IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL APPELLATE JURISDICTION

WRIT PETITION NO.602 OF 2014

Pavan Morarka)
having my office at 4th Floor, Brady House,)
12-14, V.N. Road, Fort, Mumbai – 400 001) ….Petitioner

V/s.

1. The Assistant Commissioner of Income)
Tax – 2(3), Mumbai,)
Room No.552, 5th Floor, Aaykar Bhavan,)
M.K. Road, Mumbai – 400 020)

2. The Union of India)
Through the Secretary, Department of)
Revenue, Ministry of Finance, North Block,)
New Delhi – 100 001) ….Respondents

WITH

WRIT PETITION NO.2145 OF 2014

Rachna Morarka)
having my office at 4th Floor, Brady House,)
12-14, V.N. Road, Fort, Mumbai – 400 001) ….Petitioner

V/s.

1. Income Tax Officer – 16(2)(1), Mumbai,)
Room No.221, 2nd Floor, Matru Mandir,)
Tardeo Road, Mumbai – 400 007)

2. The Union of India)
Through the Secretary, Department of)
Revenue, Ministry of Finance, North Block,)
New Delhi – 100 001) ….Respondents

Mr. P.J. Pardiwalla, Senior Advocate a/w. Mr. Niraj Sheth i/b. Mr. Atul K. Jasani for petitioner in both petitions.
Mr. Suresh Kumar for respondents in both petitions.

CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ.
DATED : 17th FEBRUARY 2022

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Since identical issues are involved in both petitions, facts from Writ Petition No.602 of 2014 in the case of Mr. Pavan Murarka (petitioner) are referred to hereunder :

Petitioner held 50% of the equity share capital of Shivum Holdings Pvt. Ltd. (Shivum) and 25% of the equity share capital of P & A Estate Pvt. Ltd. (P&A). Petitioner's wife, Rachana Murarka (RM), petitioner in Writ Petition No.2145 of 2014, held 50% of the equity share capital of Shivum and 25% of the equity share capital of P&A. Balance 50% of the equity share capital of P&A was held by Mr. Akshat Prasad. Shivum held 85% interest in a partnership firm named Laxmi Trading Company (LTC) and petitioner held the balance 15% interest in LTC. During the previous year relevant to the assessment year 2006-2007, LTC gave an advance of Rs.1,25,00,000/- to P&A on behalf of Shivum. The accumulated profits of Shivum as on 31st March 2006 were Rs.3,38,53,410/-.

2 On 29th July 2006 petitioner filed return of income for Assessment Year 2006-2007. An assessment order dated 25th November 2008 came to be passed under Section 143(3) of the Income Tax Act, 1961 (the said Act). In the meanwhile, an assessment order dated 20th June 2008 under Section 143(3) of the said Act came to be passed in the case of P&A holding that the amount advanced by LTC on behalf of Shivum to P&A constituted dividend in the hands of P&A under Section 2(22)(e) of the said

Act.

3 On 17th February 2009 Commissioner of Income Tax (Appeals) [CIT(A)] decided P&A's appeal against the Revenue holding that addition under Section 2(22)(e) cannot be made in the hands of P&A since P&A was not a shareholder of Shivum. The other contentions of P&A challenging the correctness of the treatment of the amounts advanced as dividend were not adjudicated. The view of CIT(A) was not accepted by the Department and an appeal was filed by them before the Income Tax Appellate Tribunal (ITAT) contending that an addition under Section 2(22)(e) was required to be made in the hands of P&A. The ITAT dismissed Revenue's appeal and held that the addition under Section 2(22)(e) can only be made in the hands of the shareholder and since P&A was not the shareholder, addition in its hands could not be sustained, thus deciding the issue against Revenue.

