IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JM
AND
SMT. RENU JAUHRI, AM

ITA No. 1577/Mum/2024
(Assessment Year: 2017-18)

Pankaj Chandrakant Pimple 34 Anant Apts, Near Punjab & Sindh Bank, Vazira Naka, Borivali (W), Mumbai-400 091	Vs.	**International Tax Ward 3(3)(1)** Room No. 1631, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021
PAN/GIR No. AIKPP 9700 A		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	Shri Ajay Singh a/w. Shri. Akshay Pawar
Respondent by	:	Shri. Mahesh Pamnani (Sr. DR)

Date of Hearing	:	11.10.2024
Date of Pronouncement	:	20.12.2024

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Assessing Officer ('ld. AO' for short) passed u/s. 144 r.w.s. 147 r.w.s. 144C(13) of the Income Tax Act, 1961 ('the Act'), pursuant to the directions of Hon'ble Dispute Resolution Panel ('Hon'ble DRP' for short), pertaining to the Assessment Year ('A.Y.' for short) 2017-18.

2. The assessee has raised the following grounds of appeal:

"I. Reopening of assessment is bad in law:

1. The learned CIT (DRP-2) erred in upholding the reopening of assessment vide notice u/s. l48 of the Act dated 19/7/2022 i.e. After expiry of three years from the end of the assessment year 2017-18 without appreciating that notice under 148 can be issued beyond 3 years only if income

escapement is above 50 lacs, in fact of present case the impugned notice issued for A.Y. 2017-18 is for income escaped below Rs.50 lacs. i.e., Rs.35,13,283/-, therefore reopening is bad in law.

2. The learned CIT (DRP-2) failed to appreciate that the JAO have no jurisdiction to issue show cause notice u/s 148A(b) and notice u/s. 148 and pass order u/s 148A(d) as after 19/07/2022 same can be done in a faceless manner, therefore the reassessment proceedings is bad in law

3. The learned CIT (DRP-2) failed to appreciate that the AO issued reopening notice beyond period of three years, approval was required to be taken as per provisions of amended Section 151 of the Act from Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General however approval is from PCIT.

ON MERITS:

4. The learned CIT (DRP-2) has failed to appreciate the flat was booked during FY 2013-2014 vide allotment letter dt 31/8/2013 at a consideration of Rs, 90 lacs, therefore stamp duty value of FY2013-2014 should be considered for the purpose of Section 56(2) of Income Tax Actl961 and not the stamp duty value of Rs.1,25,13,283/- on the date of registration of agreement on 29/8/2016 i.e., FY 2016-17.

5. The learned CIT (DRP-2) has failed to consider that assessee had booked the said property on 31/08/2013 and had made a part payment against such booking by account payee cheques and had registered the said property on 29/08/2016.

6. Alternatively, once assessee objected to valuation the matter ought to have been referred to valuation officer, therefore action of ld AO is not justified.

7. The ld. DRP erred in upholding the assessment order being passed u/s. 144 of the act more so when return of income was filed on 18.10.2021 pursuant to original notice u/s. 148 of the Act."

3. Brief facts of the case are that the assessee is an individual and had not filed his return of income for the year under consideration. Based upon the information received from the INSIGHT Portal, the assessee's case was reopened for the reason that the assessee has entered into transaction for purchase of property for a sale consideration of Rs. 90,00,000/-, were the stamp duty value of the said property was Rs. 1,25,13,283/-. Notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. The ld. AO then passed the draft assessment order dated 19.05.2023 u/s. 144C(1) of the Act, were the total income was derived at Rs. 35,13,283/-. The assessee filed his objections before the Hon'ble DRP which vide order dated

23.02.2024 dismissed the objections raised by the assessee thereby directing the ld. AO to uphold the addition proposed in the draft assessment order. The ld. AO then passed the final assessment order dated 24.02.2024, u/s. 144 r.w.s. 147 r.w.s 144C(13) of the Act, being the best judgment assessment on the ground that the assessee has failed to comply with the proceeding and has also not furnished any supporting documentary evidence to substantiate his contentions that the payments were made in F.Y. 2013-14 and further has also failed to submit the value of the property pertaining to that year. The ld. AO added the difference in the stamp duty value amounting to Rs. 35,13,283/- as per Section 56 (2) of the Act and the same is added as unexplained investment u/s. 69 of the Act.

4. The assessee is in appeal before us, challenging the impugned assessment order on the ground of reopening and on the merits of the addition made by the ld. AO. Ground no. 1 pertains to reopening of the assessment vide notice u/s. 148 of the Act dated 19.07.2022 which according to the assessee was reopened after expiry of 3 years from the end of A.Y. 2017-18, without considering the fact that notice u/s. 148 of the Act can be issued beyond 3 years only if income which has escaped assessment is above Rs. 50,00,000/-, Here in the present case, the income alleged to have been escaped assessment is Rs. 35,13,283/-.

