authority for different years (or in other assessee's case-without opportunity), treating them at par with "directions" particularly when the order of appellate authority was passed, limitation u/s 149 stood expired?

Answer: It is now fairly well settled that every observation of appellate authority is not direction (314 ITR 81 SC). Then after expiry of time limitation u/s 149, stated direction loses its force for timeless reopening u/s 150. Further, power of appellate authority to give direction is circumscribed " While deciding the appeal the Appellate Authority may give appropriate directions to' the AO either in regard to the assessee in appeal before him or otherwise. However, these directions cannot

travel outside the assessment year to which the appeal relates. In the same way the directions cannot relate to a third person, whose appeal is not pending before him .(A.S. Parikh vs. Income Tax Officer 203 ITR 186; Mrs. Banoo E. Cowasji 138 ITR 686 the Hori'ble Indore Bench of the Madhya Pradesh High Court ; Peico Electronics and Electricals Ltd. 210 ITR 991 the Honble Calcutta High Court; CIT Vs. Banwari Lal & Sons P. Ltd., 257 ITR 518 at page 522 the Hon'ble Delhi High Court; ITAT Hyderabad Bench m the
case of Pennar Electronics P. Ltd. 308 ITR (AT) 192.)

Question 26: What is latest position on concealment penalty when surrender of additional income is made in returns filed u/s 148 and section 153A/153C.

Answer: Refer Detailed law in 393 ITR Page 1 in case of Neeraj jindal
Held

8. The present batch of appeals concerns the interpretation and application of Section 271(1)(c) of the Act and Explanation 5 thereto. Two broad issues arise for consideration in this regard:
(i) Whether under Section 271(1)(c) as it stood prior to the insertion of Explanation 5, levy of penalty is automatic if return filed by the assessee under Section 153A of the Act discloses higher income than in the return filed under Section 139(1)?
13. At the outset, it must be noted that pursuant to the search and seizure operation conducted under Section 132(4) of the Act, the assessee was given notice under Section 153A to file fresh return of his income. Thereafter, the

assessee filed revised returns and the return filed by the assessee under Section 153A was accepted as such by the A.O. However, the A.O. was of the opinion that inasmuch that the income disclosed by the assessee under Section 153A was higher than the income in the original return filed under Section 139(1) and since in his view, such disclosure of income was a consequence of the search conducted on the assessee, there was concealment of income which attracted Section 271(1)(c) of the Act. Therefore, the question that needs to be answered is whether penalty is to be levied automatically whenever the assessee declares a higher income in his return filed under Section 153A in comparison to the original return filed under Section 139(1).

14. The Supreme Court held, in Shri T. Ashok Pai v. Commissioner of Income Tax, Bangalore (2007) 7 SCC 162, that penalty under Section 271(1)(c) is not to be mandatorily imposed. In other words, the levy of penalty under this provision is not automatic. This view has been reiterated in Union of India v. Rajasthan Spinning and Weaving Mills, (2009) 13 SCC 448 to say that for there to be a levy of penalty under Section 271(1)(c), the conditions laid out therein have to be specifically fulfilled. Section 271(1)(c) of the Act, being in the nature of a penal provision, requires a strict construction. While considering the interpretation of this provision, this Court in Commissioner of Income Tax v. SAS Pharmaceuticals (2011) 335 ITR 259 (Del), stated that:

"It is to be kept in mind that Section 271(1)(c) of the Act is a

penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Subsection (1) of Section 271 stipulates certain contingencies on the happening whereof the AO or the Commissioner (Appeals) may direct payment of penalty by the Assessee."

Thus, what is required to be judged is whether there has been a "concealment" of income in the return filed by the assessee.

15. Earlier decisions indicated a conflict of opinion as to whether Section 271(1)(c) required the revenue to specifically prove mens rea on the part of the assessee to conceal his income. In order to remove the element of mens rea, the Finance Act, 1964 deleted the word "deliberately" that preceded the words "concealed the particulars of his income" in Section 271(1)(c). Nonetheless, even post the amendment, the Apex Court in K.C. Builders v. Assistant Commissioner of Income Tax, 265 ITR 562 (SC) held that:

16. Thus, despite the fact that there is no requirement of proving mens rea specifically, it is clear that the word "conceal" inherently carries with it the requirement of establishing that there was a conscious act or omission on the part of the assessee to hide his true income. This was also the conclusion of the Supreme Court in the case of Dilip N. Shroff Karta of N.D. Shroff v. Joint Commissioner of Income Tax, Special Range Mumbai and Anr., (2007) 291 ITR 519 (SC). In a later decision in Union of India v.

