

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 2827 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

ADITYA MEDISALES LTD....Petitioner(s)

Versus

DY.COMMISSIONER OF INCOME TAX CIRCEL 1(1)....Respondent(s)

Appearance:

MR SAURABH N SOPARKAR, SENIOR ADVOCATE WITH MR MONAAL J DAVAWALA AND MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1
MR KM PARIKH, ADVOCATE for the Respondent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 10/08/2016

ORAL JUDGMENT**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged a notice dated 30.3.2012 issued by the respondent Assessing Officer to reopen the petitioner's assessment for the assessment year 2005-2006.
2. Brief facts are as under. The petitioner is a company registered under the Companies Act. For the assessment year 2005-2006, the petitioner had filed return of income on 31.10.2005 declaring total income of Rs.57.73 lacs. Such return was taken in scrutiny by the Assessing Officer. He passed the order of assessment on 27.12.2007 computing total income of Rs.5.86 crores (rounded off). To reopen such assessment, the Assessing Officer issued notice dated 11.1.2011. Briefly stated, the reasons recorded for issuing such notice were that the assessee was holding certain shares as stock-in-trade. On 1.4.2004, the assessee transferred such shares from stock-in-trade to investment. This was done at the cost price and not the market value. According to the Assessing Officer, the difference between the cost of acquisition of shares and the market value on the date of conversion was a profit to the business and such income had escaped assessment.
3. The petitioner challenged the said notice dated 11.1.2011 of reopening by filing Special Civil Application

No.10217/2011 in which on 12.9.2011 while issuing rule, the Court by way of interim relief directed that till final disposal of the petition, there shall be stay of further proceedings pursuant to the notice.

4. When such petition was pending, the Assessing Officer issued yet another notice under section 147 of the Act seeking to reopen the petitioner's assessment for the same assessment year 2005-2006 which has been challenged in this petition. The Assessing Officer had after referring to the facts of the earlier reopening, recorded the following reasons :

“(D) Since there is no bar in the Income Tax Act for number of reopening, without any prejudice, in the interest of revenue, on the other reasons and facts, without disturbing the Hon'ble High Court's order; I proceeded for reopening on new facts which are as under :

(i) The assessee continuously held certain shares and securities as “stock-in-trade” for a number of years (eg F.Yr. 1995-96 to F.Yr.2003-04)

(ii) When the assessee filed its return of income for A.Yr.2005-06 relevant to F.Yr.2004-05, the assessee claimed to have converted some of these shares and securities, earlier held as 'stock-in-trade' upto 31.03.04 into investment on 01-04.2004.

(iii) The assessee disclosed details of these relevant shares and securities held as “stock-in-trade” in respect of shares of Sun Pharmaceuticals Industries Ltd as on 31.3.04 as under :

Quantity	Value
----------	-------

- | | | |
|---|-----------|---------------|
| (1) Equity shares of
Rs.5 each in Sun
Pharma Ind. Ltd | 20,10,198 | 9,16,98,559/- |
| (2) 6% Cumulative preferential
Reedemable shares of Rs.1/-
Each (received as bonus shares)
in Sun Pharma Ind. Ltd. | 40,20,396 | 0 |

(The copy of schedule of Accounts is enclosed, marked as Annexure-A)

(iv) During the course of assessment proceedings for A.Yr.2005-06, the assessing officer requested the assessee to furnish details of "Transfer to capital Assets" vide Q.No,6 of Questionnaire dated 15.10.2007.

The assessee submitted its reply vide letter dated 17.11.07, at S.No.5 as under: 5. Detail of transfer of capital assets at Rs.11,17,89,259/- is enclosed as per Annexure-6. Heading of table is "The details of capital assets transferred to "investment" (copy of Annexure-6, submitted by the assessee, is enclosed and marked as Annexure-B).

(v) The attention is drawn towards the contents of Annexure A and Annexure-B. Following glaring manipulation come to be seen.