5. The learned Authorised Representative (‘ld. AR’ for short) for the assessee for this preposition has relied on the decision of the Hon'ble Jurisdictional High Court in the case of *Naresh Balchandrarao Shinde Vs. Income Tax Officer [2023] 146 taxmann.com 65 (Bombay), order dated 26.09.2022*, wherein it was held that when the income which has escaped assessment is less than Rs. 50,00,000/- as contemplated

u/s. 149(1)(b) of the Act, the impugned notice which was issued beyond 3 years was liable to be quashed and set aside.

6. The learned Departmental Representative ('ld. DR' for short) on the other hand controverted the said fact and stated that the assessee has failed to raise this ground before the lower authorities.

7. On perusal of the above contentions raised by the assessee, it is evident that the ld. AO has issued the impugned notice u/s. 148 of the Act, dated 19.07.2022, after 3 years from the relevant assessment year which is A.Y. 2017-18 for which the 3 year period ends on 31.03.2021. Section 149(1) of the Act mandates that notice u/s. 148 cannot be issued after lapse of 3 years from the end of the assessment year, unless the ld. AO is in possession of books of accounts or other documents or evidence which reveal that the income which has escaped assessment is Rs. 50,00,000/- or more for that year. The ld. AO has passed order u/s. 148A(d) of the Act dated 19.07.2022, and notice u/s. 148 of the Act, was issued on 19.07.2022, where the income alleged to have escaped assessment is determined as Rs. 35,13,283/- which is much below the limit prescribed by the provisions of the Act. The relevant part of the said provision is cited hereinunder for ease of reference.

"149. Time limit for notice.

"(1) No notice under section 148 shall be issued for the relevant assessment year, –

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

[(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of—

(i) an asset;

> *(ii) expenditure in respect of a transaction or in relation to an event or occasion; or*
> *(iii) an entry or entries in the books of account,*
>
> *which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:]"*

8. From the above, it is evident that the extended period would be upto 10 years, where the income chargeable to tax which has escaped assessment amounts to or is likely amount to Rs. 50,00,000/- or more. In case were the income which has escaped assessment is less than Rs. 50,00,000/-, notice u/s. 148 can be issued only when it is within the limitation period specified in Section 149(1)(a) of the Act. In the present case, the limitation period would end by 31.03.2021.

9. It is observed that the Hon'ble Delhi High Court in the case of *Ganesh Dass Khanna vs. ITO in Writ Petition (C) No. 11527/2022 & CM Application No. 34097/2022, dated 10.11.2023* has decided this issue in favour of the assessee by considering the various decisions of the Hon'ble Apex Court including the case of *Union of India and Ors. vs. Ashish Agarwal, dated 04.05.2022* and various other decisions of the Hon'ble High Courts. The relevant extract of the said decision is cited hereinunder for ease of reference.

> *"27. A careful perusal of Clause (b) of Section 149 would show that one of the conditions for triggering the extended period, which goes up to ten (10) years in cases where three (03) years have elapsed, is that income chargeable to tax which has escaped assessment amounts to, or is likely to amount to Rs. 50 lakhs or more for the AY in issue.*
>
> *28. Therefore, after the coming into force of FA 2021, in cases where, for the relevant AY, the alleged escaped income was less than Rs.50 lakhs, notice under Section 148 could only be issued for commencement of reassessment proceedings within the limitation period provided in Clause (a) of Section 149(1) of the amended 1961 Act.*
>
> *29. Thus, in the ordinary course, the limitation for AY 2016-17 would expire on 31.03.2020; likewise, for AY 2017-18, the end date for the culmination of the limitation period would be 31.03.2021.*

30. The revenue seeks to take recourse to the provisions of Section 3(1) of TOLA and the Notifications issued thereunder, from time to time, which, in effect, extended the end date for completion of proceedings and compliances up until 30.06.2021.

> *30.1 In this regard, we may refer to the last two Notifications. Via Notification dated 31.03.2021, the end date was extended till 30.04.2021. The Notification immediately following the said Notification, i.e., Notification dated 27.04.2021, extended the end date to 30.06.2021. Thus, the span concerning the extension of end dates was spread between 20.03.2020 and 30.06.2021.*

31. It is, therefore, the revenue"s case that the impugned actions, which involved passing of orders under Section 148A(d) and issuance of notices under Section 148 taken between 01.04.2021 (when FA 2021 kicked in) and 30.06.2021 were valid in the eyes of the law, having regard to the following circumstances:

> *(i) First, the observations made in the judgment of the Supreme Court in Ashish Agrawal"s case.*
>
> *(ii) Second, the observations made in paragraphs 98 and 99 by the coordinate bench in Mon Mohan Kohli"s case.*
>
> *(iii) Third, the extension of the time limit, as noticed hereinabove, granted via the subject Notifications by the Central Government in the exercise of powers under Section 3(1) of TOLA.*
>
> *(iv) Fourth, the third and fourth provisos appended to Section 149 of the 1961 Act, which provide for the exclusion of periods referred to therein, which, if excised, would bring the impugned notices and orders within the limitation prescribed under Section 149(1)(a) of the amended 1961 Act.*
>
> *(v) Fifth, the issue raised before the Court is no longer res integra, given the judgments rendered by the coordinate bench in Touchstone and Salil Gulati.*

32. Therefore, to deal with each of the submissions made on behalf of the revenue, one would, firstly, have to advert to what exactly is the ratio of the judgment rendered by the Supreme Court in Ashish Agrawal"s case.