Dharmendra Textile Processors, (2008) 13 SCC 369, the Supreme Court overruled its decision in Dilip N. Shroff (supra). Thereafter, in Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd., (2010) 11 SCC 762 the Court clarified that Dilip N. Shroff (supra) stood overruled only to the extent that it imposed the requirement of mens rea in Section 271(1)(c); however, no fault was found with the meaning of "conceal" laid down in Dilip N. Shroff's case. Thus, as the law stands, the word "conceal" in Section 271(1)(c), would require the A.O. to prove that specifically there was some conduct on part of the assessee which would show that the assessee consciously intended to hide his income.

17. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. On this point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty.

18. The Punjab & Haryana High Court in Commissioner of Income Tax v. Suraj Bhan, (2007) 294 ITR 481 (P & H), held that when an assessee files a revised return showing higher income, penalty cannot be imposed

merely on account of such higher income filed in the revised return. Similarly, the Karnataka High Court in the case of Bhadra Advancing Pvt Limited v. Assistant Commissioner of Income Tax, (2008) 219 CTR 447, held that merely because the assessee has filed a revised return and withdrawn some claim of depreciation penalty is not leviable. The additions in assessment proceedings will not automatically lead to inference of levying penalty. The Calcutta High Court in the case of Commissioner of Income Tax v. Suresh Chand Bansal, (2010) 329 ITR 330 (Cal) held that where there was an offer of additional income in the revised return filed by the assessee and such offer is in consequence of a search action, then if the assessment order accepts the offer of the assessee, levy of penalty on such offer is not justified without detailed discussion of the documents and their explanation which compelled the offer of additional income. The Madras High Court in the case of S.M.J. Housing v. Commissioner of Income Tax, (2013) 357 ITR 698 held that where after a search was conducted, the assessee filed the return of his income and the Department had accepted such return, then levy of penalty under Section 271(1)(c) was not justified. From the above cases it would be clear that when an assessee has filed revised returns after search has been conducted, and such revised return has been accepted by the A.O., then merely by virtue of the fact that such return showed a higher income, penalty under Section 271(1)(c) cannot be automatically imposed.

20. Therefore, the position that emerges from the above-mentioned

provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. On similar lines, the Gujarat High Court in the case of Kirit Dahyabhai Patel v. Assistant Commissioner of Income Tax, (2015) 280 CTR (Guj) 216, held that: "In view of specific provision of s. 153A of the I.T. Act. the return of income filed in response to notice under s. 153A of the I.T. Act is to be considered as return filed under s. 139 of the Act, as the AO has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Se 71(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under s. 153A, if any."

21. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to Section 153A(1) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate." What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any,

in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not vis-a vis the original return under Section 139.

Question 27: Whether simply making the notice and not dispatching it by time barring date u/s 149, can same be said be valid?

Answer: Real connotation of word issue is that notice etc has left the control of issuing authority so that it cannot be altered, given that meaning, merely making cannot serve the purpose without same having been dispatched before time barring date.

Refer: Delhi high court in ST Micro electronics ***384 ITR 550;*** Hon'ble Delhi High Court decision in case of Qualimax Electronics Pvt. Ltd., order dated 02.06.2010; ***Hon'ble Delhi ITAT bench decision in case of M/s On Exim Pvt. Ltd., order dated 27.08.2013 (ITA no. 1116/Del/2011) (157 TTJ 633);*** *Hon'ble Gujarat High Court in the case of Kanubhai M.Patel (HUF) Vs. Hiren Bhatt Or His Successors To Office and Others – [2011] 334 ITR 25 (Guj)*

Question 28: Whether without fling return u/s 148, can reasons be asked?

Answer: Two views are there. According to Delhi high court filing of return is must to seek reasons. According to Allahabad high court reasons can be sought without filing return also(refer Mithlesh tripati case)

Question 29: Whether notice u/s 148 being issued to individual who is dead, can be treated as valid, unknown to the AO?

Answer: decision of Third
Member Bench of ITAT Agra in the case of ITO vs Sikander Lal Jain [2011] 45 SOT 113/9 taxmann.com 321 (Agra) (TM) (para 4) dated
8.12.2010 on invalidity
of notice having been issued on the dead person, it was held that the notice u/s
148 of the Act issued to the deceased assessee is void ab initio

Question 30 What are the latest guidelines in matter of service of notice u/s 148?