The assessee had 20,10,198 equity shares of M/S Sun Pharma Ind Ltd as on 31.03.2004. The assessee claims that it converted its "stock-in-trade" into 'investment' on 01.04.2004. But the No. of shares which are claimed it have been converted into investment are shown at 40,20,396/-.

This situation is an impossibility. Since, the assessee had only 20,10,198 shares available with it on 31.3.2004, how can it convert double the number of shares into 'investment' on 1.4.2004.

(vi) In computation of income filed by the assessee along with return of income, the computation of Long Term Capital gain assessee has shown as under:

Nature of Security	Nature of Equity shares	dt of investment	Purchase value	dt of sale	sale value	index	net capital gain
Sun Pharma Preference share	40,20,396	02.11.2002	0	02.7.2004	41,41,008		4 1,41,008

The assessee had 40,20,396 numbers of 6% preferential redeemable shares of Sun Pharma Ind Ltd in its 'stock-in-trade' as on 31.03.2004 as disclosed by the assessee in its return of income, Balance-sheet and other details and documents filed with it. However in the list of shares and securities, which will claimed to the converted into 'investment' on 1.4.2004 from 'stock-in-trade' submitted during course of assessment proceedings, these are absent; meaning thereby, that remained as 'stock-in-trade'. However, they were redeemed during this year only and instead instead of showing the receipt as "business income " or "short term capital gain (even the transfer from 'stock' to 'investmentment' treated as on 1.4.2004 as per assessee claim) they have been shown as "Long term capital gains" against the provisions of the income Tax Act. Also by claiming LTCG, they have paid

taxes at a lower rate and evaded substantial amount of tax on business income.

(vii) During the course of survey and post survey inquiries, the following facts were noticed.

(1) The assessee received bonus equity shares numbered 20,10,198 from M/s. Sun Pharma Ind Ltd in the ratio of 1:1 on or after 29.05.2004 and therefore it can be conclusively said that on 1.04.2004, the assessee did not have 40,20,396 equity shares of M/s. Sun Pharma Ind Ltd which it claims to have converted into investment on 1.04.2004 (Copy of letter by M/s. Sun Pharma Ind Ltd to BSE dated 14.05.2004 downloaded from BSE website is enclosed as Annexure-C)

(2) The assessee has wrongly claimed long terms capital gain in place of Business income in the case of 40,20,396 number of 6% redeemable preference shares of Sun Pharma Ind Ltd., though they have held as 'stock-in-trade'. M/s. Sun Pharma Ind. Ltd announced buy back of 6% cumulative redeemable preferential shares on 05.05.2004 and sent letter to BSE and NSE on 11.04.2004. Copy of letter downloaded from BSE website is enclosed, marked as Annexure-D

WEB COPY

(vii) From the facts, emerging because of survey proceedings in the case, the following conclusions can be drawn;

(1) The profit on sale of redeemed preferential shares to be taxed as Business income as on the date of conversion from 'stock in trade' to 'investment' and short term capital gain from the date of conversion to the date of the sale.

(2) The assessee has been giving false information in the return of income and computation details submitted before the Assessing officer during the course of Assessment proceedings.

(3) From the conducts of the assessee, it is clear that the assessee has been manipulating its accounts and dates with the sole purpose of evading payment of taxes in view of the newly amended provisions u/s 10(38) of the income Tax Act, 1961.

In view of the above, I have reason to believe that income chargeable to the tax has escaped assessment and therefore, it is required that the reassessment proceedings u/s. 147 are carried out in the case of the assessee.”

5. The petitioner raised objections to this notice under a communication dated 28.4.2012. Such objections were rejected by an order dated 27.2.2013, at which stage, the petitioner filed this petition.

6. Learned counsel for the petitioner raised the following contentions :

1) There was no failure on part of the assessee to disclose truly and fully all material facts, notice of reopening which was issued beyond a period of four years from the end of relevant assessment year was therefore, invalid. The issues mentioned in the reasons were also examined during original assessment.