> *32.1 Briefly, the Supreme Court was called upon to grapple with a piquant situation, which was the creation of the revenue, concerning the viability of notices issued on or after 01.04.2021, when FA 2021 had already kicked in.*
>
> *32.2. The Supreme Court noticed that with the enactment and enforcement of FA 2021, Sections 147 to 149 and Section 151, as they stood on 31.03.2021, had been substituted, bringing about radical and reformative changes in the matters concerning reassessment proceedings. Taking cognizance of this state of affairs, the Supreme Court held that, since the new provisions substituted by FA 2021 were both remedial and benevolent, they would apply to past AYs provided Section 148 notices had been issued on or after 01.04.2021. This was*

also the view taken by various High Courts; a view which was sustained by the Supreme Court.

32.3. The Supreme Court, however, having regard to the fact that the procedure prescribed under the new regime (which was encapsulated in FA 2021) had not been followed, modified the judgments of the High Courts by issuing specific directions to balance the interests of the assessees and the revenue.

32.4. The Supreme Court was persuaded to modify the judgments, having regard to the fact that if the decisions of various courts, including that of the coordinate bench of this court in Mon Mohan Kohli, were to be sustained as is, it would result in the failure of reassessment proceedings, even if the same were "permissible" under FA 2021 and as per the substituted provisions incorporated in the statutes, i.e., Sections 147 to 149 and Section 151. In this regard, the following observations made in the Ashish Agrawal judgement, being apposite, are extracted hereafter:

> *"...21. Substituted Section 149 is the provision governing the time- limit for issuance of notice under Section 148 of the IT Act. The substituted Section 149 of the IT Act has reduced the permissible time-limit for issuance of such a notice to three years and only in exceptional cases ten years. It also provides further additional safeguards which were absent under the earlier regime pre-Finance Act, 2021.*
> *22. Thus, the new provisions substituted by the Finance Act, 2021 being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided Section 148 notice has been issued on or after 1-4-2021. We are in complete agreement with the view taken by the various High Courts in holding so.*
> *23. However, at the same time, the judgments of the several High Courts would result in no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted Sections 147 to 151 of the IT Act. The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated. It is true that due to a bona fide mistake and in view of subsequent extension of time vide various notifications, the Revenue issued the impugned notices under Section 148 after the amendment was enforced w.e.f. 1-4-2021, under the unamended Section 148. In our view the same ought not to have been issued under the unamended Act and ought to have been issued under the substituted provisions of Sections 147 to 151 of the IT Act as per the Finance Act, 2021..."*

32.5 With this preface, the Supreme Court passed the following directions, which resulted in modification of the judgments passed by various High Courts:

> *"...28. In view of the above and for the reasons stated above, the present appeals are allowed in part. The impugned common judgments and orders [Ashok Kumar Agarwal v. Union of India, 2021 SCC OnLine All 799]*

passed by the High Court of Judicature at Allahabad in WT No. 524 of 2021 and other allied tax appeals/petitions, is/are hereby modified and substituted as under:

28.1. The impugned Section 148 notices issued to the respective assessees which were issued under unamended Section 148 of the IT Act, which were the subject-matter of writ petitions before the various respective High Courts shall be deemed to have been issued under Section 148-A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of Section 148-A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assessees can reply to the show-cause notices within two weeks thereafter.

28.2. The requirement of conducting any enquiry, if required, with the prior approval of specified authority under Section 148-A(a) is hereby dispensed with as a one-time measure vis-à-vis those notices which have been issued under Section 148 of the unamended Act from 1-4- 2021 till date, including those which have been quashed by the High Courts.

28.3. Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the assessing officers concerned to hold any enquiry, if required.

28.4. The assessing officers shall thereafter pass orders in terms of Section 148-A(d) in respect of each of the assessees concerned; Thereafter after following the procedure as required under Section 148-A may issue notice under Section 148 (as substituted).

28.5. All defences which may be available to the assessees including those available under Section 149 of the IT Act and all rights and contentions which may be available to the assessees concerned and Revenue under the Finance Act, 2021 and in law shall continue to be available.

29. The present order shall be applicable PAN INDIA and all judgments and orders passed by the different High Courts on the issue and under which similar notices which were issued after 1-4- 2021 issued under Section 148 of the Act are set aside and shall be governed by the present order and shall stand modified to the aforesaid extent. The present order is passed in [the]exercise of powers under Article 142 of the Constitution of India so as to avoid any further appeals by the Revenue on the very issue by challenging similar judgments and orders, with a view not to burden this Court with approximately 9000 appeals. We also observe that the present order shall also govern the pending writ petitions, pending before various the High Courts in which similar notices under Section 148 of the Act issued after 1-4-2021 are under challenge.