Answer:

Extract of Delhi high court Atlanta Capital decision on service of notice:

> *8. It is the contention of Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, that the notice satisfied the requirement as to limitation under Section 149 (b) of the Act. However, as noted by the ITAT, the notice itself was not issued at the correct address. The fact that the said notice, sent by speed post, was not returned unserved, would be to no avail since the address given in the notice was not the last known address of the Assessee.*
>
> *9. Mr. Sahni then submitted that it was incumbent on the Assessee to have got his changed address entered in the PAN Data Base failing which the AO would only go by the address given in the record of the relevant AY which in the case is AY 2001-02.*

10. The Court is unable to agree with this submission. No provision in the Act has been shown to the Court which obliges the Assessee to ensure that his changed address is entered in the PAN Data Base failing which he is precluded from insisting on the notice underSection 148 being issued to him at the known address and being served upon him. In the present case, on facts, it is not in dispute that the AO was aware of the change of address of the Assessee and yet the notice under Section 148 of the Act was issued at the older address.

11. Mr. Sahni submitted that the order of the CIT (A) notes the fact that a photocopy of the notice was given to the Assessee during the re-assessment proceedings and that by itself should constitute sufficient service of notice on the Assessee. In light of the law explained by the Supreme Court in R.K. Upadhyaya v. Shanbhai P. Patel (1987) 3 SCC 96 which has in turn been followed by this Court in Chetan Gupta (supra), the requirement of both the issuance and the service of such upon the Assessee for the purposes of Section 147 and 148 of the Act are mandatory 'jurisdictional requirements'.

The mere fact that an Assessee participated in the re-assessment proceedings despite not having been issued or served with the notice under Section 148 of the Act in accordance with law will not constitute a waiver of the said jurisdictional requirement.

12. On facts, therefore, the Court finds no legal error committed by the ITAT in holding that there was no proper service of notice on the Assessee under Section 148 of the Act.

This Hon'ble Court has by a decision dated 15th September 2015 in ITA No. 72 of 2014 (Commissioner of Income Tax v. Chetan Gupta) 382 ITR 613 discussed the entire law in detail and summarised the legal position as under:

(i) Under Section 148 of the Act, the issue of notice to the Assessee and service of such notice upon the Assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements.

(ii) For the AO to exercise jurisdiction to reopen an assessment, notice under Section 148 (1) has to be mandatorily issued to the Assessee. Further the AO cannot complete the reassessment without service of the notice so issued upon the Assessee in accordance with Section 282 (1) of the Act read with Order V Rule 12 CPC and Order III Rule 6 CPC.

(iii) Although there is a change in the scheme of Sections 147, 148 and 149 of the Act from the corresponding Section 34 of the 1922 Act, the legal requirement of service of notice upon the Assessee in terms of Section 148 read with Section 282 (1) and Section 153 (2) of the Act is a jurisdictional pre-condition to finalizing the reassessment.

(iv) The onus is on the Revenue to show that proper service of notice has been effected under Section 148 of the Act on the Assessee or an agent duly empowered by him to accept notices on his behalf. In the present case, the Revenue has failed to discharge that onus.

(v) The mere fact that an Assessee or some other person on his behalf not duly authorised participated in the reassessment proceedings after coming to know of it will not constitute a waiver of the requirement of effecting proper service of notice on the Assessee under Section 148 of the Act.

(vi) Reassessment proceedings finalised by an AO without effecting proper service of notice on the Assessee under Section 148 (1) of the Act are invalid and liable to be quashed.

(vii) Section 292 BB is prospective. In any event the Assessee in the present case, having raised an objection regarding the failure by the Revenue to effect service of notice upon him, the main part of Section 292 BB is not attracted.