4 Unhappy with the view of the ITAT, an appeal was filed by Revenue before the Hon'ble High Court at Delhi maintaining their contention that the addition was required to be made in the hands of P&A. The High Court was pleased to dismiss Revenue's appeal by an order and judgment pronounced on 11th May 2011 holding that the loan or advance cannot be treated as deemed dividend in the hands of the concern which is not a shareholder. Thereafter, in paragraph 30 of the judgment, the High Court observed as under :

"Before we part with, some comments are to be necessarily

> *made by us. As pointed out above, it is not in dispute that the conditions stipulated in section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders."*

5 Displeased with the decision of the High Court at Delhi, Revenue preferred an SLP before the Hon'ble Supreme Court contending that the dividend was taxable in the hands of P&A. That appeal is still pending.

6 Relying on the observations of the Delhi High Court, the Assessing Officer at New Delhi issued a notice dated 22nd March 2013 under Section 148 of the said Act to petitioner despite agitating correctness of the conclusion of the Delhi High Court before the Apex Court. By a letter dated 28th March 2013, petitioner objected to the reassessment proceedings on the ground that the Assessing Officer at New Delhi did not have jurisdiction over petitioner as petitioner was assessed to tax at Mumbai. Petitioner's contention was that notice, if any, under Section 148 of the said Act, could be issued only by an officer at Mumbai. Initially, the Assessing Officer at New Delhi did not accept the objections of petitioner but later, on or about 13th December 2013, transferred the case records of petitioner to respondent no.1 in Mumbai, who is the Jurisdictional Assessing Officer (JAO) of petitioner.

7 Respondent no.1, thereafter, issued a notice dated 10th January 2014 under Section 148 of the said Act to petitioner stating that he has reasons to believe that income chargeable to tax for Assessment year 2006-2007 has escaped assessment within the meaning of Section 147 read with Section 150 of the said Act. In the said notice, it is also stated that the notice is issued under Section 148 read with Section 150 in view of the decision of the Hon'ble High Court, New Delhi in ITA No.1436 of 2010 dated 11th May 2011. Respondent no.1 subsequently also provided petitioner with the reasons for reopening the assessment recorded on 9th January 2014. The reasons were provided alongwith notice dated 27th January 2014 under Section 143(2) of the said Act. By a communication dated 4th February 2014 through his Chartered Accountants, petitioner objected to the validity of the notice. By an order dated 7th February 2014, the objections were rejected by respondent no.1.

8 Mr. Pardiwalla on behalf of petitioner submitted as under :

(a) the notice dated 10th January 2014 impugned in the petition is barred by limitation since it is issued beyond a period of six years from the end of the relevant assessment year, which is the time limit within which the impugned notice was required to be issued as per Section 149(1)(b) of the said Act. Therefore, the impugned notice is invalid and deserves to be quashed;

(b) the impugned notice dated 10th January 2014 seeks to derive validity in view of Section 150 of the said Act as is apparent from the face of the notice and Section 150 of the said Act has no application in the matter;

(c) for Section 150 of the said Act to apply, the notice must be issued in consequence of or to give effect to any finding or direction and the order in question must be passed by any authority in any proceeding under this Act or by a Court in any proceeding under any other law. Since none of these statutory requirements are fulfilled in the present case, Section 150 has no application and does not save the impugned notice from being barred by limitation;

(d) the observations of the Hon'ble Delhi High Court in paragraph 30 of its order (reproduced above) cannot be considered as "finding" or "direction";

(e) the judgment of the Hon'ble Delhi High Court cannot be regarded as an order covered by Section 150 of the said Act;

(f) respondents' contention that the Assessing Officer at New Delhi had issued a notice under Section 148 of the said Act to petitioner on 22nd March 2013 before the limitation period expired and, therefore, the impugned notice issued by the Assessing Officer at Mumbai in continuation of the said proceedings must also be treated as being valid and within time is misconceived. This was because the notice issued by the Assessing Officer

at New Delhi was invalid and of no effect since it was issued by an officer who did not have jurisdiction over petitioner;

(g) no records can be transferred when the proceedings were invalid *ab initio* and such transfer can not validate any proceedings taken in continuation thereof. The notice issued by a non Jurisdictional Assessing Officer is invalid as held in ***Commissioner of Income Tax V/s. M.I. Builders (P.) Ltd.***[1];