> *30. The impugned common judgments and orders [Ashok Kumar Agarwal v. Union of India, 2021 SCC OnLine All 799] passed by the High Court of Allahabad and the similar judgments and orders passed by various High Courts, more particularly, the respective judgments and orders passed by the various High Courts particulars of which are mentioned hereinabove, shall stand modified/substituted to the aforesaid extent only."*

33. These directions were issued by the Supreme Court based on a broad consensus arrived at between the learned ASG representing the revenue and counsels representing the assessees. [See paragraph 26 at page 633].

34. Consequently, the notices issued by the AO under the unamended Section 148 of the 1961 Act, which were the subject matter of writ actions preferred before various High Courts, were deemed to have been issued under Section 148A(b) of the amended 1961 Act.

35. As would be evident, there was no discussion or deliberation concerning the provisions of TOLA or the Notifications issued thereunder.

36. Amongst others, the Court issued two (02) significant directions which have some bearing on the lis before us. First, all defences, including those available under Section 149 of the amended 1961 Act, would remain open to the assessees. Second, all rights and contentions available to the assessees and the revenue under FA 2021 and in law will continue to subsist.

37. Therefore, according to us, it cannot be contended on behalf of the revenue that if the defence of limitation is available under Section 149(1)(a) of the Act, the same cannot be entertained by this Court.

38. Likewise, as indicated by the Supreme Court in no certain terms, it will also be open to the revenue to advance submissions based on the provisions of FA 2021 and those that may otherwise be available in law.

39. Besides this, since the Supreme Court, in no uncertain terms, ruled that the judgments of the various High Courts, which includes the decision of the coordinate bench of this court in Mon Mohan Kohli, stood "modified/substituted" to the extent indicated in the directions issued by the Court, it would follow that all rights and contentions will be available to the assessees, notwithstanding any observations made in that judgment which curtails the defences available to the assessees under Section 149 of the 1961 Act.

40. There is no gainsaying that the law declared by the Supreme Court, under Article 141 of the Constitution, is binding on every authority, including this Court, which would necessarily have to be given effect to. In this context, the Supreme Court's directions issued under Article 142 of the Constitution are no different.

41. However, having regard to the fact that the revenue has laid store by the judgment rendered by the coordinate bench of this Court in Mon Mohan Kohli"s case, the opening part of the said judgment reveals the question of law that came up for consideration before the said bench is extracted below:

"…whether the Government/Executive can make or change law of the land by way of Explanations to Notifications without specific Authority from the Legislature to do so and whether the Government/Executive can impede the implementation of law made by the Legislature…"

42. In this context, the coordinate bench also noted the relief sought in the writ actions, which it was called upon to adjudicate.

(i) A direction to quash reassessment notices issued after 31.03.2021 under Section 148 of the 1961 Act.

(ii) Declare explanations A(a)(ii)/A(b) contained in the Notifications dated 31.03.2021 and 27.04.2021 issued under Section 3(1) of TOLA ultra vires the provisions of TOLA, to the extent that the said explanations extended the applicability of the provisions of Section 148, 149 and 151 [as the case may be], as obtaining on 31.03.2021 [i.e., before the commencement of FA 2021] to the period beyond 31.03.2021.

43. The coordinate bench, while considering the issue which arose for consideration before it and the reliefs sought by the assesses, concluded that since the old provisions had been substituted by new provisions pursuant to the coming into force of FA 2021, the impugned explanations set out in the Notification dated 31.03.2021 and 27.04.2021 would not apply. Therefore, notices issued under Section 148 relating to any AY, albeit after 31.03.2021, had to comply with the substituted provisions. [See paragraph 98].

44. The revenue, however, seeks to latch on to the following observations made by the coordinate bench in paragraph 99:

"…99. It is clarified that the power of reassessment that existed prior to 31st March, 2021 continued to exist till the extended period i.e. till 30th June, 2021; however, the Finance Act, 2021 has merely changed the procedure to be followed prior to issuance of notice with effect from 1st April, 2021…"

44.1. A careful perusal of the said observations would show that all that the Court noted (which was a matter of fact) that the power of reassessment which existed before 31.03.2021 continued to exist till 30.06.2021, with alteration in procedure brought about upon the enactment and enforcement of FA 2021.

44.2. This is abundantly clear if one were to read the paragraphs following paragraph 99, i.e., paragraphs 100 to 105 of the judgment. The Court, in no uncertain terms, declared explanation A(a)(ii)/A(b) of Notifications dated 31.03.2021 and 27.04.2021 as being ultra vires the parent statute, i.e., TOLA.

44.3. The said explanations sought to impose the unamended provisions of Sections 148, 149 and 151 of the 1961 Act, although the substituted provisions had kicked in. The Court refused to countenance a situation that the amended provisions, i.e., Sections 147 to 149 and 151, would not be applicable, firstly, to past AYs and/or would not operate during 01.04.2021 and 30.06.2021, as the Covid-19 pandemic was prevailing in the country. The coordinate bench specifically observed that the Legislature was aware of the situation when it

enacted FA 2021. The argument that the "stop the clock" provision would operate was decried by the coordinate bench.