2) There was no escapement of income chargeable to tax.

3) The second notice of reopening, when previously the assessment was already reopened, and when such assessment was pending, was not permissible. There cannot be reopening of an assessment which is already pending. When the Assessing Officer therefore, issued the earlier notice dated 11.1.2011 and the proceedings arising out of such notice were pending, he could not have issued fresh notice of reopening. In this context, counsel relied on the following judgements :

1) In case of **Commissioner of Income-tax v. Ranchhoddas Karsondas** reported in (1959) 36 ITR 569(SC).

2) In case of **Estate of the Late A.M.K.M. Karuppan Chettiar v. Commissioner of Income-tax** reported in (1969) 72 ITR 403(SC).

3) In case of **Commissioner of Income-tax v. M.K.K.R. Muthukaruppan Chettiar** reported in (1970) 78 ITR 69 (SC).

4) In case of **Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax** reported in (1964) 51 ITR 557 (SC).

7. On the other hand, learned counsel Shri K.M.Parikh for the department opposed the petition contending that after recording reasons and issuing notice for reopening dated

11.1.2011, further materials came to the notice of the Assessing Officer demonstrating that the income chargeable to tax had escaped assessment and that same was due to failure on part of the assessee to disclose truly and fully all material facts. There is no bar in the Act for issuing second notice of reopening. The grounds mentioned in the reasons recorded for the present notice are entirely different from those mentioned in the earlier reopening.

8. Before dealing with rival contentions, we may record that by a separate judgement passed today in Special Civil Application No.10217/2011, we have set aside the notice of reopening by following the judgement of the Supreme Court in case of **Kikabhai Premchand** (supra), on the ground that transfer of shares from stock-in-trade to investment did not result into any immediate income accruing to the assessee which can be taxed in the assessment year 2005-2006.
9. As noted, for the assessment year 2005-2006, the Assessing Officer had issued first notice of reopening on 11.1.2011, which was based on the premise that the assessee having transferred its shares from stock-in-trade to investment, was liable to pay tax on the difference between cost price of such shares and the market value on the date of transfer. In the present case, the notice for reopening is founded on the allegations that the assessee had shown to have held only 20,10,198 shares of Sun Pharmaceuticals on 31.3.2004. However, on 1.4.2004, the assessee had shown to have converted 40,20,396 shares of the said company from stock-in-trade to investment.

Further, the list of shares and securities that the assessee claimed to have converted into investment on 1.4.2004 submitted during the course of assessment did not include these 40,20,396 shares. These shares were redeemed during the year under consideration and instead of showing receipt as business income or short term capital gain, it was shown as long term capital gain. The assessee had thus paid tax at a lower rate and avoided tax on business income. Thus according to the Assessing Officer, the assessee had supplied wrong information and paid tax on the sale of shares claiming as long term capital gain which at best could have been short term capital gain.

10. With the petitioner's contention of the issues having been scrutinised during the original assessment and true and full disclosure, we are not impressed. Though vehemently argued before us, we do not notice any direct reference to this transaction in the original assessment proceedings either in form of queries, replies or in the order of assessment itself. Equally with respect to full and true disclosure, even the learned counsel for the petitioner agreed that there was a clear error on part of the petitioner to show only 20,10,198 shares during the earlier proceeding though the assessee had received redeemable preference shares on its original shareholdings.

11. In the details of long term and short term capital gain during the year the assessee had shown sales of 40,20,396 shares of Sun Pharma and claimed long term capital gain thereof. The date of sale was shown as 2.7.2004 and date of investment was shown on 2.11.2002. In other words, the

vital data of converting such shares from stock-in-trade to investment on 1.4.2004 did not form part of these details. Such data was undoubtedly relevant since the question of nature of capital gain, long or short term, to the investment portfolio of the assessee may depend on the date of conversion of shares from stock-in-trade to investment. By showing the date of investment as 2.11.2002 and date of sale as 2.7.2004, the assessee cannot be stated to have disclosed true and full facts. Merely because such date of conversion was available in some other remote or obscure material would not satisfy the requirement of true and full disclosure. One may refer to explanation(1) to section 147 of the Act which provides that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer, will not necessarily amount to disclosure within the meaning of such provision.