(h) in any event, on the date on which the records were transferred by the Assessing Officer at New Delhi to the Assessing Officer at Mumbai, the time limit of six years, as per Section 149 of the said Act, had already elapsed because of which respondent no.1 recorded fresh reasons and issued a fresh notice under Section 148 of the said Act dated 14th January 2014 well beyond six years. Therefore, the notice issued by the Assessing Officer at Mumbai was independent of the notice issued by the Assessing Officer at New Delhi and, therefore, the validity thereof has to be decided independently. In such circumstances, the notice must be held to be barred by limitation;

(i) no sanction has been accorded before issuance of notice by the Assessing Officer at Mumbai under Section 151 of the said Act and, therefore, the impugned notice is invalid;

1. 349 ITR 271 (Allahabad)

(j) even the sanction issued to the Assessing Officer at New Delhi was invalid because the approval has been obtained from Additional Commissioner of Income Tax whereas, the approval ought to have been accorded by the Commissioner of Income Tax since the notice dated 22nd March 2013 was issued after a period of four years from the end of the relevant assessment year. As held in the case of ***Miranda Tools (P.) Ltd. V/s. Income Tax Officer***[2], the sanction accorded by the Additional Commissioner of Income Tax rendered the notice issued by the Assessing Officer at New Delhi bad-in-law and without jurisdiction;

(k) stand of respondents that notice under Section 148 read with Section 150 of the said Act has been issued, the approval under Section 151 of the said Act is not required to be obtained is not correct. First of all, Section 150 of the said Act has no application and secondly, Section 150 only lifts the bar of limitation for issuance of notice under Section 149 and the other conditions that are required to be complied with before jurisdiction to reassess can be validly assumed must be fulfilled. Reliance was placed on the decision of the Apex Court in the case of ***Income Tax Officer V/s. Murlidhar Bhagwan Das***[3]. In the alternative, since the notice is issued after four years and assessment under Section 143(3) of the said Act has been completed, the proviso to Section 147 has to be complied with and respondent has to show there was failure on part of petitioner to fully and

2. (2020) 114 taxmann.com 584 (Bombay)
3. (1964) 52 ITR 335 (SC)

truly disclose all material facts as a result of which income chargeable to tax has escaped assessment. No such failure has been established.

9 Mr. Suresh Kumar justified the stand of respondents. Mr. Suresh Kumar submitted as under :

(a) reassessment proceedings were initiated in March 2013 (within six years) by the Income Tax Officer, New Delhi believing himself to have jurisdiction over petitioner but when petitioner objected to the reassessment proceedings and when petitioner submitted proof that he is assessed in Bombay, the case records were transferred to the office of respondent no.1;

(b) fresh notice was issued under Section 148 read with Section 150(1) of the said Act because petitioner objected to notice dated 22nd March 2013 on the ground that it was issued by an officer who did not have jurisdiction and reassessment proceedings are in view of the directions of the Delhi High Court;

(c) reassessment proceedings can be initiated without being affected by the limitation period stated in Section 149 because Section 150(1) of the said Act clearly mentions that notice under Section 148 may be issued at any time to give effect to any “finding” or “direction” contained in an order passed by any authority in any proceedings under the Act by way of appeal, reference or revision or by a Court in any proceeding under any other law. Hence, reassessment proceedings can be initiated by respondent no.1 even after March 2013;

(d) since the reopening proceedings were initiated in view of directions of the Delhi High Court, there is no need to comply with the provisions of Section 151.

10 Having considered the rival submissions, we are satisfied that the notice dated 10th January 2014 impugned in this petition is barred by limitation since it is issued beyond a period of six years from the end of the relevant assessment year, the time limit prescribed under Section 149(1)(b) of the said Act.