44.4. In our opinion, the observations of the coordinate bench make it amply clear that Section 149 of the amended 1961 Act continued to operate despite attempts to the contrary made by the introduction of the aforementioned explanations in Notifications dated 31.03.2021 and 27.04.2021. This is evident upon perusal of the following observations made by the coordinate bench in Mon Mohan Kohli"s case:

> *"…100. This Court is of the opinion that Section 3(1) of [the] Relaxation Act empowers the Government/Executive to extend only the time limits and it does not delegate the power to legislate on provisions to be followed for initiation of reassessment proceedings. In fact, the Relaxation Act does not give power to [the] Government to extend the erstwhile Sections 147 to 151 beyond 31st March, 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021. Consequently, the impugned Explanations in the Notifications dated 31st March, 2021 and 27th April, 2021 are not conditional legislation and are beyond the power delegated to the Government as well as ultra vires the parent statute i.e. the Relaxation Act. Accordingly, this Court is respectfully not in agreement with the view of the Chhattisgarh High Court in Palak Khatuja (supra), but with the views of the Allahabad High Court and Rajasthan High Court in Ashok Kumar Agarwal (supra) and Bpip Infra Private Limited (supra) respectively.*
>
> *101. The submission of the Revenue that Section 6 of the General Clauses Act saves notices issued under Section 148 post 31st March, 2021 is untenable in law, as in the present case, the repeal is followed by a fresh legislation on the same subject and the new Act manifests an intention to destroy the old procedure. Consequently, if the Legislature has permitted reassessment to be made in a particular manner, it can only be in this manner, or not at all.*
>
> *102. The argument of the respondents that the substitution made by the Finance Act, 2021 is not applicable to past Assessment Years, as it is substantial in nature is contradicted by[the] Respondents' own Circular 549 of 1989 and its own submission that from 1st July, 2021, the substitution made by the Finance Act, 2021 will be applicable.*
>
> *103. Revenue cannot rely on Covid-19 for contending that the new provisions Sections 147 to 151 of the Income Tax Act, 1961 should not operate during the period 1st April, 2021 to 30th June, 2021 as Parliament was fully aware of [the] Covid-19 Pandemic when it passed the Finance Act, 2021. Also, the arguments of the respondents qua non-obstante clause in Section 3(1) of the Relaxation Act, „legal fiction" and „stop the clock provision" are contrary to facts and untenable in law.*

> *104. Consequently, this Court is of the view that the Executive/Respondents/Revenue cannot use the administrative power to issue Notifications under Section 3(1) of the Relaxation Act, 2020 to undermine the expression of Parliamentary supremacy in the form of an Act of Parliament, namely, the Finance Act, 2021. This Court is also of the opinion that the Executive/Respondents/Revenue cannot frustrate the purpose of substituted statutory provisions, like Sections 147 to 151 of [the] Income Tax Act, 1961 in the present instance, by emptying it of content or impeding or postponing their effectual operation…"*

44.5. As discussed hereinabove, any doubt about the availability of the defence which may have crept into the minds of the revenue by virtue of observations made in paragraph 98 of the judgment rendered by the coordinate bench in Mon Mohan Kohli"s case should have been resolved given the specific directions issued by the Supreme Court in Ashish Agarwal which stated, in no uncertain terms, that defence under Section 149 would be available to the assessees. Thus, this submission advanced by the revenue cannot be accepted.

45. This brings us to the submission advanced on behalf of the revenue that the issue raised before us is no longer res integra. In this context, as noticed above, the revenue has relied upon judgments rendered by the coordinate bench in Touchstone and Salil Gulati.

46. A close appraisal of the facts obtaining in the Touchstone case would show that the writ petitioner in that case had laid a challenge to a notice issued under Section 148 vis-à-vis AY 2013-14, and the escaped income exceeded Rs. 50 lakhs. In paragraph 16 of the judgment, the court noted this aspect of the matter and, thereafter, applied the provisions of Clause (b) of Sub-Section (1) of Section 149 of the amended 1961 Act.

47. Likewise, a perusal of the judgment rendered by the coordinate bench in Salil Gulati"s case would show that it concerned AY 2013-14, and the escaped income in this case was also more than Rs. 50 lakhs. [See paragraph 9 of the said judgment]. In the said case, the court was not called upon to render a decision regarding Clause (a) of Sub-Section (1) of Section 149.

47.1. We may also indicate that, although the revenue had raised the argument in Salil Gulati"s case that the reassessment notices had travelled back in time to their original date when such notices were first issued and that the period of limitation provided in the new Section 149 of the Act would have to be applied from that point, albeit, based on the Instruction dated 11.05.2022, the coordinate bench rendered no ruling with regard to the same [See paragraphs 5 and 9 of the said judgment].