Question 31: Whether in second round of proceedings, reopening can be challenged for the first time even though not challenged earlier:

Asnwer Yes refer

HIGH COURT OF JUDICATURE AT ALLAHABAD

2013 (351) ITR 275 (All)

Reserved

Income Tax Appeal No. 67 of 2005

Smt. Prabha Rani Agrawal

Versus

Income Tax Officer, Ward - 1, Mirzapur and another

From the aforesaid decisions, it follows that (i) a question relating to jurisdiction which goes to the root of the matter can always be raised at any stage, be in appeal or revision, (ii) initiation of proceedings under section 147 of the Act and/or service of notice are all questions relating to assumption of jurisdiction to assess escaped income, (iii) if an issue has not been decided in appeal and the matter has simply been remanded, the same can be raised again notwithstanding with the fact that no further appeal has been preferred, (iv) in the reassessment proceedings, relief in respect of item which was not originally claimed can not be claimed again as the reassessment proceedings are for the benefit of the Revenue and (v) relief can only be claimed in respect of the escaped income. Applying the

principles laid down in the aforesaid cases to the facts of the present case, we find that in the first round of proceedings before the Commissioner of Income Tax (Appeals), the appellant had specifically questioned the validity of the proceedings initiated under section 148 of the Act. That issue was not decided by the Commissioner (Appeals) who had remanded the matter for fresh assessment after providing opportunity of hearing. The question relating to the jurisdiction assumed under section 147/148 of the Act goes to the very root of the matter and it can be raised in appeal for the first time. The appellant had raised this question again in appeal and, therefore, it was incumbent upon the Commissioner of Income Tax (Appeals) to adjudicate upon the grounds taken before him. In fact, he had casually observed that the proceedings under section 148 of the Act had been validly initiated but, wrongly applied the principles laid down by the Apex Court in the case of Sun Engineering Works P. Ltd. (supra).

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR
Court No. - 35

Case :- INCOME TAX APPEAL No. - 87 of 2009
Appellant :- Km. Teena Gupta
Respondent :- Commissioner Income Tax Bareilly
The above appeal was admitted on the following questions of law:-
(A) Whether on the facts and circumstances of the case, the ITAT was correct to hold that not mentioning of assessment year in the notice u/s 148 dated 11.5.2000 would not make the reassessment proceedings illegal since the 142(1) notice dated 13.6.2000 mentioned the assessment year and the assessee was aware of the fact that the proceedings u/s 148 has been initiated for A.Y. 1997-98?
(B) Whether the ITAT has rightly ignored that service of the valid notice u/s 148 is a condition precedent to assume jurisdiction of reassessment and mere knowledge or?
(C) Whether non supply of the reasons alongwith the notice u/s 148 of the Act can validate the reassessment proceedings. Mithlesh Kumar Tripathi Vs. CIT 2006 UPTC 155?

(D) Whether the reassessment order passed u/s 144/148 of the Act, was not invalid and rightly affirmed by ITAT, when the notice u/s 143(2) of Act was not served on the appellant, as provided under Clause (b) of proviso to section 148(1) of Act, as inserted by Finance Act, 2006, effective from 01.10.1991?

(E) Whether the ITAT rightly affirmed the invoking of section 69A of the Act holding that the appellant had a capital of Rs. 1,50,000/- to Rs. 1,75,000/- without bringing any material on record?

27. Before the Tribunal, the appellant had challenged the adverse findings recorded by the Commissioner of Income Tax (Appeals) by raising 4 specific grounds which we have already reproduced hereinbefore. The Tribunal had erred in law in declining to permit the appellant to raise those grounds.

28. The approach of the Commissioner of Income Tax (Appeals) is erroneous in law for the reason that in the grounds of appeal filed against the order dated 21.03.1997, a specific ground relating to validity of proceedings initiated under section 148 of the Act had been taken which was not gone into by the Commissioner of Income Tax (Appeals) while setting aside the assessment. The principles laid down by the Apex Court in the case of Sun Engineering Works P. Ltd. (supra) would not apply as the appellant is not claiming any deduction or relief on the taxibility of any item in the reopened assessment proceedings which had not been claimed in the original assessment. The Tribunal had also erred in law in holding that as no appeal had been filed by the appellant against the order 05.02.1998 passed by the Commissioner of Income Tax (Appeals), the same had become final and the appellant can not be permitted to raise any ground relating to the validity of the proceedings under section 148 of the Act in the remand proceedings."

In view of the above, we are of the view that the issue of validity of reassessment proceedings is a jurisdictional issue. It goes to the root of the matter. The Tribunal ought to have examined the ground no.3 raised in the assessee's appeal on its merit without being prejudiced by the facts that the reassessment order has been passed on the exparte basis in which the proceedings the assessee has not objected to the initiation of the reassessment.

Accordingly, question no.1 is answered in favour of assessee and against the department.

The appeal is allowed.