11 Respondent is seeking to derive validity in view of Section 150 of the said Act. Section 150(1) reads as under :

> *150. Provision for cases where assessment is in pursuance of an order on appeal, etc.*
>
> *(1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.*
>
> *……..*

12 Therefore, for Section 150 of the Act to apply, the notice must be issued in consequence of or to give effect to any “finding” or “direction” contained in an order passed by any authority in any proceeding under this Act or by a Court in any proceeding under any other law. In our view, none of these statutory requirements are fulfilled and therefore, Section 150 has no application and does not save the impugned notice from being barred by

limitation.

13 Reliance by respondents on the observations of the Hon'ble Delhi High Court in paragraph 30 of its order and judgment dated 11th May 2011 is misplaced. The observations of the Hon'ble Delhi High Court cannot be considered as "finding" or "direction" as contemplated by Section 150 of the said Act. A "finding" can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. Similarly, a "direction" can be issued only by an authority under the powers conferred on it. Moreover, a direction by a statutory authority is in the nature of an order requiring positive compliance. When it is left to the option and discretion of the Income Tax Officer whether or not to take action, it cannot be described as a "direction". The Apex Court in *Income Tax Officer V/s. Murlidhar Bhagwan Das* (Supra) held that "*a "finding", therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in vacuum, but must be*

collated to the directions which the Appellate Assistant Commissioner can give under s. 31. Under that section he can give directions, inter alia, under s. 31(3)(b), (c) or (e) or s. 31(4). The expression "directions" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is, empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions".

14 In ***Rajinder Nath V/s. Commissioner of Income Tax***[4], the Apex Court held as under :

> *The expressions "finding" and "direction" are limited in meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding, it must be directly involved in the disposal of the case.*
>
> *.....*
>
> *As regards the expression "direction" in Section 153(3)(ii) of*

4. (1979) 120 ITR 14 (SC)

> *the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it.*

15 Even if we, for a moment, regard the observations of the Delhi High Court as "finding" or "direction", the same are not contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision or by a Court in any proceeding under any other law. Section 116 of the said Act sets out who the authorities are. Section 116 of the said Act reads as under :

> *116. Income-tax authorities.*
>
> *There shall be the following classes of income- tax authorities for the purposes of this Act, namely :-*
>
> *(a) the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963),*
>
> *(aa) Principal Directors General of Income-tax or Principal Chief Commissioners of Income-tax,*
>
> *(b) Directors- General of Income-tax or Chief Commissioners of Income-tax,*
>
> *(ba) Principal Directors of Income-tax or Principal Commissioners of Income-tax,*
> *(c) Directors of Income-tax or Commissioners of Income-tax or Commissioners of Income-tax (Appeals),*
>
> *(cc) Additional Directors of Income-tax or Additional Commissioners of Income-tax or Additional Commissioners of Income-tax (Appeals),*
>
> *(cca) Joint Directors of Income-tax or Joint Commissioners of Income-tax ,*
>
> *(d) Deputy Directors of Income-tax or Deputy Commissioners of Income-tax or Deputy Commissioners of Income-tax (Appeals),*
>
> *(e) Assistant Directors of Income-tax or Assistant Commissioners of Income-tax,*
>
> *(f) Income-tax Officers,*

(g) Tax Recovery Officers,

(h) Inspectors of Income-tax

Certainly, the Hon'ble Delhi High Court is not among the classes of Income Tax Authorities for the purpose of this Act.

Moreover, the order of the Hon'ble Delhi High Court is not an order in any provision under any other law. It is an order under the proceedings under the Act. In any case, petitioner was not a party before the Delhi High Court and, therefore, there cannot be any finding or direction in respect of petitioner. Therefore, none of the requirements of Section 150 are fulfilled. Therefore, Section 150 not being applicable to the matter at hand, it does not save the impugned notice from being barred by limitation.