12. Thus while claiming long term capital gain on sale of 40,20,396 shares of Sun Pharma, the assessee related to the date of investment of 2.11.2002 and the date of sale of 2.7.2004 completely withholding the fact that shares were transferred from stock-in-trade to investment only on 1.4.2004. On the ground of true and full disclosures therefore, notice cannot be quashed, nor can it be concluded that no income chargeable to tax had escaped assessment. This later issue of escapement of income must be left to be decided in the assessment proceedings if the notice is otherwise valid.

13. The vital question however, remains is, was the second notice of reopening valid? Section 147 of the Act, as is well known, pertains to income escaping assessment under which if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, he may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently during the course of the proceedings or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the concerned assessment year. Under sub-section(1) of section 148 of the Act before making the assessment, reassessment or re-computation, the Assessing Officer would issue notice requiring the assessee to furnish the returns. Under sub-section(2) of section 148, the Assessing Officer is required to record his reasons before issuing the notice under section 148. Thus upon issuance of notice under section 148, the assessment is reopened and upon which the Assessing Officer would have the authority to assess or reassess any income of the assessee which has escaped assessment including that which may come to his notice during the assessment. Once such notice is issued and with that the assessment has been reopened, can there be another notice for reopening? In other words, during the pendency of the proceedings for reassessment, can there be another notice also for the same purpose, may be based on different reasons?

14. Let us examine how different Courts have viewed such a situation. In case of **Ranchhoddas Karsondas** (supra), the three Judge Bench of Supreme Court considered a case

where the assessee had filed a return though according to him he did not have taxable income. Pending such return, the Assessing Officer issued notice under section 34 of the Income Tax Act, 1922 equivalent to section 147 of the present Act for reassessment and subsequently also framed assessment. In this context, the Supreme Court observed that if the return filed by the assessee was no return at all, then the conditions under section 34 would apply and the assessment could be completed within one year of the date of service of notice. Thus the validity of return was tied to the validity of the notice and vice-versa. The Supreme Court held that even a return voluntarily filed would be a valid return and the notice for reassessment which was issued was improper because with the return already filed, there was neither an omission nor a failure on the part of the assessee, nor was there any question of assessment escaping. The notice and consequent assessments were therefore, invalid. It was held and observed as under :

“It is a little difficult to understand how the existence of a return can be ignored, once it has been filed. A return showing income below the taxable limit can be made even in answer to a notice under s.22(2). The notice under s.22(1) requires in a general way what a notice under s.22(2) requires of an individual. If a return of income below the taxable limit is a good return in answer to a notice under s. 22(2), there is no reason to think that a return of a similar kind in answer to a public notice is no return at all. The conclusion does not follow from the words of s.22(1). No doubt, under that sub-section only those persons are required to make a return, whose income is above taxable limits, but a person may legitimately consider himself entitled to certain deductions and

allowances, and yet file a return to be on the safe side. He may show his income and the deductions and allowances he claims. But it may be that on a correct processing his income may be found to be above the exempted limit. No doubt, it is futile for a person not liable to tax to rush in with a return, but the return in law is not a mere scrap of paper. It is a return, such as the assessee considers, represents his true income. We are unable (and we say this with due respect) to accept the view adumbrated in the Calcutta cases. The contrary view is expressed by the Bombay High Court in the earlier case of *Harakchand Makanji & Co. v. Commissioner of Income-tax*(1948) 161 ITR 119 and in the judgment under appeal. That view was accepted by the Madras High Court in *P.S. Rama Iyer v. Commissioner of Income-tax* (1957) 32 ITR 458 and also, in our opinion, is the sounder view of the two. In the earlier of the two Bombay cases, *Chagla, C. J., and Tendolkar, J.*, held (as stated in the head note):

" Notice under section 34 is only necessary if at the end of the assessment year no return has been made by the assessee, and the authorities wished to proceed under section 22(2), but where the assessee himself chooses voluntarily to make a return, no question can arise under section 34 of assessment escaping, and therefore there is no necessity to serve any notice under section 34."