48. Therefore, the arguments advanced on behalf of the revenue that principles of constructive res judicata would apply are flawed for the following reasons:

(i) Firstly, a perusal of the judgments in Touchstone and Salil Gulati"s case, as noticed above, did not deal with the facts and circumstances, which obtain in the instant cases. There was no occasion for the writ petitioners in those cases to

invoke the provisions of Clause (a) Sub-Section (1) of Section 149, given the fact that the alleged escaped income was not below Rs. 50 lakhs.

(ii) Secondly, the defence that the limitation has expired goes to the root of the jurisdiction of the AO to trigger reassessment proceedings. It is wellestablished that the principle of res judicata is dicta, which governs procedure, and therefore, if the proceedings are wrongly initiated, it cannot come in the way of the court entertaining such an action. The estoppel, waiver or res judicata principles cannot apply in such situations. [See Chandra bhai K. Bhoir and Ors. v Krishna Arjun Bhoir and Ors, (2009) 2 SCC 315. Union of India and Another v. Association of Unified Telecom Providers of India and Ors., (2011) 10 SCC 543, Ashok Leyland Ltd. v. State of Tamil Nadu and Another (2004) 3 SCC 1 at 2861-63].

(ii)(a) Explanation IV to Section 11 of Code of Civil Procedure, 1908 [hereafter referred to as "CPC"], which adverts to the principle of constructive res judicata codifies, in a sense, what is a principle of public policy to prevent, among other things, multiplicity of proceedings between the same parties. Therefore, the expression in Explanation IV that the party to the proceedings "might have" and "ought to have" raised an issue rests on the well-established norm/rule that the party invoking the doctrine of res judicata to non-suit a litigant should be able to demonstrate that the opposing party was bound to raise the issue to defend its position.

(ii)(b) This is evident from the language of Explanation IV to Section 11 of the CPC from which this principle has been borrowed, where 0the expression used is "might and ought" and not "might or ought". [See Alka Gupta v Narender Kumar Gupta (2010) 10 SCC 141; Shiv Chander More v. Lt. Governor, (2014) 11 SCC 744; Ferro Alloys Corpn. Ltd. and Anr. v. Union of India and Ors. 1999 4 SCC 149; Shuja-ud-Din v. Siraj Din, AIR 1941 Lah 139].

(ii)(c). More importantly, in these cases, the interpretation of Section 149(1)(a) was not an issue therefore the principle of constructive res judicata, in our opinion, is not applicable.

(ii)(d) Furthermore, if the judgements rendered in Touchstone and Salil Gulati are read in the manner in which the revenue is seeking to profess, they would run counter to the ratio of the judgement of the Supreme Court in the Ashish Agrawal case.

49. The arguments advanced on behalf of the revenue that since time limits have been extended by the Central Government by virtue of the Notifications issued under Section 3(1) of TOLA and, therefore, the impugned actions which were taken much before the end date, i.e., 30.06.2021 were valid in the eyes of the law, is misconceived for the following reasons:

(i) First, there was no power invested under TOLA, and that too via Notifications, to amend the statute, which had the imprimatur of the Legislature. Since, with effect from 01.04.2021, when FA 2021 came into force, the Notifications dated 31.03.2021 and 27.04.2021, which are sought to be portrayed by the revenue as

extending the period of limitation, were contrary to the provisions of Section 149(1)(a) of the Act, in our opinion, they lost their legal efficacy.

(ii) Second, the extension of the end date for completion of proceedings and compliances, a power which was conferred on the Central Government under Section 3(1) of TOLA, cannot be construed as one which could extend the period of limitation provided under Section 149(1)(a) of the 1961 Act. As per the ratio enunciated in Ashish Agrawal"s case, Section 149(1)(a) would apply to AY 2016-17 and AY 2017-18.

50. The other argument that the provision of the third and fourth proviso would help the cause of the revenue by excluding the periods provided therein fails to take into account the following:

50.1. The third proviso appended to Section 149 of the Act, inter alia, provides that the time or extended time allowed to the assessee as per the show-cause notice issued under Section 148A(b) of the 1961 Act shall stand excluded for computation of limitation provided under the said Section.

50.2. The fourth proviso provides that where the timeframe adverted to in the third proviso leads to the situation that the period of limitation available to the AO for passing an order under 148A(d) is less than seven (7) days, then the remaining period shall stand extended to seven (7) days. Consequently, the limitation under Sub-Section (1) shall be deemed to be extended accordingly.

50.3. It is vital to bear in mind that a plain reading of the third proviso would show that it only excludes the timeframe obtaining between the date when the notice under Section 148A(b) was issued and the date by which the assessee filed its response within the time and extended time provided in the said notice.

50.4. Therefore, the date cannot be shifted beyond the date when the original notice under Section 148 of the unamended 1961 Act was issued, which was treated, as per the judgment in Ashish Agrawal"s case, as notice under 148A(b). Concededly, these notices were issued between 01.04.2021 and 30.06.2021, by which time the limitation under Section 149(1)(a) of the Act had already expired.