16 Respondent's stand that the Assessing Officer at New Delhi had issued a notice under Section 148 of the said Act on petitioner on 22nd March 2013 before the limitation period expired and, therefore, the impugned notice issued by the Assessing Officer at Mumbai in continuation of the said proceedings must also be treated as valid and within time is misconceived. This is because we notice that the notice issued by the Assessing Officer at New Delhi itself was invalid and of no effect since it was issued by an officer who did not have jurisdiction over petitioner. We gather support from the case of *Commissioner of Income Tax V/s. M.I. Builders (P.) Ltd.* (Supra), the assessee had raised the objection with regard to continuation of the proceedings by Income Tax Officer – 1(I), Lucknow on

the ground that the said proceedings are illegal as the notice under Section 148 of the said Act issued itself was devoid of proper jurisdiction and *ab initio void*. The Income Tax Officer – 1(I), Lucknow, however, without considering the objection continued to proceed in the matter and passed the assessment order and also directed to initiate penalty proceedings. The CIT(A) dismissed the appeal of the assessee but the ITAT in the appeal filed by the assessee allowed the appeal of the assessee on the ground that notice issued under Section 148(1) of the said Act was without jurisdiction and, therefore, the subsequent proceedings are invalid. Feeling aggrieved, the Revenue preferred an appeal before the High Court. While dismissing the appeal of the Revenue, the Court held that when the notice under Section 148 (1) of the said Act was issued, ACIT, Range-IV, Lucknow had no jurisdiction over the assessee as the jurisdiction over the assessee was transferred to the Additional CIT, Range-I, Lucknow. It was held that there cannot be situation where two Assessing Officer would have simultaneous jurisdiction over the assessee. Accordingly, it was held that the Tribunal had rightly held that the issuance of notice under Section 148 (1) of the said Act by the non-jurisdictional Assessing Officer was without jurisdiction.

17 We shall also note that on the date when the records were transferred by the Assessing Officer at New Delhi to the Assessing Officer at Mumbai, the time limit of six years as per Section 149 of the said Act had

already elapsed. Respondent no.1, thereafter, recorded fresh reasons and issued a fresh notice dated 14th January 2014 under Section 148, that is impugned, well beyond six years. The notice issued by the Assessing Officer at Mumbai was independent of the notice issued by the Assessing Officer at New Delhi and, therefore, the validity thereof has to be decided independently. The very fact that the Assessing Officer at Mumbai recorded his own reasons and issued a fresh notice and did not seek to derive his jurisdiction basis the notice dated 22nd March 2013 itself indicates that the Revenue's stand has no basis.

18 In our view, the stand of Revenue that no fresh sanction under Section 151 of the said Act was required is also misconceived. Admittedly, no sanction has been accorded before issuance of notice by the Assessing Officer at Mumbai. The Revenue cannot seek to sustain the validity of the notice by relying on the sanction accorded to the issuance of the notice dated 22nd March 2013 by the Assessing Officer at New Delhi. The notice issued by the Assessing Officer at New Delhi was after obtaining approval of Additional Commissioner of Income Tax, Range-14, New Delhi. Even that notice is invalid because the notice dated 22nd March 2013 was issued after a period of four years from the end of the relevant assessment year and, therefore, sanction ought to have been accorded by the Commissioner of Income Tax. The sanction accorded by the Additional Commissioner of Income Tax, therefore, would render the notice issued by the Assessing

Officer at New Delhi itself bad in law and without jurisdiction. A Division Bench of this Court in *Miranda Tools (P.) Ltd. V/s. Income Tax Officer* (Supra) in paragraph 9 has held as under :

> *9. The next question arises is whether the sanction granted by the Chief Commissioner of Income Tax would fulfill the requirement of section 151. It is long been settled that when the statute mandates the satisfaction of a particular authority for the exercise of power then it has to be done in that manner only. Adopting this principle, the Division Benches of this Court in the case of Ghanshyam K. Khabrani v. Asst. CIT1 and CIT v. Aquatic Remedies P. Ltd. have held that sanction for issuance of reopening notice has to be obtained from the Authority mentioned in Section 151 and not from any other officer including a superior officer. In the present case the Chief Commissioner of Income tax is not the officer specified in section 151 of the Act. There is thus a breach of requirement of section 151(2) of the Act regarding sanction for issuance of notice under section 148 of the Act. Consequently, the impugned notice and the impugned order cannot be sustained in law. The Petitioner, therefore, is entitled to succeed.*