This represents the law applicable to the facts as they are to be found in this case. In the assessment year no return of income was filed, nor was any notice served under s.22(2). There was, however, the general notice under s.22(1). A return in answer to that notice could be filed under s.22(3) before assessment, and for this there is no limit of time. It was filed on January 5, 1950. There was nothing to prevent the Income-tax Officer from taking up the return and proceeding to assess the income of the assessee. It was open to him, if there was sufficient justification for it, to hold that the amount noted in the

footnote was really the assessee's income, in which case an assessable income would have been found and the tax could be charged thereon. If the Income-tax Officer had acted on that return and assessed the assessee before March 31, 1950, the assessment would have been valid. He chose to ignore the return, and served on the assessee a notice under s.34(1). This notice was improper, because with the return already filed there was neither an omission nor a failure on the part of the assessee, nor was there any question of assessment 'escaping'. The notice under s.34(1) was, therefore, invalid and the consequent assessment equally so. We accordingly agree with the judgment under appeal.”

15. This decision in case of **Ranchhoddas Karsondas** (supra), was referred to and relied upon in case of **Estate of the Late A.M.K.M. Karuppan Chettiar**(supra), in which it was observed as under :

“As we have already observed, Karuppan Chettiar submitted returns of his income in his individual capacity for the years 1950-51, 1951-52 and 1952-53 in response to the notice issued under Section 22(2). The Income-tax Officer purported to treat those returns made on behalf of the Hindu undivided family and to assess the Hindu undivided family in respect of that income. That order was set aside. The returns submitted by Karuppan Chettiar in his individual capacity were, therefore, never considered and no assessment was made of Karuppan Chettiar as an individual on those returns. Karuppan Chettiar submitted fresh returns in February, 1955, and June, 1956, before the notice under Section 34 was issued on March 2, 1957. The notice under Section 34 could not be issued against Karuppan Chettiar in his individual capacity unless the returns which had already been filed by him were disposed of.”

16. Similar view was expressed in case of **M.K.K.R. Muthukaruppan Chettiar** (supra), In case of **Ghanshyamdas** (supra), the Constitution Bench of Supreme Court held that the assessment proceedings under the Sales Tax Act must be held to be pending from time, said proceedings were initiated until they were terminated by a final order of assessment and till such final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for assessment was yet not completed. The question arose in the background of power of the Commissioner to assess any turnover of a dealer which had escaped assessment. It was observed that before the assessment is completed, it cannot be predicted that the turnover had escaped assessment. It was observed as under :

“As s.34 of the Income-tax Act had no application and as there was no other time limit prescribed or necessarily implied under that Act, it held that the assessment was not out of time. This decision is a clear authority for the position that if a return was duly made, the assessment could be made at any time unless the statute prescribed a time limit. This can only be for the reason that the proceedings duly initiated in time will be pending and can, therefore, be completed without time limit. A proceeding is said to be pending as soon as it is commenced and until it is concluded. On the said analogy, the assessment proceedings under the Sales-tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed

and if, completed, it might be that the entire turnover would be caught in the net.”

17. In case of **Trustees of H.E.H. The Nizam's Supplemental Family Trust v. Commissioner of Income-tax** reported in (2000) 242 ITR 382 (SC), it was observed that a return filed along with the application for refund is a valid return and reassessment proceedings cannot be initiated so long as the assessment proceedings are not terminated. In the said case, Revenue had argued that Assessing Officer had recorded a note on his file on 10.11.1965, in which he had concluded the assessment proceedings before he initiated proceedings under section 147 of the Act. The Supreme Court observed that :

“It is settled law that unless the return of income already filed is disposed of notice for reassessments under Section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue it is immaterial whether the order is communicated or not and that the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated. In support of this contention reference was made to certain decisions of the High Courts and some observations made by this Court in a case, which we note as under.....:-

1. We may refer to the decisions of various High Courts. In case of **Smt. Nilofer Hameed and another v. Income-tax officer** reported in (1999) 235 ITR 161 (Ker), the learned Single Judge of Kerala High Court observed that the contention that a second notice under section 148 of the

Act cannot be issued when the assessment pursuant to first notice has not been completed, cannot be accepted as an absolute proposition. The Assessing Officer can issue any number of notice under section 148 of the Act provided the conditions stipulated in section 147 are satisfied and the same is within the prescribed period. It was however, added that if the assessment is pending, notice of reopening cannot be issued. Thus the learned Judge made a distinction between the notice of reopening when the original assessment was not completed and where notice of reopening was issued but was pending.

2. In case of **Indian Tube Co. Ltd. v. Income Tax Officer** reported in (2005) 272 ITR 439 (Cal), the Learned Single Judge considered a case where the Assessing Officer had issued notice for reassessment pursuant to which the assessee had also filed the return. Thereafter, the Assessing Officer issued another notice under section 148 of the Act. It was held as under :

“12. Applying the aforesaid principles to the fact of the case, it is clear that when the petitioner filed returns in compliance with the invalid notice dated 11th February, 1983 under section 148 of the 1961 Act, those returns should be treated as "return" and as such before making assessment on the basis of those returns, no further notice under section 148 of the Act could be passed.

14. In the case before us, the earlier notice has not been declared by any Tribunal as invalid and at the same time the returns submitted pursuant to earlier notices have not been assessed and thus the earlier proceedings were pending at the time of issuing second notice and as such the principle laid down in the said decision cannot have

any application to the facts of the present case.”

1. In case of **Commissioner of Income Tax v. Rajendra G. Shah** reported in (2001) 247 ITR 772 (Mad), Division Bench of Madras High Court held that reassessment proceedings could not have been instituted when the main return was pending assessment.
2. In case of **Jhunhunwala Vanaspati Ltd. v. Assistant Commissioner of Income-tax (No.2)** reported in (2004) 266 ITR 266 (All), Division Bench of Allahabad High Court held that notice under section 148 of the Act cannot be issued when the assessment proceedings are pending.
3. In case of **KLM Royal Dutch Airlines v. Assistant Director of Income-tax** reported in (2007) 292 ITR 49 (Del), Division Bench of Delhi High Court also held that when inquiry initiated under section 143(2) of the Act was pending, notice for reopening was invalid. It was observed that where an assessment has not been framed at all, it is not possible to posit that income has escaped assessment. It was held and observed as under :

“15. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been

accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

4. In case of **Commissioner of Income-tax v. K.M. Pachayappan** reported in (2008) 304 ITR 264 (Mad), Division Bench of Madras High Court held as under :

“Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under Section 147 of the Act, when there is a pendency of the Return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the Tribunal so as to warrant interference.”

1. It can thus be seen that majority of the High Courts of the country have proceeded on the basis that when the assessment proceedings are pending pursuant to the return filed by the assessee, there would be no authority in the Assessing Officer to issue notice under section 148 of the Act. Expressed in different thoughts and language, the central concept being that when a return is filed, assessment is either being done or could be carried out by issuing notice under section 143 of the Act for which time limit has not expired, in such a case, there would be no question of income chargeable to tax having escaped

assessment. Only upon completion of the assessment, or if not taken in scrutiny, upon completion of the period during which it can be scrutinised, the question of income having escaped the assessment would arise. Since the invocation of power under section 147 of the Act depends on the Assessing Officer's reason to believe that income chargeable to tax had escaped assessment, no such belief could be formed till the return is pending assessment.

2. We may however, take note of some of the decisions taking slightly different view.
3. In case of **Ashok Kumar Dixit v. Income Tax Officer and another** reported in (1992) 198 ITR 669(All), Division Bench of Allahabad High Court considered a case where the proceedings pursuant to first notice under section 148 of the Act against the petitioner was pending before the authority when second notice again under section 148 of the Act was issued. The second notice was challenged in a writ petition. In this context, the Court observed as under :
“It cannot be doubted that, if the assessing authority has come to know some facts which led him to believe that some part of the income of the assessee has been left to be assessed, he can always issue another notice under Section 148. Only because the earlier notice has been issued, that by itself in law cannot bar him from issuing the second notice under section 148. This will depend on the facts of each case.”
4. In the decision of the Division Bench of Allahabad High Court in case of **Sukhlal Ice and Cold Storage Company v. Income Tax officer and another** reported in (1993) 199

ITR 129 (All), the petitioner was served with a notice under section 148 of the Act on 28.1.1985 for the assessment year 1982-1983. The assessment order thereon was passed on 31.7.1989. In the Second Appeal before the Tribunal, the assessee argued that the notice itself was without jurisdiction. The Tribunal set aside the notice on the ground that the reasons for issuance of notice were not on record. The High Court upheld the view of the Tribunal. In the meantime, Income Tax Officer had issued another notice on 29.3.1990 under section 148 of the Act by giving necessary reasons and removing defect pointed out earlier. In this context, the Court held and observed as under :

“We have heard learned counsel for the petitioner. His sole submission is that in the presence of the first notice under Section 147 of the Act which was served on January 28, 1985, the impugned notice issued on March 29, 1990, was not sustainable in law. We, however, do not agree with the aforesaid submission for two reasons, firstly that the order dated March 30, 1990, passed by the Income-tax Tribunal having become final, the legal effect of the same is as if the earlier notice served on January 28, 1985, was without jurisdiction. The assessee can now not be permitted to take any turn to advance an argument that because of the existence of the first notice under Section 147 of the Act, the impugned notice issued on March 29, 1990, is bad in law. During the course of his argument, Shri M. S. Pipersani appearing for the petitioner has relied upon a Division Bench decision of this court in the case of STO v. Firm Ram Das Ram Dutt [1973] UPTC 20. It has been held in the said case where original assessment proceeding is pending, it cannot be said that any part of the turnover has escaped assessment. This position, however, does not operate at all in the present case. In the present case since the Tribunal has recorded a finding to the effect that the

very initiation of the proceedings under Section 147 of the Act by the first notice was without jurisdiction, therefore, it cannot be said that the said proceedings were any proceedings in the eyes of law, what to say, that they were pending. Thus the said authority is of no avail to learned counsel for the petitioner. Moreover, we also find from a copy of annexure-5 to the writ petition that the second notice dated March 29, 1990, was actually served on the assessee on March 30, 1990, on which date the proceedings under first notice under Section 147 of the Act were already declared as without jurisdiction and consequently no earlier proceedings will be subsisting on March 30, 1990. No other argument was advanced.”

5. In case of **Acorus Unitech Wireless P. Ltd and another v. Deputy Commissioner of Income-tax** reported in (2012) 345 ITR 228 (Delhi), the Division Bench of Delhi High Court considered an issue whether when the time for issuance of notice under section 143(2) of the Act had not expired, could the Assessing Officer issue notice under section 148 of the Act? It was observed that it was not possible to accept the broad universal affirmative submission that notice under section 147/148 of the Act could not be issued when Assessing Officer could have issued notice under section 143(2) of the Act. This would depend upon the facts of each case.
6. In our case, the situation is during the pendency of first notice of reassessment, the Assessing Officer recorded separate reasons and issued a fresh notice for reassessment. Though this is not a case where the original assessment itself was pending when the notice for reopening was issued and in this context, as noted, some of the High Courts have drawn a distinction, in our

opinion, there would be no material change. As long as assessment was at large by virtue of the first notice of reopening, the question of issuing second notice for the same purpose did not arise.

7. There cannot be two parallel assessments based on two notices. As long as first assessment is not completed, question of reassessment would not arise. Once a notice is issued under section 148 of the Act, it triggers initiation of proceedings for assessment or reassessment of income which may have escaped assessment earlier. During such assessment, any income which may come to the notice of Assessing Officer may also be brought to tax. Till this assessment is not completed, it would not be possible for him to form a belief that income chargeable to tax had escaped assessment. Until the assessment, be it original or reopened, is pending before the Assessing Officer, the question of issuing notice for reopening would not arise. As noted, in case of **Ranchhoddas Karsondas** (supra), the Supreme Court had taken a view that till the assessment proceedings are pending, it cannot be stated that there was escapement of income. To our mind, there is no distinction whether the pending assessment is pursuant to the return filed by the assessee originally or in response to the notice of reassessment issued by the Assessing Officer. In either case within the contours of the provisions for assessment, the assessment of the income of the assessee at the hands of the Revenue is at large.
8. We are conscious that the conclusion that we have arrived at, may lead to a piquant situation for the revenue. In a

given case, it may so happen that notice for reopening may have been issued within the period of four years from the end of relevant assessment year, on the reasons recorded, which may have no relevance to non disclosure of material facts. After four years it is entirely possible that the Revenue may chance upon further materials not disclosed by the assessee in the original return or during the assessment proceedings which may have a bearing on income escaping assessment. The suggestion that if additional information is available with the Revenue later on, it is always open for the Assessing Officer to withdraw the first notice and issue second notice including both sets of reasons, would fail in such an example. In the example cited, the Revenue would have a difficult choice to make whether to rest on the notice already issued and the reasons recorded for the same which would deprive the revenue of the additional grounds to support reopening or after withdrawing the first notice to issue a fresh notice which would be beyond a period of four years and thereby sacrifice the reasons already recorded, which would not sustain the test of failure on part of the assessee to disclose truly and fully all material facts. However, such difficulty in making a choice, would not govern the interpretation of statutory provisions or would permit us to enlarge the scope of reassessment by holding that the second notice of reopening pending reassessment would also be permissible. We do not discern any concept of alternative or protective notice of reassessment. In the result, impugned notice of reopening is bad in law. This is despite the fact that the first notice came to be quashed on the ground that on the basis of reasons recorded, it cannot

be stated that income chargeable to tax had escaped assessment.

9. To this conclusion, we may however add a caveat. In a given case, if it is found that the notice itself is invalid being nonest or ab initio void, it would be no valid notice in eye of law, pursuant to which any valid assessment proceedings would initiate. For example, if the notice is issued by an authority who was simply not competent or was issued without the sanction of the Commissioner when so required, the notice would be void, nonest and having no effect in eye of law. Such a notice would not reopen an assessment, would not commence assessment proceedings and whenever so declared, such a declaration would relate back to the original issuance thereof. In such a situation, if the Revenue has issued a second notice for reopening, the same would not be rendered invalid. In this context we may recall, the Supreme Court in case of **Ranchhoddas Karsondas** (supra), in the context of notice of reopening issued pending a return of nil income filed by the assessee linked the validity of the notice to the validity of the return observing that if the return filed by the assessee was no return, the conditions of section 34 (of the Act of 1922) would apply and the Assessing Officer could carry out the assessment.

10. In the result, for the above reasons, impugned notice dated 30.3.2012 is set aside. Petition is disposed of.

(AKIL KURESHI, J.)

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(A.J. SHASTRI, J.)