50.5. The fourth proviso, in our opinion, can have no impact on the outcome of the cases at hand, as it provides for a situation where, after the exclusion of the timeframe referred to in the third proviso, the time available to the AO for passing an order under Section 148A(d) of the Act is less than seven (7) days. The said proviso states that in such a situation, the remaining timeframe shall stand extended to seven (7) days, and consequently, the limitation under Sub-Section (1) of Section 149 shall also stand extended.

51. This brings us to the tenability of the travel back in time theory encapsulated in paragraphs 6.1 and 6.2(ii) of the Instruction dated 11.05.2022. For convenience, the relevant part of the instruction is set forth hereafter:

> *"…6.0 Operation of the new section 149 of the Act to identify cases where fresh notice under section 148 of the Act can be issued:*

6.1 With respect of [to] operation of new section 149 of the Act, the following may be seen: Hon'ble Supreme Court has held that the new law shall operate and all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available. Sub-section (1) of new section 149 of the Act as amended by the Finance Act, 2021 (before its amendment by the Finance Act, 2022) reads as under:-

149. (1) No notice under section 148 shall be issued for the relevant assessment year,- (a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b); (b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year: Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account [of] being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021.

Hon'ble Supreme Court has upheld the views of High Courts that the benefit of new law shall be made available even in respect of proceedings relating to past assessment years. Decision of [the] Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point.

6.2 Based on [the] above, the extended reassessment notices are to be dealt with as under:

(i) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh notice under section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause.

(b) of sub-section (1) of section 149 as amended by the Finance Act, 2021 and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (ii) of that section.

(ii) AY 16-17, AY 17-18: Fresh notice under section 148 can be issued in these cases, with the approval of the specified authority, under clause (a) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (i) of that section…"

52. A careful perusal of the judgment of the Supreme Court rendered in Ashish Agrawal"s case and the provisions of TOLA would show that neither the said judgment nor TOLA allowed for any such modality to be taken recourse to by the revenue, i.e., that extended reassessment notice would "travel back in time" to their original date when such notices were to be issued and thereupon the provisions of amended Section 149 would apply.

52.1 Apart from anything else, the aforesaid provisions contained in the Instruction dated 11.05.2022 are beyond the powers conferred on the CBDT under Section 119 of the 1961 Act. The paragraphs mentioned above are clearly ultra vires the provisions of Section 149(1) of the amended 1961 Act.

52.2. Furthermore, a perusal of the judgment of the Supreme Court rendered in Ashish Agrawal"s case would show that it did not rule on the provisions contained in TOLA or the impact they could have on the reassessment proceedings. In any event, TOLA conferred no such power on the CBDT.

52.3. Besides this, as correctly argued on behalf of the assessees, there is no clarity in the aforementioned Instruction regarding the "original date when such notices were to be issued". The impugned provisions of the Instruction dated 11.05.2022 are also unsustainable in law because they are vague. "Certainty" in taxing statutes is one of the grund norms, as ordinarily, they are agnostic to equitable principles.

53. Apart from what we have stated above on the language and scheme of the relevant provisions introduced with the enactment of FA 21, one has to bear in mind, in our opinion, the raison d'etre for forging the new regime. A clue about the same is provided in the Finance Minister"s budget speech delivered on 01.02.2021 and the relevant parts of the Memorandum explaining the provisions of the Finance Bill 2021 [hereafter referred to as "Memorandum"] which morphed into FA 2021. For convenience, the relevant parts are extracted below:

Speech of the Finance Minister
"...Reduction in Time for Income Tax Proceedings
153. Honourable Speaker, presently, an assessment can be re-opened up to 6 years and in serious tax fraud cases for up to 10 years. As a result, taxpayers have to remain under uncertainty for a long time.
154. I therefore propose to reduce this time-limit for re-opening of [the]assessment to 3 years from the present 6 years. In serious tax evasion cases too, only where there is evidence of concealment of income of ₹50 lakh or more in a year, can the assessment be re-opened up to 10 years. Even this reopening can be done only after the approval of the Principal Chief Commissioner, the highest level of the Income Tax Department..."

Memorandum

"...Income escaping assessment and search assessments Under the Act, the provisions related to income escaping assessment provide 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 or recompute the total income for such year under section 147 of the Act by issuing a notice under section 148 of the Act. However, such reopening is subject to the time limits prescribed in section 149 of the Act.

xxx xxx xxx

The Bill proposes a completely new procedure of [for] assessment of such cases. It is expected that the new system would result in less litigation and would provide ease of doing business to taxpayers as there is a reduction in [the] time limit by which a notice for assessment or reassessment or recomputation can be issued. The salient features of [the] new procedure are as under:--

xxx xxx xxx

(iii) Section 147 proposes to allow the Assessing Officer to assess or reassess or re-compute any income escaping assessment for any assessment year (called relevant assessment year)

xxx xxx xxx

(vii) New Section 148A of the Act proposes that before issuance of notice the Assessing Officer shall conduct enquiries, if required, and provide an opportunity of being heard to the assessee. After considering his reply, the Assessing Office shall decide, by passing an order, whether it is a fit case for issue of notice under section 148 and serve a copy of such order along with such notice on the assessee. The Assessing Officer shall before conducting any such enquiries or providing opportunity to the assessee or passing such order obtain the approval of specified authority. However, this procedure of enquiry, providing opportunity and passing order, before issuing notice under section 148 of the Act, shall not be applicable in search or requisition cases.