19 The other ground taken by respondent to oppose the petition is that since the notice has been issued under Section 148 read with Section 150 of the said Act, the approval under Section 151 of the said Act is not required to be obtained is also misconceived. As stated earlier, first of all Section 150 of the said Act has no application in the present case. In any event, Section 150, as held in *Income Tax Officer V/s. Murlidhar Bhagwan Das* (Supra), only lifts the bar of limitation for issuance of notice under Section 149 of the said Act and the other conditions that are required to be complied with before jurisdiction to reassess can be validly assumed must be fulfilled. The Apex Court while construing the second proviso to Section

34(3) of the Income Tax Act, 1921 held as under :

> *The first part of the proviso released the operation of the proviso from the restriction imposed by section 34 only in respect of the time- limit within which any action may be taken or any order of assessment or re-assessment may by made. It means that the proviso continues to be subject to the other restrictions imposed under the section and it cannot override the said provisions in that regard. Under the proviso, the period of limitation will not apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33B, section 66 or section 66A of the Act. It was not contended, nor was it possible to contend, that by reason of the reference to the said provisions the powers and jurisdiction conferred on the respective. authorities, tribunals or courts referred to therein were enlarged or modified by a' reference in the proviso or that the proviso could be read or construed as amending those sections conferring on those bodies wider or different powers or jurisdiction. Learned counsel for the department expressly disclaimed any such submission. Therefore, the scope of the proviso cannot ordinarily exceed the scope of the jurisdiction conferred on an authority under the said provisions.*
>
> (emphasis supplied)

20 Therefore, for a moment, even if accept Revenue's contention that the present proceedings are continuation of the proceedings initiated by the Assessing Officer at New Delhi vide notice dated 22nd March 2013, the proceedings would be invalid since the notice issued by the Assessing Officer at New Delhi itself was invalid inasmuch as sanction of the appropriate authority as per Section 151 was not obtained before issuing the notice.

21 On the submissions of Mr. Pardiwalla that respondent had issued impugned notice under Section 148 relying on the Delhi High Court order and judgment despite agitating the conclusion of the Delhi High Court

before the Apex Court, Mr. Suresh Kumar submitted that an SLP has been filed against the decision of the Delhi High Court to cover the contingency of an adverse outcome in the SLP. It is Revenue's contention before the Apex Court that the deemed dividend under Section 2(22)(e) is assessable in the hands of P&A. This is certainly not permissible because the jurisdictional requirement is that respondents must entertain a belief that income chargeable to tax has escaped assessment in the hands of petitioner. It is not possible for respondents to entertain such belief if they are agitating the matter against P&A. On this ground also, the impugned notice should be held as invalid. The Division Bench of this Court in ***DHFL Venture Capital Fund V/s. Income Tax Officer***[5] held that where the Assessing Officer sought to make protective assessment by reopening an assessment on the ground that a contingency may arise in future resulting in escapement of income that would be wholly impermissible and would amount to rewriting of the statutory provision. Paragraph 18 of the said judgment reads as under :

> *18. A protective assessment as the learned author indicates is regarded as being protective because it is an assessment which is made ex abundanti 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*

5. (2013) 34 taxmann.com 300 (Bombay)

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.

(emphasis supplied)

22 In the circumstances, the notice dated 10th January 2014 issued by respondent no.1 under Section 148 of the said Act to petitioner and notice dated 14th February 2014 issued by respondent no.1 to Rachna Morarka for Assessment Year 2006-2007 are quashed and set aside. Consequently, the orders rejecting petitioner's objections are also quashed and set aside.

23 Both petitions disposed accordingly.

(N.J. JAMADAR, J.) (K.R. SHRIRAM, J.)