(viii) The time limitation for issuance of notice under section 148 of the Act is proposed to be provided in section 149 of the Act and is as below:

- *in normal cases, no notice shall be issued if three years have elapsed from the end of the relevant assessment year. Notice beyond the period of three years from the end of the relevant assessment year can be taken only in a few specific cases.*
- *In specific cases where the Assessing Officer has in his possession evidence which reveal that the income escaping assessment, represented in the form of asset, amounts to or is likely to amount to fifty lakh rupees or more, notice can be issued beyond the period of three year but not beyond the period of ten years from the end of the relevant assessment year;*
- *Another restriction has been provided that the notice under section 148 of the Act cannot be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit prescribed under the provisions of clause (b), as they stood immediately before the proposed amendment.*

- *Since the assessment or reassessment or re-computation in search or requisition cases (where such search or requisition is initiated or made on or before 31st March 2021) are to be carried out as per the provision of section 153A, 153B, 153Cand 153D of the Act, the aforesaid time limitation shall not apply to such cases.*
- *It is also proposed that for the purposes of computing the period of limitation for issue of section 148 notice, the time or extended time allowed to the assessee in providing opportunity of being heard or period during which such proceedings before issuance of notice under section 148 are stayed by an order or injunction of any court, shall be excluded. If after excluding such period, time available to the Assessing Officer for passing order, about fitness of a case for issue of 148 notice, is less than seven days, the remaining time shall be extended to seven days…."*

53.1. As would be evident from the extracts set forth above, both from the Finance Minister"s speech and the Memorandum, the time limit for reopening under the new regime was reduced from six (06) years to three (03) years and only in respect of "serious tax evasion cases", that too, where evidence of concealment of income of Rs.50 lakhs or more in a given period was found, the period for reopening the assessment was extended to ten (10) years. In order to ensure that utmost care was taken before invoking the extended period of limitation, the proposal was that approval should be obtained from the Principal Chief Commissioner of Income Tax, at the highest hierarchical level of the department. Likewise, the Memorandum emphasized that the new regime was forged with the hope that it would result in less litigation and would provide ease of doing business to tax payers, as there was a reduction in the time limit by which notice for assessment, reassessment and re-computation could be issued.

53.2. Thus, as per the Memorandum, in "normal cases", no notice was intended to be issued if three (03) years had elapsed from the end of the relevant AY. Notice, beyond the prescribed three (03) years from the end of the relevant AY, could be issued only in a few specific cases; one such example which is given in the Bill is where the AO was in possession of evidence that escaped income amounted to Rs.50 lakhs or more.

53.3. In sum, the sense that one gets upon a holistic reading of the backdrop in which the new regime for reopening assessments was enacted is that where escapement of income was below Rs.50 lakhs, the normal period of limitation, i.e., three (03) years was to apply. In comparison, the extended period of ten (10) years would apply in serious tax evasion cases where there was evidence of concealment of income of Rs.50 lakhs or more in the given period.

53.4. The State, perhaps, did not deem it worthwhile to chase assessees beyond three (03) years, where the alleged escaped income was less than Rs.50 lakhs. These aspects concerning legislative policy come through if one were to read the relevant provisions of the statute referred to above in the background of the speech of the Finance Minister and the Memorandum.

Conclusion:

54. Therefore, having regard to the foregoing discussion, we are of the opinion that the impugned actions, which include orders passed under Section 148A(d) and the consequent notices issued under Section 148 of the amended 1961 Act, concerning AY 2016-17 and AY 2017-18 cannot be sustained. It is ordered accordingly.

55. Furthermore, the reference made in paragraphs 6.1 and 6.2(ii) of the Instruction dated 11.05.2022, to the extent it propounds the "travel back in time" theory, is declared bad in law.

56. The writ petitions are disposed of in the aforesaid terms."

10. From the above observation, the issue in hand has extensively been dealt with by Hon'ble High Court of Delhi which has held that only in case of serious tax evasions were the income which has escaped assessment is Rs. 50,00,000/- and above could be reassessed after the lapse of 3 years and upto 10 years from the relevant assessment year. The assessee's case would squarely be covered by the above said proposition which has also been reiterated by the Hon'ble jurisdictional High Court of Bombay in the case of Naresh Balchandrarao Shinde (supra). By respectfully following the above decisions, we hereby quash the order passed u/s. 148A(d) of the Act and the notice u/s. 148 of the Act and hence, allow ground no. 1 raised by the assessee. As we have quashed the reassessment proceedings, the other grounds raised by the assessee requires no separate adjudication and are rendered academic in nature.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 20.12.2024

Sd/-	Sd/-
(RENU JAUHRI)	**(KAVITHA RAJAGOPAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated: 20.12.2024

Karishma J. Pawar (Stenographer)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai